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

WHEN: Wednesday, November 14, 2007
9:00 a.m.–Noon

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

RESERVATIONS: (202) 741-6008

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The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 353

RIN 3206–AL21

Restoration to Duty From Uniformed Service or Compensable Injury

AGENCY: Office of Personnel Management.

ACTION: Correcting amendment.

SUMMARY: The Office of Personnel Management issued final regulations on March 15, 2007 (72 FR 12032), to amend a number of rules on pay and leave administration, including use of paid leave during uniformed service. This notice corrects an omission in the final regulations and changes the title of this section to accurately reflect the content.

DATES: This correcting amendment is effective November 7, 2007, and applicable to May 14, 2007.

FOR FURTHER INFORMATION CONTACT: Brenda Roberts by telephone at (202) 606–2858; by fax at (202) 606–0824; or by e-mail at *pay-performance-policy@opm.gov.*

SUPPLEMENTARY INFORMATION: The Office of Personnel Management is making the following correction to § 353.208 in title 5, Code of Federal Regulations, to insert the phrase ''or sick leave under 5 U.S.C. 6307, if appropriate,'' which was inadvertently omitted from the final regulation. We are also changing the title of this section from ''use of paid leave during uniform service'' to ''use of paid time off during uniform service'' to accurately reflect the inclusion of compensatory time off for travel that was added to this section in the final regulation.

List of Subjects in 5 CFR Part 353

Administrative practice and procedure, Government employees.

■ Accordingly, 5 CFR part 353 is corrected by making the following correcting amendments:

PART 353—RESTORATION TO DUTY FROM UNIFORMED SERVICE OR COMPENSABLE INJURY

■ 1. The authority citation for part 353 continues to read as follows:

Authority: 38 U.S.C. 4301 *et seq.,* and 5 U.S.C. 8151.

Subpart B—Uniformed Service

■ 2. Section 353.208 is revised to read as follows:

§ 353.208 Use of paid time off during uniformed service.

An employee performing service with the uniformed services must be permitted, upon request, to use any accrued annual leave under 5 U.S.C. 6304, military leave under 5 U.S.C. 6323, earned compensatory time off for travel under 5 U.S.C. 5550b, or sick leave under 5 U.S.C. 6307, if appropriate, during such service.

Office of Personnel Management.

Jerome D. Mikowicz,

Deputy Associate Director, Center for Pay and Leave Administration.

[FR Doc. E7–21868 Filed 11–6–07; 8:45 am]

BILLING CODE 6325–39–P

DEPARTMENT OF AGRICULTURE

Federal Crop Insurance Corporation

7 CFR Part 457

RIN 0563–AC02

Common Crop Insurance Regulations, Fresh Market Sweet Corn Crop Insurance Provisions; Correction

AGENCY: Federal Crop Insurance Corporation, USDA.

ACTION: Final rule; correction.

SUMMARY: This document contains a correction to the final regulation which was published Wednesday, September 26, 2007 (72 FR 54519–54525). The regulation pertains to the insurance of fresh market sweet corn.

EFFECTIVE DATE: November 7, 2007.

FOR FURTHER INFORMATION CONTACT: Linda Williams, Risk Management Specialist, Product Management, Product Administration and Standards Division, Risk Management Agency, United States Department of Agriculture, Beacon Facility—Mail Stop 0812, PO Box 419205, Kansas City, MO 64141–6205, telephone (816) 926–7730.

SUPPLEMENTARY INFORMATION:

Background

The final regulation that is the subject of this correction was intended to amend certain Fresh Market Sweet Corn Crop Provisions to be used in conjunction with the Common Crop Insurance Policy Basic Provisions for ease of use and consistency of terms.

Need for Correction

As published, the final regulation contained an error that may prove to be misleading and needs to be clarified. Section 16(b)(1) of the Fresh Market Sweet Corn Crop Provisions contained a parenthetical phrase that was inadvertently misplaced within the sentence so that it did not provide the correct computation to be used when computing the value of sweet corn production that is sold. This correction moves the parenthetical to the location it should have been to provide the correct computation.

List of Subjects in 7 CFR Part 457

Crop insurance, Fresh market sweet corn, Reporting and recordkeeping requirements.

Correction of Publication

■ Accordingly, the 7 CFR Part 457 is corrected as follows:

PART 457—COMMON CROP INSURANCE REGULATIONS

■ 1. The authority citation for 7 CFR part 457 continues to read as follows:

Authority: 7 U.S.C. 1506(l) and 1506(p).

■ 2. Amend § 457.129 as follows:
■ a. Revise section 16(b)(1) to read as set forth below;

The revision reads as follows:

§ 457.129 Fresh market sweet corn crop insurance provisions.

* * * * *

16. Minimum Value Option.

* * * * *

(b) * * *

(1) The dollar amount obtained by multiplying the average net value per container from all sweet corn sold (this result may not be less than the

minimum value option amount if such amount is provided in the Special Provisions) by the total number of all containers of sweet corn sold;

* * * * *

Signed in Washington, DC, on November 1, 2007.

Eldon Gould,

Manager, Federal Crop Insurance Corporation.

[FR Doc. E7–21852 Filed 11–6–07; 8:45 am]

BILLING CODE 3410–08–P

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

12 CFR Part 551

[Docket ID OTS–2007–0010]

RIN 1550–AC07

Personal Transactions in Securities

AGENCY: Office of Thrift Supervision, Treasury.

ACTION: Final rule.

SUMMARY: In June 2007, the Office of Thrift Supervision (OTS) adopted an interim final rule (Interim Rule) that requires certain officers and employees of savings associations to file reports of their personal securities transactions with the savings association no later than thirty calendar days after the end of each calendar quarter. Before OTS adopted the Interim Rule, persons subject to the rule were required to file such reports within ten business days after the end of each calendar quarter. The thirty-calendar-day period is consistent with the filing requirement for persons in similar positions at investment companies who file such reports under regulations of the Securities and Exchange Commission (SEC). Today, OTS is adopting a final rule that is identical to the Interim Rule.

DATES: The interim rule published at 72 FR 30473, June 1, 2007 is adopted as final effective November 7, 2007.

FOR FURTHER INFORMATION CONTACT: Judi McCormick, (202) 906–5636, Director—Trust and Specialty Programs, Examinations and Supervision Policy Division; or David A. Permut, (202) 906–7505, Senior Attorney, Business Transactions Division, Office of Chief Counsel, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

SUPPLEMENTARY INFORMATION:

I. Background and Public Comments

On June 1, 2007, OTS published the Interim Rule.[1] The preamble to the Interim Rule included a request for public comment. The Interim Rule amended 12 CFR 551.150(a) by changing the time period required for officers and employees who are subject to the rule to file personal securities trading reports with the savings association. Before OTS adopted the Interim Rule, the affected officers and employees had been required to file such reports with the savings association within ten business days of the end of each calendar quarter. The Interim Rule changed the ten-business day period to no later than thirty calendar days.[2]

OTS received two comments, from a trade association and a savings and loan holding company, regarding the Interim Rule. Both of the comments strongly support the Interim Rule. The commenters believe that it is appropriate for the time period provided for submitting reports under section 551.150(a) to be consistent with analogous SEC requirements. In addition, the commenters support the rule because it reduces regulatory burden.

Having considered the comments, OTS is adopting a final rule that is identical to the Interim Rule.

II. Regulatory Findings

A. Paperwork Reduction Act

OTS has determined that this rule does not involve a change to collections of information previously approved under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

B. Executive Order 12866

The Director of OTS has determined that this rule does not constitute a ''significant regulatory action'' for purposes of Executive Order 12866.

C. Regulatory Flexibility Act

Pursuant to section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601), the Director certifies that this rule will not have a significant economic impact on a substantial number of small entities. The rule makes certain changes that should reduce burdens on certain officers and employees of all savings associations, including small institutions. The change is minor and should not have a significant impact on small institutions. Accordingly, OTS has determined that a Regulatory Flexibility Analysis is not required.

D. Unfunded Mandates Reform Act of 1995

OTS has determined that the rule will not result in expenditures by state, local, or tribal governments or by the private sector of $100 million or more and that a budgetary impact statement is not required under Section 202 of the Unfunded Mandates Reform Act of 1995, Pub. L. 104–4 (Unfunded Mandates Act). The rule would make certain changes that should reduce burdens on certain officers and employees of savings associations. The change is minor and should not have a significant impact on small institutions. Accordingly, a budgetary impact statement is not required under section 202 of the Unfunded Mandates Act.

List of Subjects in 12 CFR Part 551

Reporting and recordkeeping requirements, Savings associations, Securities, Trusts and trustees.

PART 551—RECORDKEEPING AND CONFIRMATION REQUIREMENTS FOR SECURITIES TRANSACTIONS

■ Accordingly, the interim rule amending 12 CFR part 551 which was published at 72 FR 30473 on June 1, 2007, is adopted as a final rule without change.

Dated: October 30, 2007.

By the Office of Thrift Supervision.

John M. Reich,

Director.

[FR Doc. E7–21751 Filed 11–6–07; 8:45 am]

BILLING CODE 6720–01–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Parts 734 and 774

[Docket No. 0612242561–7519–01]

RIN: 0694–AD92

Expanded Licensing Jurisdiction for QRS11 Micromachined Angular Rate Sensors

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Final Rule.

SUMMARY: This final rule amends the Export Administration Regulations (EAR) to implement the transfer of

[1] See 72 FR 30473 (June 1, 2007).

[2] SEC Rule 17j–1 under the Investment Company Act, 17 CFR 270.17j–1 (2007), requires investment advisors to file personal trading reports no later than 30 days after the end of each calender quarter. OTS modeled the personal securities filing requirement in the OTS recordkeeping regulations on the SEC rule. The Interim rule caused the requirements under OTS regulations and the SEC's investment advisor requirements to be consistent.

licensing jurisdiction for QRS11–00100–100/101 and the QRS11–00050–443/569 Micromachined Angular Rate Sensors from the Department of State to the Department of Commerce (see Public Notice 5823, published in 72 FR 31452–31453, June 7, 2007) when the QRS11–00100–100/101 is integrated into a primary instrument system for use on civil aircraft or is exported solely for integration into such a system, or when the QRS11–00050–443/569 is integrated into an automatic flight control system of the type described in ECCN 7A994 or aircraft of the type described in ECCN 9A991 that incorporates such systems, or are exported solely for integration into such a system.

DATES: This rule is effective: November 7, 2007.

ADDRESSES: Although this is a final rule, comments are welcome and should be sent to *publiccomments@bis.doc.gov*, fax (202) 482–3355, or to Regulatory Policy Division, Bureau of Industry and Security, Room H2705, U.S. Department of Commerce, Washington, DC 20230. Please refer to regulatory identification number (RIN) 0694-AD92 in all comments, and in the subject line of e-mail comments. Comments on the collection of information should be sent to David Rostker, Office of Management and Budget (OMB), by e-mail to *David_Rostker@omb.eop.gov*, or by fax to (202) 395–7285.

FOR FURTHER INFORMATION CONTACT: Gene Christiansen, Office of National Security and Technology Transfer Controls, Bureau of Industry and Security, U.S. Department of Commerce at (202) 482–2984.

SUPPLEMENTARY INFORMATION:

Background

On February 9, 2004, the Bureau of Industry and Security published a rule implementing Department of Commerce licensing jurisdiction over QRS11–00100–100/101 Micromachined Angular Rate Sensors integrated into and included as an integral part of a Commercial Standby Instrument System (CSIS) of the type described in the Export Administration Regulations (EAR) under ECCN 7A994 or an aircraft of the type described in ECCN 9A991 that incorporates a CSIS that has such a sensor integrated, or exported solely for integration into such a system. In all other cases, the QRS11 Micromachined Angular Rate Sensors, including the QRS11–00100–100/101 sensors, remained subject to the licensing jurisdiction of the Department of State, Directorate of Defense Trade Controls. (See 69 FR 5928, February 9, 2004.) Subsequently, industry inquiries about incorporating the QRS11 into primary instrument systems or into automatic flight control systems, in addition to the secondary or standby systems, led the Department of State to remove from the United States Munitions List quartz rate sensors used in these applications [72 FR 31452].

Reflecting the removal of such quartz rate sensors from the United States Munitions List, this rule establishes licensing requirements for QRS11–00100–100/101 and the QRS11–00050–443/569 Micromachined Angular Rate Sensors by the Department of Commerce when the QRS11–00100–100/101 sensors are integrated into a primary instrument system or are exported solely for integration into such a system or when the QRS11–00050–443/569 sensors are integrated into an automatic flight control system for use on civil aircraft, or are exported solely for integration into such a system.

There continues to be no de minimis level for foreign-made systems that contain QRS11–00100–100/101 or QRS11–00050–443/569 Micromachined Angular Rate Sensors, or for foreign-made aircraft that incorporate systems that have QRS11–00100–100/101s or QRS11–00050–443/569s integrated (see § 734.4(a) of the EAR). The instrument systems, the automatic flight control systems, and the aircraft remain subject to the EAR regardless of their percentage, by value, of U.S. content.

Consistent with the provisions of section 6 of the Export Administration Act, a foreign policy report was submitted to Congress on November 1, 2007, notifying the Congress of the change in licensing jurisdiction reflected in this rule.

Although the Export Administration Act expired on August 20, 2001, the President, through Executive Order 13222 of August 17, 2001 (66 Fed. Reg. 44025, 3 CFR, 2001 Comp., p. 783), as extended by the Notice of August 15, 2007 (72 Fed. Reg. 46137, August 16, 2007), has continued the Export Administration Regulations in effect under the International Emergency Economic Powers Act.

Rulemaking Requirements

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

2. Notwithstanding any other provision 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 requirements of the Paperwork Reduction Act, unless that collection of information displays a currently valid Office of Management and Budget Control Number. This rule involves a collection of information subject to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.). This collection has been approved by the Office of Management and Budget under control number 0694–0088, ''Multi-Purpose Application,'' which carries a burden hour estimate of 58 minutes for a manual or electronic submission. Send comments regarding these burden estimates or any other aspect of these collections of information, including suggestions for reducing the burden, to OMB Desk Officer, New Executive Office Building, Washington, DC 20503; and to the Office of Administration, Bureau of Industry and Security, Department of Commerce, 14th and Pennsylvania Avenue, NW., Room 6883, Washington, DC 20230.

3. This rule does not contain policies with Federalism implications as that term is defined under E.O. 13132.

4. The provisions of the Administrative Procedure Act (5 U.S.C. 553) requiring prior notice, the opportunity for public comment, and a delay in effective date, are inapplicable because this regulation involves a military and foreign affairs function of the United States (5 U.S.C. 553(a)(1)). Further, no other law requires that prior notice and an opportunity for public comment be given for this final rule. Because prior notice and an opportunity for public comment are not required to be given for this rule under the Administrative Procedure Act or by any other law, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 et seq.) are not applicable. Therefore, this regulation is issued in final form. Although there is no formal comment period, public comments on this regulation are welcome on a continuing basis. Comments should be submitted to Hillary Hess, Office of Exporter Services, Bureau of Export Administration, Room H2705, U.S. Department of Commerce, Washington, DC 20230.

List of Subjects

15 CFR Part 734

Administrative practice and procedure, Exports, Foreign trade.

15 CFR Part 774

Exports, Foreign trade.

■ Accordingly, parts 734 and 774 of the Export Administration Regulations (15 CFR parts 730–774) are amended as follows:

PART 734—[AMENDED]

■ 1. The authority citation for 15 CFR part 734 continues to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; E.O. 13020, 61 FR 54079, 3 CFR, 1996 Comp. p. 219; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of August 3, 2006, 71 FR 44551 (August 7, 2006); Notice of October 27, 2006, 71 FR 64109 (October 31, 2006); Notice of August 15, 2007, 72 FR 46137 (August 16, 2007).

■ 2. Section 734.4 is amended by revising paragraph (a)(3) to read as follows:

§ 734.4 De minimis U.S. content.

(a) * * *

(3) There is no *de minimis* level for foreign-made:

(i) Commercial primary or standby instrument systems of the type described in ECCN 7A994 on the Commerce Control List (Supplement No. 1 to part 774 the EAR) when the systems integrate QRS11–00100–100/101 Micromachined Angular Rate Sensors;

(ii) Commercial automatic flight control systems when the systems integrate QRS11–00050–443/569 Micromachined Angular Rate Sensors; and

(iii) Aircraft of the type described in ECCN 9A991 when such aircraft incorporate a primary or standby instrument system integrating a QRS11–00100–100/101 sensor or an automatic flight control system integrating a QRS11–00050–443/569 sensor.

Note to paragraph (a)(3): QRS11 Micromachined Angular Rate Sensors are subject to the export licensing jurisdiction of the U.S. Department of State, Directorate of Defense Trade Controls, except when the QRS11–00100–100/101 version of the sensor is integrated into and included as an integral part of a commercial primary or standby instrument system of the type described in ECCN 7A994, or aircraft of the type described in ECCN 9A991 that incorporates a commercial primary or standby instrument that has such a sensor integrated, or is exported solely for integration into such systems; or when the QRS11–00050–443/569 is integrated into a commercial automatic flight control system of the type described in ECCN 7A994, or aircraft of the type described in ECCN 9A991 that incorporates an automatic flight control system that has such a sensor integrated, or is exported solely for integration into such a system.

* * * * *

PART 774—[AMENDED]

■ 3. The authority citation for 15 CFR Part 774 continues to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; 10 U.S.C. 7420; 10 U.S.C. 7430(e); 22 U.S.C. 287c, 22 U.S.C. 3201 *et seq.*, 22 U.S.C. 6004; 30 U.S.C. 185(s), 185(u); 42 U.S.C. 2139a; 42 U.S.C. 6212; 43 U.S.C. 1354; 46 U.S.C. app. 466c; 50 U.S.C. app. 5; Sec. 901–911, Pub. L. 106–387; Sec. 221, Pub. L. 107–56; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of August 3, 2006, 71 FR 44551 (August 7, 2006); Notice of August 15, 2007, 72 FR 46137 (August 16, 2007).

4. In Supplement No. 1 to part 774 (the Commerce Control List), Category 7—Navigation and Avionics, ECCN 7A994 is amended by revising the License Requirements section, and the ''Related Controls'' paragraph in the List of Items Controlled section, to read as follows:

Supplement No. 1 to Part 774—The Commerce Control List

* * * * *

7A994 Other navigation direction finding equipment, airborne communication equipment, all aircraft inertial navigation systems not controlled under 7A003 or 7A103, and other avionic equipment, including parts and components, n.e.s.

License Requirements

Reason for Control: RS, AT

Control(s)	Country chart
RS applies to QRS11–00100–100/101 and QRS11–00050–443/569. Micromachined Angular Rate Sensors. See Related Controls.	RS Column 1.
AT applies to entire entry	AT Column 1.

License Requirement Notes: There is no *de minimis* level for foreign-made commercial primary or standby instrument systems that integrate QRS11–00100–100/101 or commercial automatic flight control systems that integrate QRS11–00050–443/569 Micromachined Angular Rate Sensors (see § 734.4(a) of the EAR).

* * * * *

List of Items Controlled

Unit: * * *

Related Controls: QRS11 Micromachined Angular Rate Sensors are subject to the export licensing jurisdiction of the U.S. Department of State, Directorate of Defense Trade Controls, unless the QRS11–00100–100/101 is integrated into and included as an integral part of a commercial primary or standby instrument system of the type described in ECCN 7A994, or aircraft of the type described in ECCN 9A991 that incorporates such systems, or is exported solely for integration into such a system; or the QRS11–00050–443/569 is integrated into an automatic flight control system of the type described in ECCN 7A994, or aircraft of the type described in ECCN 9A991 that incorporates such systems, or are exported solely for integration into such a system. (See Commodity Jurisdiction requirements in 22 CFR Parts 121; Category VIII(e), Note(1)) In the latter case, such items are subject to the licensing jurisdiction of the Department of Commerce. Technology specific to the development and production of QRS11 sensors remains subject to the licensing jurisdiction of the Department of State.

Related Definitions: * * *

Items: * * *

■ 5. In Supplement No. 1 to part 774 (the Commerce Control List), Category 9—Propulsion Systems, Space Vehicles and Related Equipment, ECCN 9A991 is amended by revising the ''License Requirements Note'' to the License Requirements section, and revising the ''Related Controls'' paragraph in the List of Items Controlled section, to read as follows:

9A991 ''Aircraft'', n.e.s., and gas turbine engines not controlled by 9A001 or 9A101 and parts and components, n.e.s.

License Requirements

Reason for Control: AT, UN

Control(s)	Country chart
AT applies to entire entry. UN applies to 9A991.a	AT Column 1. Iraq and Rwanda.

License Requirement Notes: There is no de minimis level for foreign-made aircraft described by this entry that incorporate commercial primary or standby instrument systems that integrate QRS11–00100–100/101 or commercial automatic flight control systems that integrate QRS11–00050–443/569 Micromachined Angular Rate Sensors (see § 734.4(a) of the EAR).

* * * * *

List of Items Controlled

Unit: * * *

Related Controls: QRS11 Micromachined Angular Rate Sensors are subject to the export licensing jurisdiction of the U.S. Department of State, Directorate of Defense Trade Controls, unless the QRS11–00100–100/101 is integrated into and included as an integral part of a commercial primary or standby instrument system of the type described in ECCN 7A994, or aircraft of the type described in ECCN 9A991 that incorporates such a system, or is exported solely for integration into such a system; or the QRS11–00050–443/569 is integrated into an automatic flight control system of the type described in ECCN 7A994, or aircraft of the type described in ECCN 9A991 that incorporates such a system, or are exported solely for integration into such a system. (See Commodity Jurisdiction requirements in 22 CFR Part 121; Category VIII(e), Note(1)) In the latter case, such items are subject to the licensing jurisdiction of the Department of Commerce. Technology specific to the development and production of QRS11 sensors remains subject to the licensing jurisdiction of the Department of State.

Related Definitions: * * *

Items: * * *

Dated: October 23, 2007.

Christopher A. Padilla,

Assistant Secretary for Export Administration.

[FR Doc. E7–21840 Filed 11–6–07; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 522

Implantation or Injectable Dosage Form New Animal Drugs; Ivermectin

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect approval of a supplemental abbreviated new animal drug application (ANADA) filed by Norbrook Laboratories, Ltd. The supplemental ANADA adds claims for persistent effectiveness against various species of external and internal parasites when cattle are treated with a one percent ivermectin solution by subcutaneous injection.

DATES: This rule is effective November 7, 2007.

FOR FURTHER INFORMATION CONTACT: John K. Harshman, Center for Veterinary Medicine (HFV–104), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 301–827–0169, e-mail: *john.harshman@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION: Norbrook Laboratories, Ltd., Station Works, Newry BT35 6JP, Northern Ireland, filed a supplement to ANADA 200–437 that provides for use of NOROMECTIN (ivermectin) Injection for Cattle and Swine. The supplemental ANADA adds claims for persistent effectiveness against various species of external and internal parasites of cattle. The supplemental ANADA is approved as of October 5, 2007, and the regulations are amended in 21 CFR 522.1192 to reflect the approval.

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

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

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

List of Subjects in 21 CFR Part 522

Animal drugs.

■ Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR part 522 is amended as follows:

PART 522—IMPLANTATION OR INJECTABLE DOSAGE FORM NEW ANIMAL DRUGS

■ 1. The authority citation for 21 CFR part 522 continues to read as follows:

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

■ 2. In § 522.1192, revise paragraph (b)(2) and add paragraph (b)(3) to read as follows:

§ 522.1192 Ivermectin.

* * * * *

(b) * * *

(2) No. 055529 for use of the product described in paragraph (a)(2) of this section as in paragraphs (e)(2)(i), (e)(2)(ii)(A), (e)(2)(ii)(C), (e)(2)(iii), (e)(3), (e)(4) and (e)(5) of this section.

(3) No. 059130 for use of the product described in paragraph (a)(2) of this section as in paragraphs (e)(2)(i), (e)(2)(ii)(A), (e)(2)(ii)(B), (e)(2)(iii), (e)(3), (e)(4), and (e)(5) of this section.

* * * * *

Dated: October 26, 2007.

Bernadette Dunham,

Deputy Director, Center for Veterinary Medicine.

[FR Doc. E7–21839 Filed 11–6–07; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 301

[TD 9362]

RIN 1545–BG23

Foreign Tax Credit: Notification of Foreign Tax Redeterminations

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Temporary regulations.

SUMMARY: This document contains temporary Income Tax Regulations relating to a United States taxpayer's obligation under section 905(c) of the Internal Revenue Code (Code) to notify the IRS of a foreign tax redetermination, which is a change in the taxpayer's foreign tax liability that may affect the taxpayer's foreign tax credit. This document also contains temporary Procedure and Administration Regulations under section 6689 relating to the civil penalty for failure to notify the IRS of a foreign tax redetermination as required under section 905(c). These temporary regulations affect taxpayers that have paid foreign taxes which have been redetermined and provide guidance needed to comply with statutory changes made to the applicable law by the Taxpayer Relief Act of 1997 and the American Jobs Creation Act of 2004. The text of the temporary regulations also serves as the text of the proposed regulations (REG–209020–86) set forth in the notice of proposed rulemaking on this subject published elsewhere in this issue of the **Federal Register**.

DATES: *Effective Date:* These regulations are effective on November 7, 2007.

Applicability Dates: For dates of applicability, see §§ 1.905–3T(a), 1.905–4T(f), and 301.6689–1T(e). These regulations generally apply to foreign tax redeterminations occurring in taxable years of United States taxpayers beginning on or after November 7, 2007, where the foreign tax redetermination affects the amount of foreign taxes paid or accrued by a United States taxpayer. Where the redetermination of foreign tax paid or accrued by a foreign corporation affects the amount of foreign taxes deemed paid under section 902 or 960, this section applies to foreign tax redeterminations occurring in a taxable year of a foreign corporation which ends with or within the taxable year of the domestic corporate shareholder beginning on or after November 7, 2007. Section 1.905–3T(b) generally applies to taxes paid or

accrued in taxable years of United States taxpayers beginning on or after November 7, 2007 and to taxes paid or accrued by a foreign corporation in its taxable year which ends with or within the taxable year of the domestic corporate shareholder beginning on or after November 7, 2007. For foreign tax redeterminations occurring in taxable years of United States taxpayers beginning before November 7, 2007 and foreign tax redeterminations occurring in taxable years of a foreign corporation which end with or within the taxable year of the domestic corporate shareholder beginning before November 7, 2007, see § 1.905–4T(f)(2).

FOR FURTHER INFORMATION CONTACT: Teresa Burridge Hughes, (202) 622–3850 (not a toll-free call).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

These temporary regulations are being issued without prior notice and public comment pursuant to the Administrative Procedure Act (5 U.S.C. 553). For this reason, the collections of information contained in these regulations have been reviewed and, pending receipt and evaluation of public comments, approved by the Office of Management and Budget under control number 1545–1056. Responses to this collection of information are mandatory.

The collections of information in these temporary regulations are in § 1.905–4T. This information is required in order for taxpayers to notify the IRS of a foreign tax redetermination that may require redetermination of the taxpayer's United States tax liability.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number.

For further information concerning these collections of information; where to submit comments on the collections of information and the accuracy of the estimated burden; and suggestions for reducing this burden, please refer to the preamble of the cross-referencing notice of proposed rulemaking published in this issue of the **Federal Register**.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Background

Under section 905(c) and the regulations, a taxpayer that claims a foreign tax credit for taxes paid or accrued under section 901 or deemed paid under section 902 or 960 must notify the IRS when there has been a change to the amount of foreign taxes paid or accrued. In general, in the case of a foreign tax redetermination with respect to taxes claimed as a direct credit under section 901, the taxpayer's United States tax liability must be redetermined; and, in the case of a foreign tax redetermination with respect to taxes included in the computation of foreign taxes deemed paid under section 902 or 960, the foreign corporation's pools of post-1986 undistributed earnings and post-1986 foreign income taxes must be adjusted (subject to exceptions described in §§ 1.905–3T(d)(3) and (f)). If the taxpayer fails to notify the IRS of a foreign tax redetermination, unless it is shown that such failure is due to reasonable cause and not due to willful neglect, section 6689 imposes a penalty of 5 percent of the deficiency attributable to such redetermination if the failure is for not more than 1 month, with an additional 5 percent for each additional month during which the failure continues, but not to exceed 25 percent of the deficiency.

On June 23, 1988, the **Federal Register** published proposed (53 FR 23659) (INTL–061–86) and temporary (53 FR 23611) (TD 8210) amendments to the Income Tax Regulations (26 CFR part 1) under section 905(c) and to the Procedure and Administration Regulations (26 CFR part 301) under section 6689 (the 1988 proposed and temporary regulations). These amendments reflected the changes made to the Internal Revenue Code by section 2(c)(2) of the Revenue Act of December 28, 1980 (94 Stat. 3503, 3509) and section 1261(a) of the Tax Reform Act of 1986 (100 Stat. 2085, 2591). The IRS and the Treasury Department received several written comments, which are discussed in this preamble. A public hearing concerning the proposed regulations was neither requested nor held. In response to written comments, on March 16, 1990, the IRS and the Treasury Department issued Notice 90–26, 1990–1 CB 336 (see § 601.601(d)(2)(ii)(*b*)), which suspended a portion of the temporary regulations, specifically § 1.905–3T(d)(2)(ii)(A) and that part of § 1.905–3T(d)(2)(ii)(C) which refers to that regulation, which provided rules for accounting for foreign tax redeterminations that affect the calculation of foreign taxes deemed paid with respect to distributions or inclusions out of post-1986 undistributed earnings of a foreign corporation. Section 1.905–3T(d)(2)(ii)(A) required that, in the case of a foreign tax redetermination that affects the amount of foreign taxes deemed paid by a United States corporation for a taxable year, if the foreign tax redetermination occurs more than 90 days before the due date (with extensions) of the taxpayer's income tax return for such taxable year and before the taxpayer actually files that return, then that taxpayer must adjust the foreign tax credit to be claimed on that return for such taxable year to account for the effect of the foreign tax redetermination.

Alternatively, if a foreign tax redetermination occurs after the filing of the United States tax return, § 1.905–3T(d)(2)(ii)(B) provides that appropriate upward or downward adjustments are made at the time of the foreign tax redetermination to the pools of post-1986 foreign income taxes and post-1986 undistributed earnings of the foreign corporation. Section 1.905–3T(d)(2)(ii)(C) provides that, if the foreign tax redetermination occurs within 90 days of the due date of the United States tax return and before the taxpayer actually files its tax return, then the taxpayer may elect either to adjust the foreign tax credit to be claimed on that return in the manner described in § 1.905–3T(d)(2)(ii)(A) or adjust the pools of post-1986 foreign income taxes and post-1986 undistributed earnings to reflect the effect of the foreign tax redetermination in the manner described in § 1.905–3T(d)(2)(ii)(B).

Comments received by the IRS and the Treasury Department concerning the requirement in § 1.905–3T(d)(2)(ii)(A) to notify the IRS of a foreign tax redetermination by adjusting the foreign tax credit on the return for the taxable year in which the foreign tax redetermination occurred stated that this requirement did not take into account the amount of time that taxpayers, especially large multinational corporations, need to prepare their income tax returns. In cases for which a foreign tax redetermination requires a redetermination of United States tax liability, § 1.905–4T provides rules generally requiring taxpayers to file amended returns to notify the IRS of the redetermination.

Sections 1102(a)(1) and 1102(a)(2) of the Taxpayer Relief Act of 1997, Public Law 105–34 (111 Stat. 788, 963–966 (1997)), amended sections 986(a) and 905(c), respectively, effective for taxes paid or accrued in taxable years beginning after December 31, 1997. Section 905(c)(1)(B) was added to provide that, if accrued taxes are not

paid before the date two years after the close of the taxable year to which such taxes relate, the taxpayer must notify the IRS and redetermine its United States tax liability for the year or years in which it claimed credit for such taxes. Section 986(a)(1)(A) was amended to provide that, for purposes of determining the amount of foreign tax credit, in the case of a taxpayer who takes foreign income taxes into account when accrued, the amount of any foreign income taxes (and any adjustment thereto) generally will be translated into dollars using the average exchange rate for the taxable year to which such taxes relate. However, under section 986(a)(1)(B), the spot exchange rate on the date the taxes are paid is used to translate foreign income taxes that are paid before, or more than two years after, the taxable year to which the taxes relate. Section 986(a)(1)(C) provides that, as determined under regulations, the average exchange rate also will not apply to taxes denominated in inflationary currencies.

Subsequently, section 408(a) of the American Jobs Creation Act of 2004, Public Law 108–357 (118 Stat. 1418, 1499 (2004)), modified section 986(a) and provided, effective for taxable years beginning after December 31, 2004, that, at the election of the taxpayer, the average exchange rate will not apply to any foreign income taxes the liability for which is denominated in any currency other than in the taxpayer's functional currency. If the taxpayer so elects, taxes will be translated into dollars using the exchange rates at the time such taxes were paid to the foreign country. See section 986(a)(1)(D)(i). Section 986(a)(1)(D)(ii) provides that this election is also applicable to foreign income taxes attributable to a qualified business unit in accordance with regulations prescribed by the Secretary. On May 15, 2006, the IRS and the Treasury Department issued Notice 2006–47, 2006–20 IRB 892 (see § 601.601(d)(2)(ii)(*b*)), which provides interim rules with respect to this election. The notice provides that a taxpayer may elect to use the payment date exchange rates to translate all foreign income taxes, or it may elect to use the payment date exchange rates to translate only those nonfunctional currency foreign income taxes that are attributable to qualified business units with United States dollar functional currencies. Section 408(b)(1) of the American Jobs Creation Act of 2004 also added a special rule at section 986(a)(1)(E) for taxes paid by regulated investment companies.

In light of the statutory changes to sections 905(c) and 986(a) by the Taxpayer Relief Act of 1997 and the American Jobs Creation Act of 2004, the IRS and the Treasury Department believe it is appropriate to issue new proposed and temporary regulations. These new regulations make several significant changes to the rules of the 1988 proposed and temporary regulations to take into account statutory changes and the comments received on the 1988 proposed and temporary regulations, while leaving substantial portions of the 1988 proposed and temporary regulations unchanged. The new temporary regulations will permit the IRS to enforce properly sections 905(c) and 6689 without delay. The significant comments and revisions are described in this preamble.

Explanation of Provisions

I. Currency Translation Rules

This document contains temporary Income Tax Regulations relating to the currency translation rules that apply in determining the amount of the foreign tax credit. Section 1.905–3T(b) has been revised to reflect the statutory changes to sections 905(c) and 986(a) by the Taxpayer Relief Act of 1997 and the American Jobs Creation Act of 2004. New § 1.905–3T(b)(1)(i) provides that, in the case of a taxpayer or a member of a qualified group (as defined in section 902(b)(2)) that takes foreign income taxes into account when accrued, the amount of any foreign taxes denominated in foreign currency that have been paid or accrued, additional tax liability denominated in foreign currency, taxes withheld in foreign currency, or estimated taxes paid in foreign currency will be translated into dollars using the average exchange rate (as defined in § 1.989(b)–1) for the United States taxable year to which such taxes relate.

However, new § 1.905–3T(b)(1)(ii) provides five exceptions to the general rule that accrual basis taxpayers translate foreign taxes using the average exchange rate. First, § 1.905–3T(b)(1)(ii)(A) provides that any foreign taxes denominated in foreign currency that were paid more than two years after the close of the United States taxable year to which they relate will be translated into dollars using the exchange rate as of the date of payment of the foreign taxes.

Second, § 1.905–3T(b)(1)(ii)(B) provides that any foreign income taxes paid before the beginning of the United States taxable year to which such taxes relate will be translated into dollars using the exchange rate as of the date of payment of the foreign taxes.

Third, § 1.905–3T(b)(1)(ii)(C) provides that any foreign income taxes the liability for which is denominated in any inflationary currency will be translated into dollars using the exchange rate as of the date of payment of the foreign taxes. For this purpose, the term *inflationary currency* means the currency of a country in which there is cumulative inflation during the base period of at least 30 percent, as determined by reference to the consumer price index of the country listed in the monthly issues of International Financial Statistics, or a successor publication, of the International Monetary Fund. For purposes of § 1.905–3T(b)(1)(ii)(C), *base period* means, with respect to any taxable year, the thirty-six calendar months immediately preceding the last day of such taxable year. See § 1.985–1(b)(2)(ii)(D).

Fourth, under the provisions of § 1.905–3T(b)(1)(ii)(D), a taxpayer that is otherwise required to translate foreign income taxes that are denominated in foreign currency using the average exchange rate may elect to translate foreign income taxes into dollars using the exchange rate as of the date of payment of the foreign taxes, provided that the liability for such taxes is denominated in nonfunctional currency. This election may be made for all foreign income taxes or for only those foreign income taxes the liability for which is denominated in nonfunctional currency and that are attributable to qualified business units with United States dollar functional currencies. This election allows taxpayers to avoid a mismatch between the translated dollar amount of foreign tax credit and the translated dollar amount of the foreign income used to pay the tax. The election must be made by attaching a statement to the taxpayer's timely filed return (including extensions) for the first taxable year to which the election applies. The statement must identify whether the election is made for all foreign taxes or only for foreign taxes attributable to qualified business units with a United States dollar functional currency. Once made, the election will apply to the taxable year for which made and all subsequent taxable years unless revoked with the consent of the Commissioner.

Finally, in the case of a regulated investment company (as defined in section 851 and the regulations under that section) which takes into account income on an accrual basis, § 1.905–3T(b)(1)(ii)(E) provides that foreign income taxes paid or accrued with

respect to such income will be translated into dollars using the exchange rate as of the date the income accrues. This exception takes account of the special rule at section 852(b)(9) that requires a regulated investment company to take dividends into account on the ex-dividend date, rather than on the later date on which the dividends are paid (and the tax is actually withheld). The translation rule permits greater conformity between the translated dollar amount of dividends paid in foreign currency and the translated dollar amount of taxes withheld from such dividends. For a discussion of the effective dates of the currency translation provisions, see the ''Effective Date'' section of this document.

Section 1.905–3T(b)(4), concerning the allocation of refunds of foreign tax to the separate categories of income under section 904(d), is not modified by these temporary regulations. Section 1.905–3T(b)(5), which provides rules with respect to the basis of foreign currency that is refunded, is revised to reflect the 1997 and 2004 changes to the currency translation rules, as provided in § 1.905–3T(b)(3).

II. Definition of Foreign Tax Redetermination

The term ''foreign tax redetermination'' in § 1.905–3T(c) has been revised to reflect the statutory changes made to section 905(c) in the Taxpayer Relief Act of 1997 and the American Jobs Creation Act of 2004. New § 1.905–3T(c) provides that, for purposes of §§ 1.905–3T and 1.905–4T, a foreign tax redetermination means a change in the foreign tax liability that may affect a taxpayer's foreign tax credit. A foreign tax redetermination includes: (1) Accrued taxes that when paid differ from the amounts added to post-1986 foreign income taxes or claimed as credits by the taxpayer (such as corrections to overaccruals and additional payments); (2) accrued taxes that are not paid before the date two years after the close of the taxable year to which such taxes relate; (3) any tax paid that is refunded in whole or in part; and (4) for taxes taken into account when accrued but translated into dollars on the date of payment, a difference between the dollar value of the accrued tax and the dollar value of the tax paid attributable to fluctuations in the value of the foreign currency relative to the dollar between the date of accrual and the date of payment.

Section 1.905–3T(d)(1) has been revised to reflect the modified definition in new § 1.905–3T(c) of a foreign tax redetermination that results from currency fluctuations, but new § 1.905–3T(d)(1) otherwise adopts without amendment the rule in § 1.905–3T(d)(1) of the 1988 regulations that provides that no redetermination of United States tax liability is required with respect to such foreign tax redetermination if the amount of such redetermination is less than the lesser of ten thousand dollars or two percent of the total dollar amount of the foreign tax initially accrued with respect to that foreign country for the United States taxable year. Comments requested that this exception be broadened by eliminating the $10,000 limitation and by increasing the percentage ceiling from 2 percent to 5 percent, in order to increase the number of taxpayers eligible for the exception, therefore minimizing the administrative burden of filing amended returns for both taxpayers and the IRS. Since the 1988 temporary regulations were published, the administrative burdens of accounting for exchange rate fluctuations have been substantially reduced by the change in law allowing taxpayers claiming credits on the accrual basis to use annual average exchange rates rather than date of payment exchange rates to translate foreign tax. In addition, the IRS and Treasury Department believe that it is appropriate to limit the exception to a dollar threshold. Accordingly, this comment was not adopted.

III. Adjustments to Pools of Post-1986 Undistributed Earnings and Post-1986 Foreign Income Taxes

On March 16, 1990, Notice 90–26, 1990–1 CB 336 (see § 601.601(d)(2)(ii)(*b*)), suspended § 1.905–3T(d)(2)(ii)(A) and that part of § 1.905–3T(d)(2)(ii)(C) which refers to § 1.905–3T(d)(2)(ii)(A). Prior to its suspension, § 1.905–3T(d)(2)(ii)(A) required taxpayers to recompute the foreign tax credit claimed on their current year income tax return to account for foreign tax redeterminations that affect the amount of foreign tax deemed paid under section 902 or 960 and that occurred more than 90 days before the due date (with extensions) of the United States tax return for that taxable year and before the actual filing date. Section 1.905–3T(d)(2)(ii)(C) permitted taxpayers to elect to apply § 1.905–3T(d)(2)(ii)(A) to a foreign tax redetermination occurring within 90 days of the due date (with extensions) of the tax return for that taxable year and before the actual filing date.

Section 1.905–3T(d)(2)(ii)(B) of the 1988 regulations requires that, if a foreign tax redetermination occurs after the filing of the United States tax return for such taxable year, then appropriate upward or downward adjustments will be made at the time of the foreign tax redetermination to the foreign corporation's pools of post-1986 foreign taxes and post-1986 earnings and profits to reflect the effect of the foreign tax redetermination in calculating foreign taxes deemed paid with respect to distributions and inclusions (and the amount of such distributions and inclusions) that are includible in taxable years subsequent to the taxable year for which such tax return is filed. The part of § 1.905–3T(d)(2)(ii)(C) not suspended by Notice 90–26 allows a taxpayer to elect to adjust the pools of post-1986 foreign taxes and post-1986 earnings and profits to reflect the effect of the foreign tax redetermination in the manner described in § 1.905–3T(d)(2)(ii)(B). Notice 90–26 also provided that, pending the issuance of final regulations under section 905(c), redeterminations otherwise subject to § 1.905–3T(d)(2)(ii)(A) or (C) were required to be accounted for through adjustment to the appropriate pools of post-1986 earnings and profits and post-1986 foreign taxes in the manner described in § 1.905–3T(d)(3) and subject to the exceptions set forth in § 1.905–3T(d)(4).

A comment concerning § 1.905–3T(d)(2) of the 1988 regulations was received, suggesting that taxpayers be allowed to elect to adjust earnings and profits and tax pools or file an immediate claim for refund, in the case of an additional assessment of foreign tax which generates a potential refund of U.S. tax. Because the taxpayer must wait for a subsequent distribution to benefit from the additional credits, the comment stated that the taxpayer is inappropriately denied an immediate benefit, that is, making a claim for an immediate refund, provided by section 6511(d)(3)(A). Subsequently, the Taxpayer Relief Act of 1997 confirmed the Secretary's regulatory authority to prescribe appropriate adjustments to a foreign corporation's pools of post-1986 foreign income taxes and post-1986 undistributed earnings in lieu of a redetermination, and amended section 905(c)(2) explicitly to provide that no redetermination of U.S. tax shall be made by reason of additional taxes paid more than two years after the year to which they relate. In light of the statutory changes, this comment was not adopted.

Section 1.905–3T(d)(2) of the 1988 regulations has been revised to reflect the provisions of Notice 90–26. New § 1.905–3T(d)(2)(i) provides that appropriate upward or downward adjustments will be made at the time of the foreign tax redetermination to the

foreign corporation's pools of post-1986 undistributed earnings and post-1986 foreign income taxes, in accordance with § 1.905–3T(d)(2)(ii), to reflect the effect of the foreign tax redetermination in calculating foreign taxes deemed paid with respect to subsequent distributions and inclusions (and the amount of such distributions and inclusions).

Section 1.905–3T(d)(2)(iii) of the 1988 regulations, which provides rules with respect to the reporting requirements for adjustments to the appropriate pools of post-1986 undistributed earnings and post-1986 foreign income taxes has been revised. The 1988 regulations require that the domestic corporate shareholder attach notice of such adjustments to its return on a yearly basis. In the interest of reducing the reporting requirement burden, this notification requirement has been eliminated. New § 1.905–3T(d)(2)(i) refers to § 1.905–4T(b)(2), which provides that, where a redetermination of foreign tax paid or accrued by a foreign corporation affects the computation of foreign taxes deemed paid under section 902 or 960, and the taxpayer is required to adjust the foreign corporation's pools of post-1986 undistributed earnings and post-1986 foreign income taxes under § 1.905–3T(d)(2), the taxpayer is required to notify the IRS of such redetermination by reflecting the adjustments to the foreign corporation's pools of post-1986 undistributed earnings and post-1986 foreign income taxes on a Form 1118 for the taxpayer's first taxable year with respect to which the redetermination affects the computation of foreign taxes deemed paid.

The 1988 regulations provide four exceptions to the general rule in § 1.905–3T(d)(2) requiring pooling adjustments in lieu of a redetermination of United States tax liability to account for the effect of a redetermination of foreign tax paid or accrued by a foreign corporation on foreign taxes deemed paid under section 902 or 960. A shareholder-level redetermination of United States tax liability is required where the foreign tax liability is denominated in a hyperinflationary currency (see § 1.905–3T(d)(4)(i)); where the foreign tax redetermination occurs with respect to foreign taxes deemed paid with respect to a subpart F inclusion or an actual distribution which has the effect of reducing the foreign corporation's pool of post-1986 foreign income taxes below zero (see § 1.905–3T(d)(4)(iv)); or where a domestic corporate shareholder of a controlled foreign corporation receives a distribution out of previously taxed earnings and profits and a foreign country imposes tax on the foreign corporation's income, which tax is subsequently reduced (see § 1.905–3T(f)). These exceptions are adopted without amendment and have been moved to § 1.905–3T(d)(3)(i), (iv), and (vi), respectively, in the new temporary regulations.

The fourth exception, at § 1.905–3T(d)(4)(ii) in the 1988 regulations, provides that if the foreign tax liability of a United States taxpayer is in a currency other than a hyperinflationary currency and the amount of foreign tax accrued for the taxable year to a foreign country, as measured in units of foreign currency, exceeds the amount of foreign tax paid to that foreign country for the taxable year by at least two percent, then the IRS, in its discretion, may require a redetermination of United States tax liability, in lieu of an adjustment of the pools of post-1986 undistributed earnings and post-1986 foreign income taxes. Section 1.905–3T(d)(2)(iii) of the 1988 regulations provides that, if a taxpayer may be required to redetermine its United States tax liability under § 1.905–3T(d)(4)(ii), the taxpayer must attach a notice of such adjustment to its return for the year with or within which ends the foreign corporation's taxable year during which the foreign tax redetermination occurs. Comments were received with respect to these provisions, requesting that the regulations set forth the factors the IRS would take into account in determining whether to exercise such discretion; the percentage limitation be increased to ten percent; the IRS not enforce this provision if the deficiency resulting from the overaccrual of foreign tax is less than $25,000; and the provision only be used in specific situations, such as consistent overaccrual of foreign taxes. Further, in order to avoid taxpayers being subject to the penalty under section 6689 for failure to notify the IRS within 180 days of the foreign tax redetermination, as required by § 1.905–4T(b)(2) of the 1988 regulations, a comment requested that, when the IRS exercises its discretion under § 1.905–3T(d)(4)(ii), the date on which such redetermination occurs should be deemed to be the date on which the IRS notifies the taxpayer that a redetermination of U.S. tax liability is required.

In lieu of the discretionary rule in the 1988 temporary regulations, § 1.905–3T(d)(3)(ii) of the new regulations requires a redetermination of United States tax liability for all affected years if a foreign tax redetermination occurs with respect to foreign taxes paid by a foreign corporation and such foreign tax redetermination, if taken into account in the taxable year of the foreign corporation to which the foreign tax redetermination relates, has the effect of reducing by ten percent or more the foreign taxes deemed paid by the domestic corporate shareholder under section 902 or 960 in the taxable year of the shareholder with or within which ends the taxable year of the foreign corporation to which the foreign tax redetermination relates or in any intervening taxable year. Thus, a redetermination of the United States taxpayer's deemed paid credit under section 902 or 960 is required by reason of a foreign tax redetermination at the foreign subsidiary level only if the overstatement of the foreign tax credit is substantial in amount, taking into account the effect of the redetermination on the entire tax pool of the foreign subsidiary and not just the tax attributable to the year to which the redetermination relates. This new rule is more consistent with the other three exceptions to pooling adjustments in § 1.905–3T(d)(4)(i) and (iv) and § 1.905–3T(f) of the 1988 temporary regulations, which are at new § 1.905–3T(d)(3)(i), (iv), and (vi). Further, § 1.905–3T(d)(3)(ii) of the new regulations provides consistent treatment among taxpayers, adds certainty as to when adjustments to prior-year section 902 or 960 credits are required, and reduces the administrative burden associated with yearly notification of such foreign tax redeterminations.

A comment requested that the regulations be revised to address the situation where a controlled foreign corporation is sold. In a typical case, the seller of the controlled foreign corporation contracts to indemnify the buyer for any tax deficiencies arising with respect to taxable periods occurring prior to the date of the sale and will be entitled to any refunds relating to such periods. The additional assessments or refunds of tax are reflected as adjustments to the pools of the foreign corporation in the hands of the buyer but accrue economically to the seller. However, the seller derives no U.S. tax benefit or detriment from those additional payments or refunds because it no longer has an economic interest in the foreign corporation. It was suggested that the regulations should provide an additional exception to the pooling rules allowing recomputation of the seller's U.S. tax liability as if the foreign tax redetermination occurred immediately prior to the sale. The IRS and Treasury Department are continuing to study this issue and request comments on the

potential scope of an additional exception to the pooling adjustment rules in the context of various types of acquisitions.

Comments are also solicited on other changes that should be made to the 1988 temporary regulations, including changes relating to the statutory changes made by the Taxpayer Relief Act of 1997 and the American Jobs Creation Act of 2004.

IV. Time and Manner of Notification

A. Overview of New Rules

New § 1.905–4T(a) provides that if, as a result of a foreign tax redetermination (as defined in § 1.905–3T(c)), a redetermination of United States tax liability is required under section 905(c) and § 1.905–3T(d), the taxpayer must provide notification of the foreign tax redetermination. Section 1.905–4T(b)(1) of the new temporary regulations provides rules with respect to the time and manner of notifying the IRS of a foreign tax redetermination that necessitates a redetermination of United States tax liability. New § 1.905–4T(b)(1)(i) sets forth the general rule that, where a redetermination of United States tax liability is required, the taxpayer must notify the IRS by filing an amended return, Form 1118 (Foreign Tax Credit—Corporations) or 1116 (Foreign Tax Credit), and the statement required under § 1.905–4T(c) for the taxable year with respect to which a redetermination of United States tax liability is required. However, where a foreign tax redetermination requires an individual to redetermine the individual's United States tax liability, and as a result of such foreign tax redetermination the amount of creditable taxes paid or accrued by such individual during the taxable year does not exceed the applicable dollar limitation in section 904(k) (currently $300, or $600 in the case of a joint return), the individual will not be required to file Form 1116 with the amended return for such taxable year if the individual satisfies the requirements of section 904(k).

B. Revision of 1988 Temporary Regulations in Response to Comments

The 1988 temporary regulations at § 1.905–4T(b)(2) require taxpayers to notify the IRS of a foreign tax redetermination that reduced the amount of foreign taxes paid or deemed paid by filing an amended return for the affected year or years within 180 days after the date that the foreign tax redetermination occurred. The IRS and the Treasury Department received several comments suggesting that this rule was unduly burdensome to taxpayers. The comments noted that multiple foreign tax redeterminations requiring a redetermination of United States tax liability for the same taxable year would require the filing of multiple returns for such year, and that filing an amended Federal tax return would trigger additional state tax notification and amended return filing requirements.

In light of these comments, the new temporary regulations at § 1.905–4T(b)(1)(ii) provide that, if a foreign tax redetermination reduced the amount of foreign taxes paid or accrued, or included in the computation of foreign taxes deemed paid, a taxpayer must file a separate notification for each taxable year with respect to which a redetermination of United States tax liability is required by the due date (with extensions) of the original return for the taxable year in which the foreign tax redetermination occurred. With respect to a foreign tax redetermination that increased the amount of foreign taxes paid or accrued, or included in the computation of foreign taxes deemed paid, new § 1.905–4T(b)(1)(iii) adopts the rule provided in the 1988 temporary regulations at § 1.905–4T(b)(2) and provides that the taxpayer must file a separate notification for each taxable year with respect to which a redetermination of United States tax liability is required within the period provided by section 6511(d)(3)(A).

C. Special Rules for Certain Redeterminations

The new temporary regulations at § 1.905–4T(b)(1)(iv) provide that, where more than one foreign tax redetermination requires a redetermination of United States tax liability for the same taxable year and those redeterminations occur within two consecutive taxable years of the taxpayer, the taxpayer may file for such taxable year one amended return, Form 1118 or 1116, and the statement required under § 1.905–4T(c) that reflect all such foreign tax redeterminations. If the taxpayer chooses to file one notification for such foreign tax redeterminations, the due date for such notification is the due date of the original return (with extensions) for the year in which the first foreign tax redetermination that reduced foreign tax liability occurred. However, because foreign tax redeterminations with respect to the taxable year for which a redetermination of United States tax liability is required may occur after the due date for providing such notification in the later of the two consecutive years, more than one amended return may be required with respect to that taxable year.

Section 1.905–4T(b)(1)(v) of the new temporary regulations provides that, where a foreign tax redetermination requires a redetermination of United States tax liability that would otherwise result in an additional amount of United States tax due, but such amount is eliminated as a result of a carryback or carryover of an unused foreign tax under section 904(c), the taxpayer may, in lieu of applying the general notification rule described in § 1.905–4T(b)(1)(i) or (ii), notify the IRS by attaching a statement to the original return for the taxable year in which the foreign tax redetermination occurs. The statement must be filed by the due date (with extensions) of such return and contain the information described in § 1.904–2(f), including the amounts carried back or over to the year with respect to which a redetermination of United States tax liability is required.

The 1988 temporary regulations at § 1.905–3T(d)(2)(iii) provide rules concerning the time, manner, and contents of the notification statement for an adjustment of a foreign corporation's pools of post-1986 undistributed earnings and post-1986 foreign income taxes due to a foreign tax redetermination. The new temporary regulations, at § 1.905–4T(b)(2), modify the reporting requirement with respect to such pooling adjustments by providing that where a redetermination of foreign tax paid or accrued by a foreign corporation affects the computation of foreign taxes deemed paid under section 902 or 960, and the taxpayer is required to adjust the foreign corporation's pools of post-1986 undistributed earnings and post-1986 foreign income taxes under § 1.905–3T(d)(2), the taxpayer must notify the IRS of the redetermination by reflecting the adjustments to the foreign corporation's pools of post-1986 undistributed earnings and post-1986 foreign income taxes on a Form 1118 for the taxpayer's first taxable year with respect to which the redetermination affects the computation of foreign taxes deemed paid. New § 1.905–4T(b)(2) requires the taxpayer to file the Form 1118 by the due date (with extensions) of the original return for such taxable year. In the case of multiple redeterminations that affect the computation of foreign taxes deemed paid for the same taxable year and that are required to be reported under new § 1.905–4T(b)(2), a taxpayer may file one notification for all such redeterminations in lieu of filing a separate notification for each such redetermination.

D. Large and Mid-Size Business Taxpayers

Section 1.905–4T(b)(2) of the 1988 temporary regulations requires a taxpayer to notify the IRS of a foreign tax redetermination that reduced the amount of foreign taxes paid or accrued, or included in the computation of foreign taxes deemed paid, by filing an amended return for the affected year within 180 days after the date that the foreign tax redetermination occurred. The IRS and the Treasury Department received several comments with respect to such rule suggesting that, in lieu of filing an amended return, taxpayers that are under continuous examination in a program such as the Coordinated Examination Program should be permitted to provide notice of foreign tax redeterminations to the examiner during an examination.

Taking into account these comments, the new temporary regulations at § 1.905–4T(b)(3) provide that, where a redetermination of United States tax liability is required by reason of a foreign tax redetermination that occurs while a taxpayer is under the jurisdiction of the Large and Mid-Size Business Division and that results in a reduction in the amount of foreign taxes paid or accrued, or included in the computation of foreign taxes deemed paid, the taxpayer must provide notice of such redetermination as part of the examination process in lieu of filing an amended return for the affected year as otherwise required by § 1.905–4T(b)(1)(i) and (ii). If the taxpayer is required under § 1.905–4T(b)(3) to provide notice as part of the examination process, the taxpayer must satisfy the requirements of § 1.905–4T(b)(3) (in lieu of the generally applicable rules of § 1.905–4T(b)(1)(i) or (ii)) in order not to be subject to the penalty under section 6689 and the regulations under that section.

Section 1.905–4T(b)(3) of the new regulations requires a taxpayer to notify the IRS of the foreign tax redetermination by providing to the examiner a statement described in § 1.905–4T(c) during an examination of the return for the taxable year for which a redetermination of United States tax liability is required by reason of the foreign tax redetermination. The taxpayer must provide the statement to the examiner no later than 120 days after the latest of the date the foreign tax redetermination occurs, the opening conference, or the hand-delivery or postmark date of the opening letter concerning the examination. If, however, the foreign tax redetermination occurs more than 180 days after the latest of the opening conference or the hand-delivery or postmark date of the opening letter, the taxpayer may, in lieu of applying the rules of § 1.905–4T(b)(1)(i) and (ii), provide to the examiner a statement which complies with the requirements of § 1.905–4T(b)(3), and the IRS, in its discretion, may accept such statement or require the taxpayer to comply with the rules of § 1.905–4T(b)(1)(i) and (ii).

This exception in § 1.905–4T(b)(3) to the generally applicable notification requirements of § 1.905–4T(b)(1) is not permitted to extend the length of the notification period set forth in § 1.905–4T(b)(1). In addition, no notification under § 1.905–4T(b)(3) will be due before May 5, 2008.

V. Notification Contents

Section 1.905–4T(c)(1) of the new temporary regulations requires the taxpayer to furnish a statement that contains information sufficient for the IRS to redetermine the taxpayer's United States tax liability where such a redetermination is required under section 905(c). The taxpayer must provide such information in a form that enables the IRS to verify and compare the original computations of the claimed foreign tax credit, the revised computations resulting from the foreign tax redetermination, and the net changes resulting therefrom. The statement must include the taxpayer's name, address, identifying number, and the taxable year or years of the taxpayer that are affected by the foreign tax redetermination. If the written statement is submitted to the IRS under § 1.905–4T(b)(3), which provides rules with respect to taxpayers under the jurisdiction of the Large and Mid-Size Business Division, the statement must also include a declaration under penalties of perjury.

Where a redetermination of United States tax liability is required by reason of a foreign tax redetermination, new § 1.905–4T(c)(2) requires that the taxpayer provide, in addition to the information described in new § 1.905–4T(c)(1), specific information concerning the foreign tax redetermination. To take into account the amendment of section 986(a) (concerning translation rates for foreign taxes) by the Taxpayer Relief Act of 1997 and the American Jobs Creation Act of 2004, the new temporary regulations require the taxpayer to provide the exchange rates used to translate the amount of foreign taxes paid, accrued, or refunded in accordance with § 1.905–3T(b) (as the case may be). These new temporary regulations also include the requirement of the 1988 temporary regulations that taxpayers provide information relating to the interest paid by foreign governments or owing to the United States due to a foreign tax redetermination.

If, as a result of a redetermination of foreign tax paid or accrued by a foreign corporation, adjustments to the pools of post-1986 undistributed earnings and post-1986 foreign income taxes are required under § 1.905–3T(d)(2) of the 1988 temporary regulations in lieu of a redetermination of a domestic corporate shareholder's United States tax liability, § 1.905–3T(d)(2)(iii) of the 1988 temporary regulations requires that the taxpayer provide certain information concerning the foreign tax redetermination and the pooling adjustments. In order to reduce the notification requirement burden, the new temporary regulations modify this reporting requirement, as discussed above in section IV.C., ''Special Rules for Certain Redeterminations.'' If, as a result of a redetermination of foreign tax paid or accrued by a foreign corporation, a redetermination of United States tax liability is required under new § 1.905–3T(d)(3) in lieu of a pooling adjustment, the new temporary regulations at § 1.905–4T(c)(3) specify the information that the taxpayer must provide.

VI. Payment or Refund of United States Tax, and Application of Interest and Penalties

Section 1.905–4T(d) of the new temporary regulations adopts without amendment that portion of the 1988 temporary regulations at § 1.905–4T(b)(1) which provides that the amount of tax, if any, due upon a redetermination of United States tax liability will be paid by the taxpayer after notice and demand has been made by the IRS. The regulation also clarifies that deficiency procedures under Subchapter B of chapter 63 of the Internal Revenue Code will not apply with respect to the assessment of the amount due upon such redetermination, meaning that the IRS is not required to send a statutory notice of deficiency to a taxpayer, and the taxpayer does not have an opportunity to petition the Tax Court, prior to the IRS' assessment and collection of the amount of additional tax due. In accordance with sections 905(c) and 6501(c)(5), the statute of limitations under section 6501(a) will not apply to the assessment and collection of the amount of additional tax due. The amount of tax, if any, shown by a redetermination of United States tax liability to have been overpaid will be credited or refunded to the

taxpayer in accordance with section 6511(d)(3)(A) and the provisions of § 301.6511(d)–3. Accordingly, the taxpayer must file a claim for credit or refund within ten years from the last date (without extensions) prescribed for filing the return for the taxable year in which the foreign taxes were actually paid or accrued.

Similarly, § 1.905–4T(e) of the new temporary regulations adopts without amendment the interest and penalties provisions of the 1988 temporary regulations at § 1.905–4T(c). First, new § 1.905–4T(e)(1) provides that interest on the underpayment or overpayment resulting from a redetermination of United States tax liability will be computed in accordance with sections 6601 and 6611 and the regulations under those sections. No interest will be assessed or collected on any underpayment resulting from a refund of foreign tax for any period before the receipt of the refund, except to the extent interest was paid by the foreign country or possession of the United States on the refund for the period. In no case, however, will interest assessed and collected pursuant to the preceding sentence for any period before receipt of the refund exceed the amount that otherwise would have been assessed and collected under section 6601 and the regulations under that section for that period. Interest will be assessed from the time the taxpayer (or the foreign corporation of which the taxpayer is a shareholder) receives a foreign tax refund until the taxpayer pays the additional tax due the United States.

Second, new § 1.905–4T(e)(2) provides that, if an adjustment to the foreign corporation's pools of post-1986 undistributed earnings and post-1986 foreign income taxes under § 1.905–3T(d)(2) is required in lieu of a redetermination of United States tax liability, no underpayment or overpayment of United States tax liability will result from a foreign tax redetermination. Consequently, no interest will be paid by or to a taxpayer as a result of adjustments to a foreign corporation's pools of post-1986 undistributed earnings and post-1986 foreign income taxes where required under § 1.905–3T(d)(2).

Third, § 1.905–4T(e)(3) of the new temporary regulations provides that failure to comply with the provisions of § 1.905–4T of the new temporary regulations will subject the taxpayer to the penalty provisions of section 6689 and the regulations under that section.

VII. Foreign Tax Redeterminations With Respect to Pre-1987 Accumulated Profits

Section 1.905–5T of the 1988 regulations provides rules relating to foreign tax redeterminations occurring in pre-1987 taxable years, and those occurring in post-1986 taxable years with respect to pre-1987 accumulated profits. The new temporary regulations amend the cross-references to §§ 1.905–3T and 1.905–4T and clarify that these rules apply to foreign tax redeterminations with respect to pre-1987 accumulated profits that are accumulated in taxable years of a foreign corporation beginning after December 31, 1986, but before the first taxable year in which the ownership requirements of section 902 are met. See § 1.902–1(a)(10)(i).

VIII. Penalty Under Section 6689

Under section 6689, a taxpayer that fails to notify the IRS of a foreign tax redetermination in the time and manner prescribed by regulations for giving such notice is subject to a penalty unless it is shown that such failure is due to reasonable cause and not due to willful neglect. Section 6689(a) provides that the penalty is calculated by adding to the deficiency attributable to the foreign tax redetermination an amount equal to 5 percent of the deficiency if the failure is for not more than 1 month, plus an additional 5 percent of the deficiency for each month (or fraction thereof) during which the failure continues. The total amount of the penalty is not to exceed 25 percent of the deficiency.

Section 301.6689–1T(a) has been revised to clarify that deficiency proceedings under Subchapter B of chapter 63 of the Code will not apply with respect to the amount of such penalty, meaning that the IRS is not required to send a statutory notice of deficiency to a taxpayer, and the taxpayer does not have an opportunity to petition the Tax Court, prior to the IRS' assessment and collection of the amount of such penalty.

Comments were received suggesting that, in computing the amount of the penalty, an overpayment resulting from one foreign tax redetermination should offset an underpayment resulting from another foreign tax redetermination where both foreign tax redeterminations arise from the same foreign taxing jurisdiction and require a redetermination of United States tax liability for the same taxable year. Thus, the commentators suggested, where the underpayment is completely offset by one or more overpayments, the section 6689 penalty should not apply. Because the penalty is determined with respect to a deficiency attributable to such redetermination, there must be some deficiency for the penalty to apply. Where underpayments and overpayments offset each other to reduce or eliminate a deficiency, any penalty under section 6689 would also be reduced or eliminated. The IRS and Treasury Department do not believe an amendment to the regulations is necessary to clarify this rule.

Another comment was received suggesting that the section 6689 penalty generally should be inapplicable to Coordinated Exam Program taxpayers, provided that a notice of foreign tax redeterminations is submitted by the taxpayer at the commencement of the audit. Such a suggestion is generally adopted at § 1.905–4T(b)(3). A further comment requested that the definition of reasonable care under the regulations be revised. The 1988 regulations provide that, if a taxpayer exercised ordinary business care and prudence and was nevertheless unable to file the notification within the prescribed time, then the delay will be considered to be due to reasonable cause and not willful neglect. The comment recommended instead adopting a more objective test based on substantial compliance. This comment is rejected because ordinary business care and prudence is the general standard for reasonable care that is used in the regulations for other penalties.

Effective/Applicability Date

The new temporary regulations of §§ 1.905–3T(c) and (d) and 1.905–4T are generally applicable for foreign tax redeterminations occurring in taxable years of United States taxpayers beginning on or after November 7, 2007 where the redetermination affects the amount of foreign taxes paid or accrued by a United States taxpayer. Where the redetermination of foreign tax paid or accrued by a foreign corporation affects the computation of foreign taxes deemed paid under section 902 or 960 with respect to post-1986 undistributed earnings (or pre-1987 accumulated profits) of the foreign corporation, the new temporary regulations of §§ 1.905–3T(c) and (d), 1.905–4T, and 1.905–5T are generally effective for foreign tax redeterminations occurring in taxable years of a foreign corporation which end with or within a taxable year of the domestic corporate shareholder beginning on or after November 7, 2007. See § 1.905–4T(f)(1). In no case, however, will § 1.905–4T(f) operate to extend the statute of limitations provided by section 6511(d)(3)(A).

Section 1.905–3T(b), which provides rules with respect to currency translation, generally is applicable for taxes paid or accrued in taxable years of United States taxpayers beginning on or after November 7, 2007 and to taxes paid or accrued by a foreign corporation in its taxable years which end with or within a taxable year of the domestic corporate shareholder beginning on or after November 7, 2007. For taxable years beginning after December 31, 1997, and before November 7, 2007, section 986(a), as amended by the Taxpayer Relief Act of 1997 and the American Jobs Creation Act of 2004, shall apply. For taxable years beginning after December 31, 1986, and prior to the effective date of the Taxpayer Relief Act of 1997 (January 1, 1998), § 1.905–3T of the 1988 temporary regulations shall apply.

Section 1.905–3T(b)(1)(ii)(D), which provides taxpayers otherwise required to translate foreign income taxes using the average exchange rate an election to translate taxes using the exchange rate for the date of payment, is applicable for taxable years beginning on or after November 7, 2007. For taxable years beginning after December 31, 2004, and before November 7, 2007, the rules of Notice 2006–47, 2006–20 IRB 892 (see § 601.601(d)(2)(ii)(*b*)), shall apply.

Although all foreign tax redeterminations occurring in taxable years beginning after December 31, 1986, are subject to the requirements of section 905(c) and the regulations under that section, the 1988 temporary regulations did not specify the date by which the required notifications must be made in order to avoid a penalty under section 6689. The IRS and the Treasury Department recognize the burden associated with requiring notification by a specific date of all previously-unreported foreign tax redeterminations that require a United States tax redetermination with respect to post-1986 taxable years. Consequently, the new temporary regulations at § 1.905–4T(f)(2) provide a specific due date only for notifications of foreign tax redeterminations that occurred in a taxpayer's three taxable years preceding the first taxable year identified in § 1.905–4T(f)(1), and taxable years of foreign corporations ending with or within such taxable years of their domestic corporate shareholders. However, the unlimited statute of limitations under section 905(c) and deficiency interest provisions continue to apply to any underpayment of United States tax attributable to a foreign tax redetermination.

Section 1.905–4T(f)(2)(ii) provides notification requirements for any foreign tax redetermination which occurred in the last taxable year of a United States taxpayer beginning before November 7, 2007 and the two immediately preceding taxable years and which reduced the amount of foreign taxes paid or accrued by the taxpayer for any taxable year. This section also requires notification of any redetermination of foreign taxes paid or accrued by a foreign corporation which occurred in a taxable year of the foreign corporation which ends with or within a taxable year of a domestic corporate shareholder described in the preceding sentence and which requires a redetermination of United States tax liability under § 1.905–3T(d)(3) for any taxable year. If, as of November 7, 2007, the taxpayer has not satisfied the notice requirements described in §§ 1.905–3T and 1.905–4T of the 1988 temporary regulations with respect to such foreign tax redeterminations, the new temporary regulations at § 1.905–4T(f)(2)(ii) generally require the taxpayer to notify the IRS of such foreign tax redetermination no later than the due date (with extensions) of its original return for the taxable year following the taxable year in which these regulations are first effective.

New § 1.905–4T(f)(2)(ii) sets forth the time and manner of the notification, which must contain the previously-unreported information described in new § 1.905–4T(c). The temporary regulations do not require notification of previously-unreported foreign tax redeterminations of a foreign corporation that occurred in taxable years of the foreign corporation that ended with or within a domestic corporate shareholder's taxable year beginning before November 7, 2007, if the foreign tax redetermination does not require a redetermination of United States tax liability but is accounted for by adjusting the foreign corporation's pools of post-1986 undistributed earnings and post-1986 foreign income taxes.

New § 1.905–4T(f)(2)(iii) provides that a taxpayer under the jurisdiction of the Large and Mid-Size Business Division that is otherwise required to file an amended return, Form 1118, and the statement required under § 1.905–4T(c) as required in new § 1.905–4T(f)(2)(ii) may, in lieu of applying § 1.905–4T(f)(2)(ii), notify the IRS in the course of an examination of the return for the taxable year for which a redetermination of United States tax liability is required. In such case, the notification must contain the information described in new § 1.905–4T(c) and must be provided within 120 days after the latest of the opening conference or the hand-delivery or postmark date of the opening letter concerning an examination of the return for the taxable year for which a redetermination of United States tax liability is required or May 5, 2008, whichever is later. However, if November 7, 2007 is more than 180 days after the latest of the opening conference or the hand-delivery or postmark date of the opening letter, the IRS, in its discretion, may accept such statement or require the taxpayer to comply with the rules of paragraph (f)(2)(ii) of this section. In addition, this exception to the notification requirements of § 1.905–4T(f)(2)(ii) is not permitted to extend the length of the notification period set forth in § 1.905–4T(f)(2)(ii). Therefore, § 1.905–4T(f)(2)(iii) will not apply if the last day for providing notice of the foreign tax redetermination under § 1.905–4T(f)(2)(ii) precedes the latest of the opening conference or the hand-delivery or postmark date of the opening letter concerning an examination of the return for the taxable year for which a redetermination of United States tax liability is required.

Section 1.905–4T(f)(2)(iv) provides that interest will be computed in accordance with § 1.905–4T(e), and that the taxpayer must satisfy the requirements of § 1.905–4T(f)(2) in order not to be subject to the penalty provisions of section 6689 and the regulations under that section.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. For the applicability of the Regulatory Flexibility Act (5 U.S.C. chapter 6), refer to the Special Analyses section of the preamble of the cross-referenced notice of proposed rulemaking published in this issue of the **Federal Register**. Pursuant to section 7805(f) of the Internal Revenue Code, this regulation has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small businesses.

Drafting Information

The principal author of these regulations is Teresa Burridge Hughes of the Office of Associate Chief Counsel (International). However, other personnel from the IRS and Treasury

Department participated in their development.

List of Subjects

26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

26 CFR Part 301

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

■ Accordingly, 26 CFR parts 1 and 301 are amended as follows:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

■ **Par. 2.** Section 1.905–3T is amended as follows:

■ 1. Revise the section heading and paragraphs (a), (b)(1), (b)(2), (b)(3), (b)(5), (c), and (d)(2)(i).

■ 2. Revise the second and third sentences in paragraph (d)(1).

■ 3. Remove paragraphs (d)(2)(ii), (d)(2)(iii), (d)(2)(iv), the heading for paragraph (d)(3), and paragraph (d)(3)(i).

■ 4. Redesignate paragraphs (d)(3), (d)(3)(ii), (d)(3)(iii), (d)(3)(iv), and (d)(3)(v) as paragraph (d)(2)(ii), (d)(2)(ii)(A), (d)(2)(ii)(B), (d)(2)(ii)(C), and (d)(2)(ii)(D), respectively.

■ 5. Add a new paragraph heading to newly-designated paragraph (d)(2)(ii).

■ 6. Revise newly-designated paragraphs (d)(2)(ii)(A), (d)(2)(ii)(B), and (d)(2)(ii)(D).

■ 7. Remove the language ''(d)(3)(iv)'' from the second to last sentence of newly-designated paragraph (d)(2)(ii)(C) and add the language ''(d)(2)(ii)(C)'' in its place. Remove the language ''§ 1.905–3T(d)(4)(iv)'' from the last sentence of newly-designated paragraph (d)(2)(ii)(C) and add the language ''paragraph (d)(3)(iv) of this section'' in its place.

■ 8. Redesignate paragraph (d)(4) as paragraph (d)(3).

■ 9. Remove the language ''(d)(4)'' from newly-designated paragraph (d)(3) and add the language ''(d)(3)'' in its place.

■ 10. Revise newly-designated paragraphs (d)(3)(ii), (d)(3)(iii), and (d)(3)(v).

■ 11. Redesignate paragraph (f) as paragraph (d)(3)(vi).

■ 12. Add a new paragraph (f).

The revisions and additions read as follows:

§ 1.905–3T Adjustments to United States tax liability and to the pools of post-1986 undistributed earnings and post-1986 foreign income taxes as a result of a foreign tax redetermination (temporary).

(a) *Effective/applicability dates*—(1) *Currency translation.* Except as provided in § 1.905–5T, paragraph (b) of this section applies to taxes paid or accrued in taxable years of United States taxpayers beginning on or after November 7, 2007 and to taxes paid or accrued by a foreign corporation in its taxable years which end with or within a taxable year of the domestic corporate shareholder beginning on or after November 7, 2007. For taxable years beginning after December 31, 1997, and before November 7, 2007, section 986(a), as amended by the Taxpayer Relief Act of 1997 and the American Jobs Creation Act of 2004, shall apply. For taxable years beginning after December 31, 1986, and before January 1, 1998, § 1.905–3T (as contained in 26 CFR part 1, revised as of April 1, 2007) shall apply.

(2) *Foreign tax redeterminations.* Paragraphs (c) and (d) of this section apply to foreign tax redeterminations occurring in taxable years of United States taxpayers beginning on or after November 7, 2007 where the foreign tax redetermination affects the amount of foreign taxes paid or accrued by a United States taxpayer. Where the redetermination of foreign tax paid or accrued by a foreign corporation affects the computation of foreign taxes deemed paid under section 902 or 960 with respect to post-1986 undistributed earnings of the foreign corporation, paragraphs (c) and (d) of this section apply to foreign tax redeterminations occurring in taxable years of a foreign corporation which end with or within a taxable year of the domestic corporate shareholder beginning on or after November 7, 2007. For corresponding rules applicable to foreign tax redeterminations occurring in taxable years beginning before November 7, 2007, see §§ 1.905–3T and 1.905–5T (as contained in 26 CFR part 1, revised as of April 1, 2007).

(b) *Currency translation rules*—(1) *Translation of foreign taxes taken into account when accrued*—(i) *In general.* Except as provided in paragraph (b)(1)(ii) of this section, in the case of a taxpayer or a member of a qualified group (as defined in section 902(b)(2)) that takes foreign income taxes into account when accrued, the amount of any foreign taxes denominated in foreign currency that have been paid or accrued, additional tax liability denominated in foreign currency, taxes withheld in foreign currency, or estimated taxes paid in foreign currency shall be translated into dollars using the average exchange rate (as defined in § 1.989(b)–1) for the United States taxable year to which such taxes relate.

(ii) *Exceptions*—(A) *Taxes not paid within two years.* Any foreign income taxes denominated in foreign currency that are paid more than two years after the close of the United States taxable year to which they relate shall be translated into dollars using the exchange rate as of the date of payment of the foreign taxes. To the extent any accrued foreign income taxes denominated in foreign currency remain unpaid two years after the close of the taxable year to which they relate, see paragraph (b)(3) of this section for translation rules for the required adjustments.

(B) *Taxes paid before taxable year begins.* Any foreign income taxes paid before the beginning of the United States taxable year to which such taxes relate shall be translated into dollars using the exchange rate as of the date of payment of the foreign taxes.

(C) *Inflationary currency.* Any foreign income taxes the liability for which is denominated in any inflationary currency shall be translated into dollars using the exchange rate as of the date of payment of the foreign taxes. For this purpose, the term *inflationary currency* means the currency of a country in which there is cumulative inflation during the base period of at least 30 percent, as determined by reference to the consumer price index of the country listed in the monthly issues of International Financial Statistics, or a successor publication, of the International Monetary Fund. For purposes of this paragraph (b)(1)(ii)(C), *base period* means, with respect to any taxable year, the thirty-six calendar months immediately preceding the last day of such taxable year (see § 1.985–1(b)(2)(ii)(D)). Accrued but unpaid taxes denominated in an inflationary currency shall be translated into dollars at the exchange rate on the last day of the United States taxable year to which such taxes relate.

(D) *Election to translate taxes using exchange rate for date of payment.* A taxpayer that is otherwise required to translate foreign income taxes that are denominated in foreign currency using the average exchange rate may elect to translate foreign income taxes described in this paragraph (b)(1)(ii)(D) into dollars using the exchange rate as of the date of payment of the foreign taxes, provided that the liability for such taxes is denominated in nonfunctional currency. A taxpayer may make an election under this paragraph

(b)(1)(ii)(D) for all foreign income taxes, or for only those foreign income taxes that are denominated in nonfunctional currency and are attributable to qualified business units with United States dollar functional currencies. The election must be made by attaching a statement to the taxpayer's timely filed return (including extensions) for the first taxable year to which the election applies. The statement must identify whether the election is made for all foreign taxes or only for foreign taxes attributable to qualified business units with United States dollar functional currencies. Once made, the election shall apply for the taxable year for which made and all subsequent taxable years unless revoked with the consent of the Commissioner. Accrued but unpaid taxes subject to an election under this paragraph (b)(1)(ii)(D) shall be translated into dollars at the exchange rate on the last day of the United States taxable year to which such taxes relate. For taxable years beginning after December 31, 2004, and before November 7, 2007, the rules of Notice 2006–47, 2006–20 IRB 892 (see § 601.601(d)(2)(ii)(*b*)), shall apply.

(E) *Regulated investment companies.* In the case of a regulated investment company (as defined in section 851 and the regulations under that section) which takes into account income on an accrual basis, foreign income taxes paid or accrued with respect to such income shall be translated into dollars using the exchange rate as of the date the income accrues.

(2) *Translation of foreign taxes taken into account when paid.* In the case of a taxpayer that takes foreign income taxes into account when paid, the amount of any foreign tax liability denominated in foreign currency, additional tax liability denominated in foreign currency, or estimated taxes paid in foreign currency shall be translated into dollars using the exchange rate as of the date of payment of such foreign taxes. Foreign taxes withheld in foreign currency shall be translated into dollars using the exchange rate as of the date on which such taxes were withheld.

(3) *Refunds or other reductions of foreign tax liability.* In the case of a taxpayer that takes foreign income taxes into account when accrued, a reduction in the amount of previously-accrued foreign taxes that is attributable to a refund of foreign taxes denominated in foreign currency, a credit allowed in lieu of a refund, the correction of an overaccrual, or an adjustment on account of accrued taxes denominated in foreign currency that were not paid by the date two years after the close of the taxable year to which such taxes relate, shall be translated into dollars using the exchange rate that was used to translate such amount when originally claimed as a credit or added to post-1986 foreign income taxes. In the case of foreign income taxes taken into account when accrued but translated into dollars on the date of payment, see paragraph (d) of this section for required adjustments to reflect a reduction in the amount of previously-accrued foreign taxes that is attributable to a difference in exchange rates between the date of accrual and date of payment. In the case of a taxpayer that takes foreign income taxes into account when paid, a refund or other reduction in the amount of foreign taxes denominated in foreign currency shall be translated into dollars using the exchange rate that was used to translate such amount when originally claimed as a credit. If a refund or other reduction of foreign taxes relates to foreign taxes paid or accrued on more than one date, then the refund or other reduction shall be deemed to be derived from, and shall reduce, the last payment of foreign taxes first, to the extent of that payment. See paragraphs (d)(1) (redetermination of United States tax liability for foreign taxes paid directly by a United States person) and (d)(2)(ii) (method of adjustment of a foreign corporation's pools of post-1986 undistributed earnings and post-1986 foreign income taxes) of this section.

* * * * *

(5) *Basis of foreign currency refunded*—(i) *In general.* A recipient of a refund of foreign tax shall determine its basis in the currency refunded under the following rules.

(ii) *United States dollar functional currency.* If the functional currency of the qualified business unit (QBU) (as defined in section 989 and the regulations under that section) that paid the tax and received the refund is the United States dollar or the person receiving the refund is not a QBU, then the recipient's basis in the foreign currency refunded shall be the dollar value of the refund determined under paragraph (b)(3) of this section by using, as appropriate, either the average exchange rate for the taxable year to which such taxes relate or the other exchange rate that was used to translate such amount when originally claimed as a credit or added to post-1986 foreign income taxes.

(iii) *Nondollar functional currency.* If the functional currency of the QBU receiving the refund is not the United States dollar and is different from the currency in which the foreign tax was paid, then the recipient's basis in the foreign currency refunded shall be equal to the functional currency value of the non-functional currency refund translated into functional currency at the exchange rate between the functional currency and the non-functional currency. Such exchange rate is determined under paragraph (b)(3) of this section by substituting the words ''functional currency'' for the word ''dollar'' and by using, as appropriate, either the average exchange rate for the taxable year to which such taxes relate or the other exchange rate that was used to translate such amount when originally claimed as a credit or added to post-1986 foreign income taxes.

(iv) *Functional currency tax liabilities.* If the functional currency of the QBU receiving the refund is the currency in which the refund was made, then the recipient's basis in the currency received shall be the amount of the functional currency received.

(v) *Foreign currency gain or loss.* For purposes of determining foreign currency gain or loss on the initial payment of accrued foreign tax in a non-functional currency, see section 988. For purposes of determining subsequent foreign currency gain or loss on the disposition of non-functional currency the basis of which is determined under this paragraph (b)(5), see section 988(c)(1)(C).

(c) *Foreign tax redetermination.* For purposes of this section and § 1.905–4T, the term *foreign tax redetermination* means a change in the foreign tax liability that may affect a taxpayer's foreign tax credit. A foreign tax redetermination includes: accrued taxes that when paid differ from the amounts added to post-1986 foreign income taxes or claimed as credits by the taxpayer (such as corrections to overaccruals and additional payments); accrued taxes that are not paid before the date two years after the close of the taxable year to which such taxes relate; any tax paid that is refunded in whole or in part; and, for taxes taken into account when accrued but translated into dollars on the date of payment, a difference between the dollar value of the accrued tax and the dollar value of the tax paid attributable to fluctuations in the value of the foreign currency relative to the dollar between the date of accrual and the date of payment.

(d) * * * (1) * * * See § 1.905–4T(b) which requires notification to the IRS of a foreign tax redetermination with respect to which a redetermination of United States liability is required, and see section 905(b) and the regulations under that section which require that a taxpayer substantiate that a foreign tax was paid and provide all necessary

information establishing its entitlement to the foreign tax credit. However, a redetermination of United States tax liability is not required (and a taxpayer need not notify the IRS) if the foreign taxes are taken into account when accrued but translated into dollars as of the date of payment, the difference between the dollar value of the accrued tax and the dollar value of the tax paid is attributable to fluctuations in the value of the foreign currency relative to the dollar between the date of accrual and the date of payment, and the amount of the foreign tax redetermination with respect to each foreign country is less than the lesser of ten thousand dollars or two percent of the total dollar amount of the foreign tax initially accrued with respect to that foreign country for the United States taxable year. * * *

(2) *Foreign taxes deemed paid under sections 902 or 960*—(i) *Redetermination of United States tax liability not required.* Subject to the special rule of paragraph (d)(3) of this section, a redetermination of United States tax liability is not required to account for the effect of a redetermination of foreign tax paid or accrued by a foreign corporation on the foreign taxes deemed paid by a United States corporation under section 902 or 960. Instead, appropriate upward or downward adjustments shall be made, in accordance with paragraph (d)(2)(ii) of this section, at the time of the foreign tax redetermination to the foreign corporation's pools of post-1986 undistributed earnings and post-1986 foreign income taxes to reflect the effect of the foreign tax redetermination in calculating foreign taxes deemed paid with respect to distributions and inclusions (and the amount of such distributions and inclusions) that are includible in the United States taxable year in which the foreign tax redetermination occurred and subsequent taxable years. See § 1.905–4T(b)(2) for notification requirements where a redetermination of foreign tax paid or accrued by a foreign corporation affects the computation of foreign taxes deemed paid under section 902 or 960, and the taxpayer is required to adjust the foreign corporation's pools of post-1986 undistributed earnings and post-1986 foreign income taxes under this paragraph (d)(2).

(ii) *Adjustments to the pools of post-1986 undistributed earnings and post-1986 foreign income taxes*—(A) *Reduction in foreign tax paid or accrued.* A foreign corporation's pool of post-1986 foreign income taxes in the appropriate separate category shall be reduced by the United States dollar amount of a foreign tax refund or other reduction in the amount of foreign tax paid or accrued, translated into United States dollars as provided in paragraph (b)(3) of this section. A foreign corporation's pool of post-1986 undistributed earnings in the appropriate separate category shall be increased by the functional currency amount of the foreign tax refund or other reduction in the amount of foreign tax paid or accrued. The allocation of the refund or other adjustment to the appropriate separate categories shall be made in accordance with paragraph (b)(4) of this section and § 1.904–6. If a foreign corporation receives a refund of foreign tax in a currency other than its functional currency, that refund shall be translated into its functional currency, for purposes of computing the increase to its pool of post-1986 undistributed earnings, at the exchange rate between the functional currency and the non-functional currency, as determined under paragraph (b)(3) of this section, by substituting the words ''functional currency'' for the word ''dollar'' and by using the same average or spot rate exchange rate convention that applies for purposes of translating such foreign taxes into United States dollars.

(B) *Additional foreign tax paid or accrued.* A foreign corporation's pool of post-1986 foreign income taxes in the appropriate separate category shall be increased by the United States dollar amount of the additional foreign tax paid or accrued, translated in accordance with the rules of paragraphs (b)(1) and (b)(2) of this section. A foreign corporation's pool of post-1986 undistributed earnings in the appropriate separate category shall be decreased by the functional currency amount of the additional foreign tax paid or accrued. The allocation of the additional amount of foreign tax among the separate categories shall be made in accordance with § 1.904–6. If a foreign corporation pays or accrues foreign tax in a currency other than its functional currency, that tax shall be translated into its functional currency, for purposes of computing the decrease to its pool of post-1986 undistributed earnings, at the exchange rate between the functional currency and the non-functional currency, as determined under paragraph (b)(3) of this section, by substituting the words ''functional currency'' for the word ''dollar'' and by using the same average or spot rate exchange rate convention that applies for purposes of translating such foreign taxes into United States dollars.

* * * * *

(D) *Examples.* The following examples illustrate the application of this paragraph (d)(2):

Example 1. Controlled foreign corporation (CFC) is a wholly-owned subsidiary of its domestic parent, P. Both CFC and P are calendar year taxpayers. CFC has a functional currency, the u, other than the dollar and its pool of post-1986 undistributed earnings is maintained in that currency. CFC and P use the average exchange rate to translate foreign taxes. In 2008, CFC accrued and paid 100u of foreign income taxes with respect to non-subpart F income. The average exchange rate for 2008 was $1:1u. In 2009, CFC received a refund of 50u of foreign taxes with respect to its non-subpart F income in 2008. CFC made no distributions to P in 2008. In accordance with paragraph (d)(2)(ii)(A) of this section and subject to paragraph (d)(3) of this section, in 2009 CFC's pool of post-1986 foreign income taxes must be reduced by $50 (because the refund must be translated into dollars using the exchange rate that was used to translate such amount when added to CFC's post-1986 foreign income taxes, that is, $1:1u, the average exchange rate for 2008) and the CFC's pool of post-1986 undistributed earnings must be increased by 50u (because the post-1986 undistributed earnings must be increased by the functional currency amount of the refund received). An income adjustment reflecting foreign currency gain or loss under section 988 with respect to the refund of foreign taxes received by CFC is not required because the foreign taxes are denominated and paid in CFC's functional currency.

Example 2. The facts are the same as in *Example 1,* except that in 2008, CFC had general category post-1986 undistributed earnings attributable to non-subpart F income of 200u (net of foreign taxes), and CFC accrued and paid 160u in foreign income taxes with respect to those earnings. The average exchange rate for 2008 was $1:1u. Also in 2008, CFC made a distribution to P of 50u, and P was deemed to have paid $40 of foreign taxes with respect to that distribution (50u/200u × $160). In 2009, CFC received a refund of foreign taxes of 5u with respect to its nonsubpart F income in 2008. Also in 2009, CFC made a distribution to P of 50u. CFC had no income and paid no foreign taxes in 2009. In accordance with paragraph (d)(2)(ii) of this section, CFC's pool of general category post-1986 foreign income taxes is reduced in 2009 by $5 to $115 (because the refund must be translated into dollars using the exchange rate that was used to translate such amount when added to CFC's post-1986 foreign income taxes, that is, $1:1u, the average exchange rate for 2008), and CFC's pool of general category post-1986 undistributed earnings must be increased in 2009 by 5u to 155u (because the post-1986 undistributed earnings must be increased by the functional currency amount of the refund received). (An income adjustment reflecting foreign currency gain or loss under section 988 with respect to the refund of foreign taxes received by CFC is not required because the foreign taxes are denominated and paid in CFC's functional currency.) A redetermination of P's deemed paid credit

and U.S. tax for 2008 is not required, because the 5u refund, if taken into account in 2008, would have reduced P's deemed paid taxes by less than 10% (50u/205u × $155 = $37.80). See paragraph (d)(3)(ii) of this section. P is deemed to pay $37.10 of foreign taxes with respect to the distribution in 2009 of 50u (50u/155u × $115).

Example 3. (i) CFC1 is a foreign corporation that is wholly-owned by P, a domestic corporation. CFC2 is a foreign corporation that is wholly-owned by CFC1. The functional currency of CFC1 and CFC2 is the u, and the pools of post-1986 undistributed earnings of CFC1 and CFC2 are maintained in that currency. CFC1, CFC2, and P use the average exchange rate to translate foreign income taxes. In 2008, CFC2 had post-1986 undistributed earnings attributable to non-subpart F income of 100u (net of foreign taxes) and paid 100u in foreign income taxes with respect to those earnings. The average exchange rate for 2008 was $1:1u. CFC1 had no income and no earnings and profits other than those resulting from distributions from CFC2, as provided in either Situation 1 or Situation 2. CFC1 paid no foreign taxes.

(ii) *Situation 1.* In 2009, CFC2 received a refund of foreign taxes of 25u with respect to its 2008 taxable year. As of the close of 2009, CFC2 had 125u of post-1986 undistributed earnings (100u + 25u) and $75 of post-1986 foreign income taxes ($100 − $25). In 2010, CFC2 made a distribution to CFC1 of 50u. CFC1 was deemed to have paid $30 of foreign taxes with respect to that distribution (50u/125u × $75). (An income adjustment reflecting foreign currency gain or loss under section 988 with respect to the refund of foreign taxes received by CFC1 is not required because the foreign taxes are denominated and paid in CFC1's functional currency.) At the end of 2010, CFC2 had 75u of post-1986 undistributed earnings (125u − 50u) and $45 of post-1986 foreign income taxes ($75 − $30).

(iii) *Situation 2.* The facts are the same as in *Example 3(ii), Situation 1,* except that CFC2 made a distribution of 50u in 2009 and received a refund of 75u of foreign tax in 2010. In 2009, the amount of foreign taxes deemed paid by CFC1 is $50 (50u/100u × $100). In accordance with paragraph (d)(2)(ii)(C) of this section, the pools of post-1986 foreign income taxes of CFC1, as well as CFC2, must be adjusted in 2010, because the 2010 refund would otherwise have the effect of reducing below zero CFC2's pool of post-1986 foreign income taxes. Under paragraph (d)(3)(iv) of this section, the pools would have to be adjusted in 2009, and a redetermination of P's United States tax liability would be required, if P had received or accrued a distribution or inclusion from CFC1 or CFC2 in 2009 and computed an amount of foreign taxes deemed paid. CFC1's pool of post-1986 foreign income taxes must be reduced in 2010 by $42.86, determined as follows: $50 (foreign taxes deemed paid on the distribution from CFC2) minus $7.14 (the foreign taxes that would have been deemed paid had the refund occurred prior to the distribution (50u/175u × $25)). CFC2's pool of foreign taxes must be reduced in 2010 by $32.14, determined as follows: $75 (75u refund translated into dollars using the exchange rate that was used to translate such amount when originally added to post-1986 foreign income taxes, that is, $1:1u, the average exchange rate for 2008) minus $42.86 (the adjustment to CFC1's pool of post-1986 foreign income taxes). (An income adjustment reflecting foreign currency gain or loss under section 988 with respect to the refund of foreign taxes received by CFC1 is not required because the foreign taxes are denominated and paid in CFC1's functional currency.) The following reflects the pools of post-1986 undistributed earnings and post-1986 foreign income taxes of CFC1 and CFC2.

	Post-1986 earnings (u)	Foreign taxes ($)
CFC2:		
2008	100	100
2009	100 − 50 = 50	100 − 50 = 50
2010	50 + 75 = 125	50 − 32.14 = 17.86
CFC1:		
2009	50	50
2010	50	50 − 42.86 = 7.14

* * * * *

(d)(3) * * *

(ii) *Deemed paid foreign tax adjustment of ten percent or more.* A redetermination of United States tax liability is required if a foreign tax redetermination occurs with respect to foreign taxes paid by a foreign corporation and such foreign tax redetermination, if taken into account in the taxable year of the foreign corporation to which the foreign tax redetermination relates, has the effect of reducing by ten percent or more the domestic corporate shareholder's foreign taxes deemed paid under section 902 or 960 with respect to a distribution or inclusion from the foreign corporation in any taxable year of the domestic corporate shareholder. If a redetermination of United States tax is required under the preceding sentence for any taxable year, a redetermination of United States tax is also required for all subsequent taxable years in which the domestic corporate shareholder received or accrued a distribution or inclusion from the foreign corporation.

(iii) *Example.* The following example illustrates the application of paragraph (d)(3)(ii) of this section:

Example. (i) *Facts.* Controlled foreign corporation (CFC) is a wholly-owned subsidiary of its domestic parent, P. Both CFC and P use the calendar year as their taxable year. CFC has a functional currency, the u, other than the dollar, and its pool of post-1986 undistributed earnings is maintained in that currency. CFC and P use the average exchange rate to translate foreign income taxes. As of January 1, 2008, CFC had 500u of general category post-1986 undistributed earnings and $200 of general category post-1986 foreign income taxes. In 2008, when the average exchange rate for the year was $1:1u, CFC earned general category income of 600u, accrued 100u of foreign income tax with respect to that income, and made a distribution to P of 100u, 10% of CFC's post-1986 undistributed earnings of 1,000u. P was deemed to have paid $30 of foreign income taxes in 2008 with respect to that distribution (100u/1,000u × $300). In 2009, CFC paid its actual foreign tax liability for 2007 of 80u. Also in 2009, for which the average exchange rate was $1:1.5u, CFC earned 500u of general category income, accrued 150u of tax with respect to that income, and distributed 100u to P. In 2010, CFC incurred a general category loss of (500u) and accrued no foreign tax. The loss was carried back to 2008 for foreign tax purposes, and CFC received a refund in 2011 of all 80u of foreign taxes paid for its 2008 taxable year.

(ii) *Result in 2009.* If the 20u overaccrual of tax for 2007 were taken into account in 2008, CFC's general category post-1986 undistributed earnings would be 1,020u, CFC's general category post-1986 foreign income taxes would be $280, and P would be deemed to pay $27.45 of tax with respect to the 2008 distribution of 100u (100u/1020u × $280 = $27.45). Because $2.55 is less than 10% of the $30 of foreign taxes deemed paid as originally calculated in 2008, P is not required to redetermine its deemed paid credit and U.S. tax liability for 2008 in 2009. Instead, CFC's general category post-1986 foreign income taxes are reduced by $20 in 2009 (because the overaccrual for 2008 is translated into dollars using the exchange rate that was used to translate such amount when originally added to post-1986 foreign income taxes, that is, $1:1u, the average exchange rate for 2008), and the corresponding pool of general category post-1986 undistributed earnings is increased by 20u in 2009 (because the post-1986 undistributed earnings pool is increased by the functional currency amount of the overaccrual). CFC's general category post-1986 undistributed earnings are also

increased in 2009 to 1270u by the 350u earned in 2009 (900u + 20u + 350u = 1270u), and CFC's general category post-1986 foreign income taxes are increased by $100 to $350 ($270 − $20 + $100). P is deemed to pay $27.56 of foreign income taxes in 2009 with respect to the 100u distribution from CFC in that year (100u/1270u × $350).

(iii) *Result in 2011.* If the 80u refund of tax for 2008 were taken into account in 2008, CFC's general category post-1986 undistributed earnings would be 1,100u, CFC's general category post-1986 foreign income taxes would be $200, and P would be deemed to pay $18.18 of tax with respect to the 2008 distribution of 100u (100u/1,100u × $200 = $18.18). Because $11.82 is more than 10% of the $30 of foreign taxes deemed paid as originally calculated in 2008, under paragraph (d)(3)(ii) of this section, P is required to redetermine its deemed paid credit and U.S. tax liability for 2008 and 2009 in 2011. As redetermined in 2011, CFC's post-1986 undistributed earnings for 2009 are 1350u (1,100u as revised for 2008, less 100u distributed in 2008, plus 350u earned in 2009), and its post-1986 foreign income taxes for 2009 are $381.82 ($200 as revised for 2008, less $18.18 deemed paid in 2008, plus $100 accrued for 2009). As redetermined in 2011, P's deemed paid credit with respect to the 100u distribution from CFC in 2009 is $24.28 (100u/1350u × $381.82).

* * * * *

(v) *Example.* The following example illustrates the application of paragraph (d)(3)(iv) of this section:

Example. Controlled foreign corporation (CFC) is a wholly-owned subsidiary of its domestic parent, P. Both CFC and P are calendar year taxpayers. CFC has a functional currency, the u, other than the dollar, and its pool of post-1986 undistributed earnings is maintained in that currency. CFC and P use the average exchange rate to translate foreign taxes. The average exchange rate for both 2008 and 2009 was $1:1u. In 2008, CFC earned 200u of general category income, accrued and paid 100u of foreign taxes with respect to that income, and made a distribution to P of 50u, half of CFC's post-1986 undistributed earnings of 100u. P is deemed to have paid $50 of foreign taxes with respect to that distribution (50u/100u × $100). In 2009, CFC received a refund of all 100u of foreign taxes related to the general category income for 2008. In 2009, CFC earned an additional 290u of income, 200u of which was passive category income and 90u of which was general category income, and accrued and paid 95u of foreign tax, 40u of which was with respect to the passive category income and 45u of which was with respect to the general category income. In accordance with paragraph (d)(3)(iv) of this section, P is required to redetermine its United States tax liability for 2008 to account for the foreign tax redetermination occurring in 2009 because, if an adjustment to CFC's pool of post-1986 foreign income taxes in the general category were made, the pool would be ($5). A deficit is not permitted to be carried in CFC's pool of post-1986 foreign income taxes in any separate category.

* * * * *

(f) *Expiration date.* The applicability of this section expires on or before November 5, 2010.

■ **Par. 3.** Section 1.905–4T is revised to read as follows:

§ 1.905–4T Notification of foreign tax redetermination (temporary).

(a) *Application of this section.* The rules of this section apply if, as a result of a foreign tax redetermination (as defined in § 1.905–3T(c)), a redetermination of United States tax liability is required under section 905(c) and § 1.905–3T(d).

(b) *Time and manner of notification*—(1) *Redetermination of United States tax liability*—(i) *In general.* Except as provided in paragraphs (b)(1)(iv), (v), and (b)(3) of this section, any taxpayer for which a redetermination of United States tax liability is required must notify the Internal Revenue Service (IRS) of the foreign tax redetermination by filing an amended return, Form 1118 (Foreign Tax Credit—Corporations) or Form 1116 (Foreign Tax Credit), and the statement required under paragraph (c) of this section for the taxable year with respect to which a redetermination of United States tax liability is required. Such notification must be filed within the time prescribed by this paragraph (b) and contain the information described in paragraph (c) of this section. Where a foreign tax redetermination requires an individual to redetermine the individual's United States tax liability, and as a result of such foreign tax redetermination the amount of creditable taxes paid or accrued by such individual during the taxable year does not exceed the applicable dollar limitation in section 904(k), the individual shall not be required to file Form 1116 with the amended return for such taxable year if the individual satisfies the requirements of section 904(k).

(ii) *Reduction in amount of foreign tax liability.* Except as provided in paragraphs (b)(1)(iv), (v), and (b)(3) of this section, for each taxable year of the taxpayer with respect to which a redetermination of United States tax liability is required by reason of a foreign tax redetermination that reduces the amount of foreign taxes paid or accrued, or included in the computation of foreign taxes deemed paid, the taxpayer must file a separate notification for each such taxable year by the due date (with extensions) of the original return for the taxpayer's taxable year in which the foreign tax redetermination occurred.

(iii) *Increase in amount of foreign tax liability.* Except as provided in paragraphs (b)(1)(iv), (v), and (b)(3) of this section, for each taxable year of the taxpayer with respect to which a redetermination of United States tax liability is required by reason of a foreign tax redetermination that increases the amount of foreign taxes paid or accrued, or included in the computation of foreign taxes deemed paid, the taxpayer must notify the Internal Revenue Service within the period provided by section 6511(d)(3)(A). Filing of such notification within the prescribed period shall constitute a claim for refund of United States tax.

(iv) *Multiple redeterminations of United States tax liability for same taxable year.* Where more than one foreign tax redetermination requires a redetermination of United States tax liability for the same taxable year of the taxpayer and those redeterminations occur within two consecutive taxable years of the taxpayer, the taxpayer may file for such taxable year one amended return, Form 1118 or 1116, and the statement required under paragraph (c) of this section that reflect all such foreign tax redeterminations. If the taxpayer chooses to file one notification for such redeterminations, the taxpayer must file such notification by the due date (with extensions) of the original return for the taxpayer's taxable year in which the first foreign tax redetermination that reduces foreign tax liability occurred. Where a foreign tax redetermination with respect to the taxable year for which a redetermination of United States tax liability is required occurs after the date for providing such notification, more than one amended return may be required with respect to that taxable year.

(v) *Carryback and carryover of unused foreign tax.* Where a foreign tax redetermination requires a redetermination of United States tax liability that would otherwise result in an additional amount of United States tax due, but such amount is eliminated as a result of a carryback or carryover of an unused foreign tax under section 904(c), the taxpayer may, in lieu of applying the rules of paragraphs (b)(1)(i) and (ii) of this section, notify the IRS of such redetermination by attaching a statement to the original return for the taxpayer's taxable year in which the foreign tax redetermination occurs. Such statement must be filed by the due date (with extensions) of the original return for the taxpayer's taxable year in which the foreign tax redetermination occurred and contain the information described in § 1.904–2(f).

(vi) *Example.* The following example illustrates the application of this paragraph (b)(1):

Example. (i) X, a domestic corporation, is an accrual basis taxpayer and uses the calendar year as its United States taxable year. X conducts business through a branch in Country M, the currency of which is the m, and also conducts business through a branch in Country N, the currency of which is the n. X uses the average exchange rate to translate foreign income taxes. Assume that X is able to claim a credit under section 901 for all foreign taxes paid or accrued.

(ii) In 2008, X accrued and paid 100m of Country M taxes with respect to 400m of foreign source general category income. The average exchange rate for 2008 was $1:1m. Also in 2008, X accrued and paid 50n of Country N taxes with respect to 150n of foreign source general category income. The average exchange rate for 2008 was $1:1n. X claimed a foreign tax credit of $150 ($100 (100m at $1:1m) + $50 (50n at $1:1n)) with respect to its foreign source general category income on its United States tax return for 2008.

(iii) In 2009, X accrued and paid 100n of Country N taxes with respect to 300n of foreign source general category income. The average exchange rate for 2009 was $1.50:1n. X claimed a foreign tax credit of $150 (100n at $1.5:1n) with respect to its foreign source general category income on its United States tax return for 2009.

(iv) On June 15, 2012, when the spot exchange rate was $1.40:1n, X received a refund of 10n from Country N, and, on March 15, 2013, when the spot exchange rate was $1.20:1m, X was assessed by and paid Country M an additional 20m of tax. Both payments were with respect to X's foreign source general category income in 2008. On May 15, 2013, when the spot exchange rate was $1.45:1n, X received a refund of 5n from Country N with respect to its foreign source general category income in 2009.

(v) X must redetermine its United States tax liability for both 2008 and 2009. With respect to 2008, X must notify the IRS of the June 15, 2012, refund of 10n from Country N that reduced X's foreign tax liability by filing an amended return, Form 1118, and the statement required in paragraph (c) of this section for 2008 by the due date of the original return (with extensions) for 2012. The amended return and Form 1118 must reduce the amount of foreign taxes claimed as a credit under section 901 by $10 (10n refund translated at the average exchange rate for 2008, or $1:1n (see § 1.905–3T(b)(3)). X will recognize foreign currency gain or loss under section 988 in or after 2012 on the conversion of the 10n refund into dollars. With respect to the March 15, 2013, additional assessment of 20m by Country M, X must notify the IRS within the time period provided by section 6511(d)(3)(A), increasing the foreign taxes available as a credit by $24 (20m translated at the exchange rate on the date of payment, or $1.20:1m). See sections 986(a)(1)(B)(i) and 986(a)(2)(A) and § 1.905–3T(b)(1)(ii)(A). X may so notify the IRS by filing a second amended return, Form 1118, and the statement required in paragraph (c) of this section for 2008, within the time period provided by section 6511(d)(3)(A). Alternatively, when X redetermines its United States tax liability for 2008 to take into account the 10n refund from Country N which occurred in 2012, X may also take into account the 20m additional assessment by Country M which occurred on March 15, 2013. See § 1.905–4T(b)(1)(iv). Where X reflects both foreign tax redeterminations on the same amended return, Form 1118, and in the statement required in paragraph (c) of this section for 2008, the amount of X's foreign taxes available as a credit would be:

(A) Reduced by $10 (10n refund translated at $1:1n) and

(B) Increased by $24 (20m additional assessment translated at the exchange rate on the date of payment, March 15, 2013, or $1.20:1m). The foreign taxes available as a credit therefore would be increased by $14 ($24 (additional assessment) − $10 (refund)). The due date of the 2008 amended return, Form 1118, and the statement required in paragraph (c) of this section reflecting foreign tax redeterminations in both years would be the due date (with extensions) of X's original return for 2012.

(vi) With respect to 2009, X must notify the IRS by filing an amended return, Form 1118, and the statement required in paragraph (c) of this section for 2009 that is separate from that filed for 2008. The amended return, Form 1118, and the statement required in paragraph (c) of this section for 2009 must be filed by the due date (with extensions) of X's original return for 2013. The amended return and Form 1118 must reduce the amount of foreign taxes claimed as a credit under section 901 by $7.50 (5n refund translated at the average exchange rate for 2009, or $1.50:1n). X will recognize foreign currency gain or loss under section 988 in or after 2013 on the conversion of the 5n refund into dollars.

(2) *Pooling adjustment in lieu of redetermination of United States tax liability.* Where a redetermination of foreign tax paid or accrued by a foreign corporation affects the computation of foreign taxes deemed paid under section 902 or 960, and the taxpayer is required to adjust the foreign corporation's pools of post-1986 undistributed earnings and post-1986 foreign income taxes under § 1.905–3T(d)(2), the taxpayer is required to notify the IRS of such redetermination by reflecting the adjustments to the foreign corporation's pools of post-1986 undistributed earnings and post-1986 foreign income taxes on a Form 1118 for the taxpayer's first taxable year with respect to which the redetermination affects the computation of foreign taxes deemed paid. Such Form 1118 must be filed by the due date (with extensions) of the original return for such taxable year. In the case of multiple redeterminations that affect the computation of foreign taxes deemed paid for the same taxable year and that are required to be reported under this paragraph (b)(2), a taxpayer may file one notification for all such redeterminations in lieu of filing a separate notification for each such redetermination. See section 905(b) and the regulations under that section which require that a taxpayer substantiate that a foreign tax was paid and provide all necessary information establishing its entitlement to the foreign tax credit.

(3) *Taxpayers under the jurisdiction of the Large and Mid-Size Business Division.* The rules of this paragraph (b)(3) apply where a redetermination of United States tax liability is required by reason of a foreign tax redetermination that results in a reduction in the amount of foreign taxes paid or accrued, or included in the computation of foreign taxes deemed paid, and such foreign tax redetermination occurs while a taxpayer is under the jurisdiction of the Large and Mid-Size Business Division (or similar program). The taxpayer must, in lieu of applying the rules of paragraphs (b)(1)(i) and (ii) of this section (requiring the filing of an amended return, Form 1118, and a statement described in paragraph (c) of this section by the due date (with extensions) of the original return for the taxpayer's taxable year in which the foreign tax redetermination occurred), notify the IRS of such redetermination by providing to the examiner the statement described in paragraph (c) of this section during an examination of the return for the taxable year for which a redetermination of United States tax liability is required by reason of such foreign tax redetermination. The taxpayer must provide the statement to the examiner no later than 120 days after the latest of the date the foreign tax redetermination occurs, the opening conference of the examination, or the hand-delivery or postmark date of the opening letter concerning the examination. If, however, the foreign tax redetermination occurs more than 180 days after the latest of the opening conference or the hand-delivery or postmark date of the opening letter, the taxpayer may, in lieu of applying the rules of paragraphs (b)(1)(i) and (ii) of this section, provide the statement to the examiner within 120 days after the date the foreign tax redetermination occurs, and the IRS, in its discretion, may accept such statement or require the taxpayer to comply with the rules of paragraphs (b)(1)(i) and (ii) of this section. A taxpayer subject to the rules of this paragraph (b)(3) must satisfy the rules of this paragraph (b)(3) (in lieu of the rules of paragraphs (b)(1)(i) and (ii) of this section) in order not to be subject to the penalty relating to the failure to file notice of a foreign tax

redetermination under section 6689 and the regulations under that section. This paragraph (b)(3) shall not apply where the due date specified in paragraph (b)(1)(ii) of this section for providing notice of the foreign tax redetermination precedes the latest of the opening conference or the hand-delivery or postmark date of the opening letter concerning an examination of the return for the taxable year for which a redetermination of United States tax liability is required by reason of such foreign tax redetermination. In addition, any statement that would otherwise be required to be provided under this paragraph (b)(3) on or before May 5, 2008 will be considered timely if provided on or before May 5, 2008.

(4) *Example.* The following example illustrates the application of paragraph (b)(3) of this section:

Example. X, a taxpayer under the jurisdiction of the Large and Mid-Size Business Division, uses the calendar year as its United States taxable year. On October 15, 2009, X receives a refund of foreign tax that constitutes a foreign tax redetermination that necessitates a redetermination of United States tax liability for X's 2008 taxable year. Under paragraph (b)(1)(ii) of this section, X is required to notify the IRS of the foreign tax redetermination by filing an amended return, Form 1118, and the statement required in paragraph (c) of this section for its 2008 taxable year by September 15, 2010 (the due date (with extensions) of the original return for X's 2009 taxable year). On December 15, 2010, the IRS hand delivers an opening letter concerning the examination of the return for X's 2008 taxable year, and the opening conference for such examination is scheduled for January 15, 2011. Because the date for notifying the IRS of the foreign tax redetermination under paragraph (b)(1)(ii) of this section precedes the date of the opening conference concerning the examination of the return for X's 2008 taxable year, paragraph (b)(3) of this section does not apply, and X must notify the IRS of the foreign tax redetermination by filing an amended return, Form 1118, and the statement required in paragraph (c) of this section for the 2007 taxable year by September 15, 2010.

(c) *Notification contents*—(1) *In general.* In addition to satisfying the requirements of paragraph (b) of this section, the taxpayer must furnish a statement that contains information sufficient for the IRS to redetermine the taxpayer's United States tax liability where such a redetermination is required under section 905(c), and to verify adjustments to the pools of post-1986 undistributed earnings and post-1986 foreign income taxes where such adjustments are required under § 1.905–3T(d)(2). The information must be in a form that enables the IRS to verify and compare the original computations with respect to a claimed foreign tax credit, the revised computations resulting from the foreign tax redetermination, and the net changes resulting therefrom. The statement must include the taxpayer's name, address, identifying number, and the taxable year or years of the taxpayer that are affected by the foreign tax redetermination. In addition, the taxpayer must provide the information described in paragraph (c)(2) or (c)(3) of this section, as appropriate. If the statement is submitted to the IRS under paragraph (b)(3) of this section, which provides requirements with respect to reporting by taxpayers under the jurisdiction of the Large and Mid-Size Business Division, the statement must also include the following declaration signed by a person authorized to sign the return of the taxpayer: ''Under penalties of perjury, I declare that I have examined this written statement, and to the best of my knowledge and belief, this written statement is true, correct, and complete.''

(2) *Foreign taxes paid or accrued.* Where a redetermination of United States tax liability is required by reason of a foreign tax redetermination as defined in § 1.905–3T(c), in addition to the information described in paragraph (c)(1) of this section, the taxpayer must provide the following: the date or dates the foreign taxes were accrued, if applicable; the date or dates the foreign taxes were paid; the amount of foreign taxes paid or accrued on each date (in foreign currency) and the exchange rate used to translate each such amount, as provided in § 1.905–3T(b)(1) or (b)(2); and information sufficient to determine any interest due from or owing to the taxpayer, including the amount of any interest paid by the foreign government to the taxpayer and the dates received. In addition, in the case of any foreign tax that is refunded in whole or in part, the taxpayer must provide the date of each such refund; the amount of such refund (in foreign currency); and the exchange rate that was used to translate such amount when originally claimed as a credit (as provided in § 1.905–3T(b)(3)) and the exchange rate for the date the refund was received (for purposes of computing foreign currency gain or loss under section 988). In addition, in the case of any foreign taxes that were not paid before the date two years after the close of the taxable year to which such taxes relate, the taxpayer must provide the amount of such taxes in foreign currency, and the exchange rate that was used to translate such amount when originally added to post-1986 foreign income taxes or claimed as a credit. Where a redetermination of United States tax liability results in an amount of additional tax due, but the carryback or carryover of an unused foreign tax under section 904(c) only partially eliminates such amount, the taxpayer must also provide the information required in § 1.904–2(f).

(3) *Foreign taxes deemed paid.* Where a redetermination of United States tax liability is required under § 1.905–3T(d)(3) to account for the effect of a redetermination of foreign tax paid or accrued by a foreign corporation on foreign taxes deemed paid under section 902 or 960, in addition to the information described in paragraphs (c)(1) and (c)(2) of this section, the taxpayer must provide the balances of the pools of post-1986 undistributed earnings and post-1986 foreign income taxes before and after adjusting the pools in accordance with the rules of § 1.905–3T(d)(2), the dates and amounts of any dividend distributions or other inclusions made out of earnings and profits for the affected year or years, and the amount of earnings and profits from which such dividends were paid for the affected year or years.

(d) *Payment or refund of United States tax.* The amount of tax, if any, due upon a redetermination of United States tax liability shall be paid by the taxpayer after notice and demand has been made by the IRS. Subchapter B of chapter 63 of the Internal Revenue Code (relating to deficiency procedures) shall not apply with respect to the assessment of the amount due upon such redetermination. In accordance with sections 905(c) and 6501(c)(5), the amount of additional tax due shall be assessed and collected without regard to the provisions of section 6501(a) (relating to limitations on assessment and collection). The amount of tax, if any, shown by a redetermination of United States tax liability to have been overpaid shall be credited or refunded to the taxpayer in accordance with the provisions of section 6511(d)(3)(A) and § 301.6511(d)–3 of this chapter.

(e) *Interest and penalties*—(1) *In general.* If a redetermination of United States tax liability is required by reason of a foreign tax redetermination, interest shall be computed on the underpayment or overpayment in accordance with sections 6601 and 6611 and the regulations under these sections. No interest shall be assessed or collected on any underpayment resulting from a refund of foreign tax for any period before the receipt of the refund, except to the extent interest was paid by the foreign country or possession of the United States on the refund for the period. In no case, however, shall interest assessed and collected pursuant to the preceding sentence for any period

before receipt of the foreign tax refund exceed the amount that otherwise would have been assessed and collected under section 6601 and the regulations under this section for that period. Interest shall be assessed from the time the taxpayer (or the foreign corporation of which the taxpayer is a shareholder) receives a refund until the taxpayer pays the additional tax due the United States.

(2) *Adjustments to pools of foreign taxes.* No underpayment or overpayment of United States tax liability results from a redetermination of foreign tax unless a redetermination of United States tax liability is required. Consequently, no interest shall be paid by or to a taxpayer as a result of adjustments to a foreign corporation's pools of post-1986 undistributed earnings and post-1986 foreign income taxes made in accordance with § 1.905–3T(d)(2).

(3) *Imposition of penalty.* Failure to comply with the provisions of this section shall subject the taxpayer to the penalty provisions of section 6689 and the regulations under that section.

(f) *Effective/applicability date*—(1) *In general.* This section applies to foreign tax redeterminations (defined in § 1.905–3T(c)) occurring in taxable years of United States taxpayers beginning on or after November 7, 2007, where the foreign tax redetermination affects the amount of foreign taxes paid or accrued by a United States taxpayer. Where the redetermination of foreign tax paid or accrued by a foreign corporation affects the computation of foreign taxes deemed paid under section 902 or 960 with respect to pre-1987 accumulated profits or post-1986 undistributed earnings of the foreign corporation, this section applies to foreign tax redeterminations occurring in a taxable year of the foreign corporation which ends with or within a taxable year of its domestic corporate shareholder beginning on or after November 7, 2007. In no case, however, shall this paragraph (f)(1) operate to extend the statute of limitations provided by section 6511(d)(3)(A).

(2) *Foreign tax redeterminations occurring in taxable years beginning before November 7, 2007*—(i) *Scope.* This paragraph (f)(2) applies to any foreign tax redetermination (as defined in § 1.905–3T(c)) which occurred in any of the three taxable years of a United States taxpayer immediately preceding the taxpayer's first taxable year beginning on or after November 7, 2007; reduced the amount of foreign taxes paid or accrued by the taxpayer; and requires a redetermination of United States tax liability for any taxable year. This paragraph (f)(2) also applies to any redetermination of foreign tax paid or accrued by a foreign corporation which occurred in a taxable year of the foreign corporation which ends with or within any of the three taxable years of a domestic corporate shareholder immediately preceding such shareholder's first taxable year beginning on or after November 7, 2007; reduced foreign taxes included in the computation of foreign taxes deemed paid by such shareholder under section 902 or 960; and requires a redetermination of United States tax liability under § 1.905–3T(d)(3) for any taxable year. For corresponding rules applicable to foreign tax redeterminations occurring in taxable years beginning before the third taxable year immediately preceding the taxable year beginning on or after November 7, 2007, see 26 CFR 1.905–4T and 1.905–5T (as contained in 26 CFR part 1, revised as of April 1, 2007).

(ii) *Notification required.* If, as of November 7, 2007, the taxpayer has not satisfied the notification requirements described in § 1.905–3T and this section (as contained in 26 CFR part 1, revised as of April 1, 2007, as modified by Notice 90–26, 1990–1 CB 336, see § 601.601(d)(2)(ii)(*b*) of this chapter), with respect to a foreign tax redetermination described in paragraph (f)(2)(i) of this section, the taxpayer must notify the IRS of the foreign tax redetermination by filing an amended return, Form 1118 or 1116, and the statement required in paragraph (c) of this section for the taxable year with respect to which a redetermination of United States tax liability is required. Such notification must be filed no later than the due date (with extensions) of the original return for the taxpayer's first taxable year following the taxable year in which these regulations are first effective. Where the foreign tax redetermination requires an individual to redetermine the individual's United States tax liability, and as a result of such foreign tax redetermination the amount of creditable taxes paid or accrued by such individual during the taxable year does not exceed the applicable dollar limitation in section 904(k), the individual shall not be required to file Form 1116 with the amended return for such taxable year if the individual satisfies the requirements of section 904(k). The rules of paragraphs (b)(1)(iv) and (v) of this section (concerning multiple redeterminations of United States tax liability for the same taxable year, and the carryback and carryover of unused foreign tax) shall apply.

(iii) *Taxpayers under the jurisdiction of the Large and Mid-Size Business Division.* If a taxpayer under the jurisdiction of the Large and Mid-Size Business Division is otherwise required under paragraph (f)(2)(ii) of this section to notify the IRS of a foreign tax redetermination described in paragraph (f)(2)(ii) of this section by filing an amended return, Form 1118, and the statement required in paragraph (c) of this section, such taxpayer may, in lieu of applying the rules of paragraph (f)(2)(ii) of this section, provide to the examiner the information described in paragraph (c) of this section during an examination of the return for the taxable year for which a redetermination of United States tax liability is required by reason of such foreign tax redetermination. The taxpayer must provide the information to the examiner on or before the date that is the later of May 5, 2008 or 120 days after the latest of the opening conference or the hand-delivery or postmark date of the opening letter concerning an examination of the return for the taxable year for which a redetermination of United States tax liability is required. However, if November 7, 2007 is more than 180 days after the latest of the opening conference or the hand-delivery or postmark date of the opening letter, the IRS, in its discretion, may accept such statement or require the taxpayer to comply with the rules of paragraph (f)(2)(ii) of this section. This paragraph (f)(2)(iii) shall not apply where the due date specified in paragraph (f)(2)(ii) of this section for providing notice of the foreign tax redetermination precedes the latest of the opening conference or the hand-delivery or postmark date of the opening letter concerning an examination of the return for the taxable year for which a redetermination of United States tax liability is required.

(iv) *Interest and penalties.* Interest shall be computed in accordance with paragraph (e) of this section. Failure to comply with the provisions of this paragraph (f)(2) shall subject the taxpayer to the penalty provisions of section 6689 and the regulations under that section.

(3) *Expiration date.* The applicability of this section expires on or before November 5, 2010.

■ **Par. 4.** Section 1.905–5T is amended as follows:

■ 1. Remove the language ''earnings and profits accumulated in taxable years of a foreign corporation beginning prior to January 1, 1987'' from the second sentence of paragraph (a) and add the language ''pre-1987 accumulated profits (as defined in § 1.902–1(a)(10)(i)'' in its place.

■ 2. Remove the language ''§ 1.905–4(b)(3)'' from the second sentence of

paragraph (d)(1) and add the language ''§ 1.905–4T(c)'' in its place.

■ 3. Remove the language ''§ 1.905–4T(b)(3)(ii)(A)'' from paragraph (d)(2) and add the language ''§ 1.905–4T(c)(2)'' in its place.

■ 4. Remove the language ''paragraph (b)(3)(iii)'' from paragraph (d)(3) and add the language ''§ 1.905–4T(c)(3)'' in its place.

■ 5. Remove the language ''§ 1.905–4T(b)(3)(iii) in lieu of the exchange rate for the date of the accrual'' from paragraph (d)(4) and add the language ''§ 1.905–4T(c)(3)'' in its place.

■ 6. Revise the heading and first sentence of paragraph (f).

■ 7. Add a new paragraph (g).

The revision and addition read as follows:

§ 1.905–5T Foreign tax redeterminations and currency translation rules for foreign tax redeterminations occurring in taxable years beginning prior to January 1, 1987 (temporary).

* * * * *

(f) *Special effective/applicability date.* See § 1.905–4T(f) for the applicability date of notification requirements relating to foreign tax redeterminations that affect foreign taxes deemed paid under section 902 or section 960 with respect to pre-1987 accumulated profits accumulated in taxable years of a foreign corporation beginning on or after January 1, 1987. * * *

(g) *Expiration date.* The applicability of this section expires on or before November 5, 2010.

PART 301—PROCEDURE AND ADMINISTRATION

■ **Par. 5.** The authority citation for part 301 continues to read as follows:

Authority: 26 U.S.C. 7805 * * *

■ **Par. 6.** Section 301.6689–1T is amended as follows:

■ 1. Add a new sentence at the end of paragraph (a).

■ 2. Revise paragraph (e).

The addition and revision read as follows:

§ 301.6689–1T Failure to file notice of redetermination of foreign tax (temporary).

(a) * * * Subchapter B of chapter 63 of the Internal Revenue Code (relating to deficiency proceedings) shall not apply with respect to the assessment of the amount of the penalty.

* * * * *

(e) *Effective/applicability date*—(1) *In general.* This section applies to foreign tax redeterminations (as defined in § 1.905–3T(c) of this chapter) occurring in taxable years of United States taxpayers beginning on or after November 7, 2007, and in the three immediately preceding taxable years. For corresponding rules applicable to foreign tax redeterminations occurring in earlier taxable years of United States taxpayers, see 26 CFR 301.6689–1T (as contained in 26 CFR part 301, revised as of April 1, 2007).

(2) *Expiration date.* The applicability of this section expires on or before November 5, 2010.

Kevin M. Brown,

Deputy Commissioner for Services and Enforcement.

Approved: August 9, 2007.

Karen A. Sowell,

Deputy Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. E7–21766 Filed 11–6–07; 8:45 am]

BILLING CODE 4830–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 97

[EPA–R03-OAR–2007–0448; FRL–8493–2]

Approval and Promulgation of Air Quality Implementation Plans; West Virginia; Withdrawal of Direct Final Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Withdrawal of Direct final rule.

SUMMARY: Due to an adverse comment, EPA is withdrawing the direct final rule to approve a SIP revision submitted by West Virginia pertaining to its abbreviated SIP for the Clean Air Interstate Rule (CAIR) Nitrogen Oxides (NO_X) Annual and NO_X Ozone Season trading programs. In the direct final rule published on September 13, 2007 (72 FR 52289), we stated that if we received adverse comment by October 15, 2007, the rule would be withdrawn and not take effect. EPA subsequently received an adverse comment. EPA will address the comment received in a subsequent final action based upon the proposed action also published on September 13, 2007 (72 FR 52325). EPA will not institute a second comment period on this action.

DATES: *Effective Date:* The Direct final rule is withdrawn as of November 7, 2007.

FOR FURTHER INFORMATION CONTACT: Marilyn Powers, (215) 814–2308, or by e-mail at *powers.marilyn@epa.gov.*

List of Subjects

40 CFR Part 52

Environmental protection, Air pollution control, Nitrogen dioxide, Ozone, Particulate Matter, Reporting and recordkeeping requirements, Sulfur oxides.

40 CFR Part 97

Environmental protection, Administrative practice and procedure, Air pollution control, Intergovernmental relations, Nitrogen oxides, Ozone, Reporting and recordkeeping requirements.

Dated: October 29, 2007.

Donald S. Welsh,

Regional Administrator, Region III.

■ Accordingly, the addition of entries for 45 CSR 39 and 40 to the table in paragraph (c) and the addition of an entry for Article 3, Chapter 64 of the Code of West Virginia to the table in paragraph (e) of § 52.2520 are withdrawn as of November 7, 2007.

[FR Doc. E7–21863 Filed 11–6–07; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2006–0524; FRL–8153–7]

Oxytetracycline; Pesticide Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes a tolerance for residues of oxytetracycline in or on apples. Interregional Research Project #4 (IR-4) requested this tolerance under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective November 7, 2007. Objections and requests for hearings must be received on or before January 7, 2008, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2006–0524. To access the electronic docket, go to *http://www.regulations.gov*, select ''Advanced Search,'' then ''Docket Search.'' Insert the docket ID number where indicated and select the ''Submit'' button. Follow the instructions on the regulations.gov website to view the docket index or access available documents. All

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

FOR FURTHER INFORMATION CONTACT: Barbara Madden, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–6463; e-mail address: *madden.barbara@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

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

- Crop production (NAICS code 111), e.g., agricultural workers; greenhouse, nursery, and floriculture workers; farmers.
- Animal production (NAICS code 112), e.g., cattle ranchers and farmers, dairy cattle farmers, livestock farmers.
- Food manufacturing (NAICS code 311), e.g., agricultural workers; farmers; greenhouse, nursery, and floriculture workers; ranchers; pesticide applicators.
- Pesticide manufacturing (NAICS code 32532), e.g., agricultural workers; commercial applicators; farmers; greenhouse, nursery, and floriculture workers; residential users.

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

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

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

C. Can I File an Objection or Hearing Request?

Under section 408(g) of FFDCA, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2006–0524 in the subject line on the first page of your submission. All requests must be in writing, and must be mailed or delivered to the Hearing Clerk as required by 40 CFR part 178 on or before January 7, 2008.

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket that is described in **ADDRESSES**. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit this copy, identified by docket ID number EPA–HQ–OPP–2006–0524, by one of the following methods:

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

II. Petition for Tolerance

In the **Federal Register** of October 11, 2006 (71 FR 59783) (FRL–8097–6), EPA issued a notice pursuant to section 408(d)(3) of FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 7E4855) by Interregional Research Project #4 (IR-4), 500 College Rd., East, Suite 201 W, Princeton, NJ 08540. The petition requested that 40 CFR 180.337 be amended by establishing a tolerance for residues of the fungicide oxytetracycline, in or on apple at 0.35 parts per million (ppm). That notice referenced a summary of the petition prepared by Nufarm Americas Inc., the registrant, which is available to the public in the docket, *http://www.regulations.gov*. Comments were received on the notice of filing. EPA's response to these comments is discussed in Unit IV.C.

Oxytetracycline has two major agricultural uses. It is used to treat plant and animal disease and at subtherapeutic doses in animals to promote growth. Clinically, oxytetracycline is a second-line of defense against a host of infections. The pesticidal use of oxytetracycline on plants is small compared to the animal and human usage; it has been estimated as <0.5% of all antibiotic uses.

III. Aggregate Risk Assessment and Determination of Safety

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

were added to FFDCA by the Food Quality Protection Act (FQPA) of 1996.

Consistent with section 408(b)(2)(D) of FFDCA, and the factors specified in section 408(b)(2)(D) of FFDCA, EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for the petitioned-for tolerance for residues of oxytetracycline on apple at 0.35 ppm. EPA's assessment of exposures and risks associated with establishing the tolerance follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children. Specific information on the studies received and the nature of the adverse effects caused by oxytetracycline as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies can be found at *http://www.regulations.gov*. The referenced document is available in the docket established by this action, which is described under **ADDRESSES**, and is identified as document 0027 (pages 20 thru 24) in Docket ID EPA–HQ–OPP–2005–0492.

For oxytetracycline a definitive target organ has not been identified. The most common effect in intermediate- or long-term oral exposures was a decrease in body weight and/or body weight gain. Clinical signs noted were increased incidence of respiratory signs and rough hair coat and decreased maternal survival and percent of treated dams found pregnant. In a chronic toxicity study in dogs, a yellow discoloration of the thyroid was observed in all dosed animals at necropsy. No other changes in clinical signs, mortality, body weight, food consumption, macrosopy, or histopathology were reported in dogs.

In prenatal developmental toxicity studies, maternal toxicity was evident in rats as a dose-related increase in mortality. A dose-related decrease in fetal body weight was observed in rats. No maternal or developmental toxicity was observed in mice treated up to 2,100 milligrams/kilograms/day (mg/kg/day). No treatment-related external, visceral, or skeletal abnormalities were found in either species. In a study citation that was reported by a Joint FAO/WHO committee, oxytetracycline did not adversely affect reproductive parameters in rats over two generations. There is no evidence of increased sensitivity in pups versus adults based on rat and mice developmental studies and the rat multi-generation reproduction study. In prenatal developmental studies in both rats and mice treated with oxytetracycline, there was no toxicity identified in the pups at any dose tested. In the 2–generation study, there was no toxicity identified in pups at the highest dose tested. The degree of concern is low for prenatal and/or postnatal toxicity resulting from exposure to oxytetracycline. No evidence of neurotoxicity was observed in any study.

The microbiological effects of oxytetracycline were examined by studies examining the induction of drug-resistant organisms in dogs. In a 6–week study in dogs, which received oxytetracycline, there was no increase in the level of resistant fecal coliforms at 2 ppm in the diet (equivalent to 0.05 mg/kg/day). Dogs receiving 10 ppm (equivalent to 0.25 ppm) displayed an increase in a multiple antibiotic-resistant population of enteric lactose-fermenting organisms.

The mechanisms of action of antimicrobials, such as oxytetracycline, are based on affecting the pathogenic organism and not the host. The database for oxytetracycline demonstrates that it is indeed of low toxicological concern as most adverse effects seen following oral oxytetracycline treatment in animals are observed at very high dosages (e.g, near or above 1,000 mg/kg/day in animals). In humans, there are demonstrated toxicological concerns associated with the use of oxytetracycline, although the risk of adverse effects are low.

B. Toxicological Endpoints

For hazards that have a threshold below which there is no appreciable risk, the toxicological level of concern (LOC) is derived from the highest dose at which no adverse effects are observed (the NOAEL) in the toxicology study identified as appropriate for use in risk assessment. However, if a NOAEL cannot be determined, the lowest dose at which adverse effects of concern are identified (the LOAEL) is sometimes used for risk assessment. Uncertainty/safety factors (UFs) are used in conjunction with the LOC to take into account uncertainties inherent in the extrapolation from laboratory animal data to humans and in the variations in sensitivity among members of the human population as well as other unknowns. Safety is assessed for acute and chronic risks by comparing aggregate exposure to the pesticide to the acute population adjusted dose (aPAD) and chronic population adjusted dose (cPAD). The aPAD and cPAD are calculated by dividing the LOC by all applicable UFs. Short-, intermediate-, and long-term risks are evaluated by comparing aggregate exposure to the LOC to ensure that the margin of exposure (MOE) called for by the product of all applicable UFs is not exceeded.

For non-threshold risks, the Agency assumes that any amount of exposure will lead to some degree of risk and estimates risk in terms of the probability of occurrence of additional adverse cases. Generally, cancer risks are considered non-threshold. For more information on the general principles EPA uses in risk characterization and a complete description of the risk assessment process, see *http://www.epa.gov/pesticides/factsheets/riskassess.htm*. A summary of the toxicological endpoints for oxytetracycline used for human risk assessment can be found at *www.regulations.gov* in document 0027 (pages 27 thru 29) in Docket ID EPA–HQ–OPP–2005–0492.

No appropriate acute dietary endpoint attributable to a single exposure was identified for females age 13-49 or for the general population. A chronic dietary endpoint (cPAD) was identified for all populations based on the microbiological study in dogs with a NOAEL of 0.05 mg/kg/day based on a shift from a predominantly drug-susceptible population of enteric lactose-fermenting organisms to a multiple antibiotic-resistant population at 0.25 mg/kg/day (LOAEL) in mature beagle dogs. This chronic endpoint is considered conservative and protective for the entire toxicological database and was selected based on the qualitative classification of overall risk of resistance being medium. Other studies in the toxicological database demonstrated NOAELs near or above 1,000 mg/kg/day with the exception of a cited 2–generation reproductive study which had a NOAEL of 18 mg/kg/day. Based on the data available, the UF for the dog study is 10X for intraspecies variations and 10X for interspecies extrapolation. The cPAD was selected using an animal resistance endpoint in mature beagle dogs. The risk assessment team acknowledges that this study is not a precise description of antibiotic resistance in animals or humans. It is, however, a good indicator of the selective pressure of antibiotic usage and recognizes the potential for resistance in future infections.

C. Exposure Assessment

1. *Dietary exposure from food and feed uses*. In evaluating dietary exposure to oxytetracycline, EPA considered exposure under the petitioned-for tolerances as well as all existing oxytetracycline tolerances in (40 CFR 180.337). EPA assessed dietary exposures from oxytetracycline in food as follows:

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

No such effects were identified in the toxicological studies for oxytetracycline; therefore, a quantitative acute dietary exposure assessment is unnecessary.

ii. *Chronic exposure*. In conducting the chronic dietary exposure assessment, EPA used the food consumption data from the USDA 1994–1996 and 1998 Nationwide Continuing Surveys of Food Intake by Individuals (CSFII). As to residue levels in food, EPA relied upon anticipated residues and percent crop treated (PCT) information for all commodities. Anticipated residue levels for apples, peaches (nectarines), and pears, percent crop treated information, default processing factors, and Food Safety and Inspection Service (FSIS) monitoring data from 2002, 2003, and 2004 to estimate residue levels in livestock commodities were used. Tolerances are currently established under 40 CFR 180.337 for residues of oxytetracycline *per se* in/on peach and pears at 0.35 ppm. As indicated in 40 CFR 180.1(h), tolerances for peaches also cover nectarines. Therefore, nectarines were included in the analysis using the peach residue data. For apples, an anticipated residue level of 0.033 ppm was used, based on the mean residue level measured in the field trial studies reflecting a total oxytetracycline application rate of 1.53 lb ai/A. For peach, nectarine, and pears, an anticipated residue level of 0.20 ppm was used, based on average residue levels from the available field trial data.

Based on the registered uses of oxytetracycline on pears, peaches, and nectarines, and the proposed use on apples, no quantifiable residues in meat, milk, poultry, and eggs (MMPE) are expected. However, the Food and Drug Administration (FDA) has established tolerances in MMPE commodities for the sum of the residues of the tetracyclines including chlortetracycline, oxytetracycline, and tetracycline as listed in 21 CFR 556.500. Accordingly, the analysis includes estimates of possible oxytetracycline residues in livestock commodities making use of monitoring data from the FSIS collected in 2002, 2003, and 2004. These data were taken from the FSIS National Residue Program Data publications (Red Books).

The relevant FSIS data sampled kidney tissue from a variety of livestock (cattle, swine, poultry, goats, etc), analyzing for oxytetracycline residues. As tetracycline residues partition preferentially into fat and kidney, measured oxytetracycline residues in kidney were used as worst-case level for all other livestock tissues. In 2004 and 2002, no oxytetracycline residues were detected in 4,270 and 6,942 samples, respectively. In 2003, three kidney samples had finite oxytetracycline residue levels out of 5,260 samples. To compute an estimated residue level for use in Dietary Exposure Evaluation Model-Food Consumption Intake Database (DEEM-FCID), an average residue level was calculated using ½ level of detection (LOD) for nondetects (0.005 ppm) together with the three detected levels of 2.5, 5.0, and 5.0 ppm. This provided an estimated residue level of oxytetracycline in livestock commodities of 0.0058 ppm. This value was used for all livestock commodities in the DEEM-FCID analyses.

iii. *Cancer* There was no evidence of carcinogenicity for male or female mice fed oxytetracycline hydrochloride for two years. Results from carcinogenicity studies in rats were less clear cut (equivaocal); however, based on the weight of the evidence, the EPA has classified oxytetracycline as a ''Group D'' carcinogen (''Not Classifiable as to Human Carcinogenicity''). Therefore, a cancer risk assessment was not conducted.

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

Section 408(b)(2)(F) of FFDCA states that the Agency may use data on the actual percent of food treated for assessing chronic dietary risk only if:

a. The data used are reliable and provide a valid basis to show what percentage of the food derived from such crop is likely to contain such pesticide residue.

b. The exposure estimate does not underestimate exposure for any significant subpopulation group.

c. Data are available on pesticide use and food consumption in a particular area, the exposure estimate does not understate exposure for the population in such area. In addition, the Agency must provide for periodic evaluation of any estimates used. To provide for the periodic evaluation of the estimate of PCT as required by section 408(b)(2)(F) of FFDCA, EPA may require registrants to submit data on PCT.

The Agency used PCT information as follows: 5% peaches, 5% nectarines, and 25% pears. The Agency used projected percent crop treated (PPCT) information for apples assuming 10% of apples are treated.

EPA uses an average PCT for chronic dietary risk analysis. The average PCT figure for each existing use is derived by combining available federal, state, and private market survey data for that use, averaging by year, averaging across all years, and rounding up to the nearest multiple of five percent except for those situations in which the average PCT is less than one. In those cases <1% is used as the average and <2.5% is used as the maximum. EPA uses a maximum PCT for acute dietary risk analysis. The maximum PCT figure is the single maximum value reported overall from available federal, state, and private market survey data on the existing use, across all years, and rounded up to the nearest multiple of five percent. In most cases, EPA uses available data from United States Department of Agriculture/National Agricultural Statistics Service (USDA/NASS), Proprietary Market Surveys, and the National Center for Food and Agriculture Policy (NCFAP) for the most recent 6 years.

Generally, estimated PCT at the national level for a given crop/year may be equated to the average of all corresponding state PCTs weighted by their state acres grown. Such estimates take account of usage (or lack of usage) in all states for which the crop is grown and for which data are available. However, for a new use with previous usage occurring only under Section 18s, estimated PCT calculated over all growing states may understate what PCT would be upon Section 3 registration

because that calculation may include states with no usage because they were not granted Section 18s. (However, this may not hold if all states where the product is efficacious were granted Section 18 emergency exemptions.)

Therefore, to provide conservative PPCT estimates based on historical usage under Section 18s, only states with Section 18s are included in the PCT computations for each year. That is, for each year, estimated PCT for states with Section 18s is computed as the weighted average of state PCTs taken over only states with Section 18s. This extrapolates Section 18 usage to the national level. The computation utilizes data from the U.S. Department of Agriculture National Agricultural Statistics Service (USDA/NASS) because such data are readily available and are not proprietary. For risk assessment, the average over years of the weighted average state PCTs is appropriate to use as the PPCT estimate for use in chronic dietary risk assessment, and maximum over years is appropriate for use in acute dietary risk assessment. This approach is conservative because use is likely to be higher in states which requested emergency exemptions as compared to states which did not have such a severe need that they relied on the emergency exemption route.

Predominant factors that bear on whether the estimated PPCTs for oxytetracycline on apples could be exceeded may include the history and scope of the relevant Section 18s, the presence or lack of alternatives and other factors. All relevant information currently available for predominant factors has been considered for oxytetracycline on apples.

The Agency believes that the three conditions listed in Unit III.D.iv. have been met. With respect to Condition 1, PCT estimates are derived from Federal and private market survey data, which are reliable and have a valid basis. The Agency is reasonably certain that the percentage of the food treated is not likely to be an underestimation. As to Conditions 2 and 3, regional consumption information and consumption information for significant subpopulations is taken into account through EPA's computer-based model for evaluating the exposure of significant subpopulations including several regional groups. Use of this consumption information in EPA's risk assessment process ensures that EPA's exposure estimate does not understate exposure for any significant subpopulation group and allows the Agency to be reasonably certain that no regional population is exposed to residue levels higher than those estimated by the Agency. Other than the data available through national food consumption surveys, EPA does not have available information on the regional consumption of food to which oxytetracycline may be applied in a particular area.

2. *Dietary exposure from drinking water*. The Agency lacks sufficient monitoring data to complete a comprehensive dietary exposure analysis and risk assessment for oxytetracycline in drinking water. Because the Agency does not have comprehensive monitoring data, drinking water concentration estimates are made by reliance on simulation or modeling taking into account data on the environmental fate characteristics of oxytetracycline. Further information regarding EPA drinking water models used in pesticide exposure assessment can be found at *http://www.epa.gov/oppefed1/models/water/index.htm*.

Based on the First Index Reservoir Screening Tool (FIRST) and Screening Concentration in Ground Water (SCI-GROW) models, the estimated environmental concentrations (EECs) of oxytetracycline for chronic exposures are estimated to be 4.6 parts per billion (ppb) for surface water and 0.33 ppb for ground water.

Modeled estimates of drinking water concentrations were directly entered into the dietary exposure model. The estimates were calculated based on the maximum use pattern for oxytetracycline assuming 9 separate applications of oxytetracycline calcium to peaches and/or nectarines at a rate of 0.642 lb ai/A with a 7–day retreatment interval. For chronic dietary risk assessment, the annual average concentration of 4.6 ppb was used to assess the contribution to drinking water.

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

Oxytetracycline is not registered for use on any sites that would result in residential exposure.

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

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

D. Safety Factor for Infants and Children

1. *In general*. Section 408 of FFDCA provides that EPA shall apply an additional (''10X'') tenfold margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the database on toxicity and exposure unless EPA determines based on reliable data that a different margin of safety will be safe for infants and children. This additional margin of safety is commonly referred to as the FQPA safety factor. In applying this provision, EPA either retains the default value of 10X when reliable data do not support the choice of a different factor, or, if reliable data are available, EPA uses a different additional FQPA safety factor value based on the use of traditional UFs and/or special FQPA safety factors, as appropriate.

2. *Prenatal and postnatal sensitivity*. No quantitative or qualitative evidence suggests increased susceptibility of rat or mouse fetuses from *in utero* exposure to oxytetracycline in the developmental toxicity studies. Effects on offspring body weight were seen in the presence of systemic effects in the dam. The data requirement for the 2–generation reproduction study has been waived but a study available in literature demonstrates no quantitative or qualitative evidence of increased susceptibility in rats.

3. *Conclusion*. Historically, all the toxicological data requirements for oxytetracycline have been waived. The prenatal developmental and carcinogenicity studies in rats and mice were the only acceptable studies submitted to the EPA. However, given the extensive literature and study reports available on oxytetracycline, the risk assessment takes a weight-of-the-evidence approach, considering the

available data from a variety of sources, including studies submitted and reviewed by the EPA, the National Toxicology Program, the World Health Organization (WHO), the FDA, and open literature studies. The information available on the effects of oxytetracycline in laboratory animals is sufficient to evaluate the toxicity of oxytetracycline and related compounds. Based on the information available from these sources, the database is complete and there are no datagaps. EPA has determined that reliable data show that it would be safe for infants and children to reduce the FQPA safety factor to 1X. The decision is based on the following findings:

i. The toxicity database is complete.

ii There is a low degree of concern and no residual uncertainties with regard to pre- and/or postnatal toxicity.

iii. A developmental neurotoxicity study is not required because there was no evidence of neurotoxicity in the current toxicity database.

iv. The dietary food exposure assessment utilizes mean residue levels and percent crop treated information for all relevant commodities, and monitoring data to estimate possible livestock residue levels. By using these refined assessments, chronic exposures are not likely to be underestimated. The dietary drinking water assessment (Tier 1 estimates) yields values generated by modeling methods which are designed to provide conservative, health protective, high-end estimates of water concentrations.

v. In the previous risk assessments for oxytetracycline the 1993 Reregistration Eligibility Decisision (*http://www.epa.gov/pesticides/reregistration/status_page_o.htm*) the reference dose was established at 0.005 mg/kg/body weight per day based on a NOAEL of 0.05 mg/kg body weight per day from the microbiological study in dogs. However, only an UF of 10 to account for intraspecies variability was used since it was determined that the dog gut is similar to that of humans. For this current assessment, EPA has used an UF of 100 to account for intraspecies and interspecies variablility. Though the reduction of the FQPA safety factor from 10x to 1x does not explicitly address the bacterial resistance issue, the chronic dietary endpoint (cPAD) is based on this effect. Therefore, the current risk assessment is sufficiently conservative and protective of infants and children.

E. Aggregate Risks and Determination of Safety

Safety is assessed for acute and chronic risks by comparing aggregate exposure to the pesticide to the aPAD and cPAD. The aPAD and cPAD are calculated by dividing the LOC by all applicable UFs. For linear cancer risks, EPA calculates the probability of additional cancer cases given aggregate exposure. Short-, intermediate-, and long-term risks are evaluated by comparing aggregate exposure to the LOC to ensure that the MOE called for by the product of all applicable UFs is not exceeded.

1. *Acute risk*. There were no toxic effects attributable to a single dose. An endpoint of concern was not identified to quantitate an acute-dietary risk to the U.S. general population or to the subpopulation females 13-50 years old. Therefore, oxytetracycline is not expected to pose an acute risk.

2. *Chronic risk*. Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that exposure to oxytetracycline from food and water will utilize 32% of the chronic population adjusted dose (cPAD) for the U.S. population, 97% of the cPAD for all infants less than 1 year old, the subpopulation at greatest exposure, and 92% of the cPAD for children 1-2 years old. There are no residential uses for oxytetracycline that result in chronic residential exposure to oxytetracyline.

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

Oxytetracycline is not registered for use on any sites that would result in residential exposure. Therefore, the aggregate risk is the sum of the risk from food and water.

4. *Aggregate cancer risk for U.S. population*. As discussed in Unit III.D.iii., EPA has classified oxytetracycline as a ''Group D'' carcinogen (''Not Classifiable as to Human Carcinogenicity''). Therefore, a cancer risk assessment was not conducted.

5. *Pharmaceutical aggregate risk*. Section 408 of the FFDCA requires EPA to consider potential sources of exposure to a pesticide and related substances in addition to the dietary sources expected to result from a pesticide use subject to the tolerance. In order to determine whether to maintain a pesticide tolerance, EPA must ''determine that there is a reasonable certainty of no harm.'' Under FFDCA section 505, the Food and Drug Administration reviews human drugs for safety and effectiveness and may approve a drug notwithstanding the possibility that some users may experience adverse side effects. EPA does not believe that, for purposes of the section 408 dietary risk assessment, it is compelled to treat a pharmaceutical user the same as a non-user, or to assume that combined exposures to pesticide and pharmaceutical residues that lead to a physiological effect in the user constitutes ''harm'' under the meaning of section 408 of the FFDCA.

Rather, EPA believes the appropriate way to consider the pharmaceutical use of oxytetracycline in its risk assessment is to examine the impact that the additional nonoccupational pesticide exposures would have to a pharmaceutical user exposed to a related (or, in some cases, the same) compound. Where the additional pesticide exposure has no more than a minimal impact on the pharmaceutical user, EPA could make a reasonable certainty of no harm finding for the pesticide tolerances of that compound under section 408 of the FFDCA. If the potential impact on the pharmaceutical user as a result of co-exposure from pesticide use is more than minimal, then EPA would not be able to conclude that dietary residues were safe, and would need to discuss with FDA appropriate measures to reduce exposure from one or both sources. EPA provided its findings with respect to oxytetracycline to FDA in a letter dated May 24, 2006, which is available in the public docket (EPA–HQ–OPP–2005–0492).

The pesticidal exposure estimates described in the May 24, 2006 letter reflect the dietary dose from pesticidal uses of oxytetracycline that a user treated with a pharmaceutical oxytetracycline product would receive in a reasonable worst-case scenario. EPA's pesticide exposure assessment has taken into consideration the appropriate population, exposure route, and exposure duration for comparison with exposure to the pharmaceutical use of oxytetracycline.

EPA estimates that the pharmaceutical oxytetracycline exposure a user is expected to receive from a typical therapeutic dose (25 mg/kg/day for children) is 50,000 to 200,000 times greater than the estimated dietary exposure from the pesticidal sources of oxytetracycline (0.000121 mg/kg/day to 0.000473 mg/kg/day). Therefore, because the pesticide exposure has no more than a minimal impact on the total dose to a pharmaceutical user, EPA believes that there is a reasonable certainty that the potential dietary pesticide exposure will result in no harm to a user being treated therapeutically with oxytetracycline. FDA is aware of EPA's conclusions regarding pesticide exposure in users

receiving treatment with a pharmaceutical oxytetracycline drug product and FDA's June 7, 2006 response to EPA is available the public docket (EPA–HQ–OPP–2005–0492).

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

IV. Other Considerations

A. Analytical Enforcement Methodology

HWI Method MR-OPAP-MA with modifications is used to measure and evaluate oxytetracycline residues. The method is adapted from Pfizer Method STP No. 012.14 entitled Microbiological Agar Diffusion Assay for Oxytetracycline in Fruit Extract and Hazelton Method OTCF entitled Oxytetracycline in Feeds which is published in Official Methods of Analysis of the AOAC, 15th Edition as Method 968.50. The method is similar to Final Action Microbiological Methods I and II in the AOAC Official Methods of Analysis (1984; 42.293–42.298).

Although there is an enforcement method for oxytetracycline, it could be improved. The available method is nonspecific and the data generated by the method indicate that recoveries are generally low and markedly variable. As a condition of registration, EPA has required that the registrant develop an improved enforcement method based on HPLC, similar to AOAC methods 995.09 and 995.04, which use HPLC to determine tetracycline levels in animal tissues and milk, respectively.

B. International Residue Limits

There are currently no Codex maximum residue levels (MRLs) for oxytetracycline.

C. Response to Comments

Several comments were received from a private citizen objecting to IR-4 Rutgers University increasing the use of this pesticide and establishment of tolerances. The Agency has received these same comments from this commenter on numerous previous occasions. Refer to **Federal Register** 70 FR 37686 (June 30, 2005), 70 FR 1354 (January 7, 2005), 69 FR 63096–63098 (October 29, 2004) for the Agency's response to these objections.

V. Conclusion

Therefore, the tolerance is established for residues of oxytetracycline in or on apple at 0.35 ppm

VI. Statutory and Executive Order Reviews

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

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

This final rule directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of section 408(n)(4) of FFDCA. As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 6, 2000) do not apply to this rule. In addition, This rule does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104–4).

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

VII. Congressional Review Act

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

List of Subjects in 40 CFR Part 180

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

Dated: October 29, 2007.

Donald R. Stubbs,

Acting Director, Registration Division, Office of Pesticide Programs.

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

PART 180—AMENDED

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

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

■ 2. Section 180.337 is amended by alphabetically adding the following commodity to the table to read as follows:

§ 180.337 Oxytetracycline; tolerance for residues.

* * *

Commodity	Parts per million
Apple	0.35
* * * *	*

[FR Doc. E7–21796 Filed 11–6–07; 8:45 am]

BILLING CODE 6560–50–S

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Part 385

FMCSA Policy on Calculating Crash Rates and Driver, Vehicle, and Hazardous Materials Out-of-Service Rates and the Top 30 Percent of the National Average Under 49 CFR 385.407

AGENCY: Federal Motor Carrier Safety Administration (FMCSA).

ACTION: Notice of enforcement policy.

SUMMARY: FMCSA may not issue a hazardous materials safety permit to a motor carrier that has a crash rate, driver, vehicle or hazardous material out-of-service rate in the top 30 percent of the national average pursuant to 49 CFR 385.407. This document states the FMCSA policy on calculating motor carrier crash rates, and driver, vehicle, and hazardous material out-of-service rates that represent the top 30 percent of the national average as indicated in the Motor Carrier Management Information System (MCMIS). The document explains how FMCSA calculates the top thirty percent of the national average and how it calculates whether a single motor carrier falls within the top thirty percent of the national average in each of these categories. The document restates without change the FMCSA policy that has been publicly available on its Web site since January 2005.

EFFECTIVE DATE: January 3, 2005.

FOR FURTHER INFORMATION CONTACT: James O. Simmons, Office of Enforcement and Compliance, Hazardous Materials Division, 1200 New Jersey Avenue, SE., Washington, DC 20590, (202) 493–0496 (voice), *james.simmons@dot.gov* (e-mail), Debra S. Straus, Office of the Chief Counsel, (202) 366–2266 (voice), or *debra.straus@dot.gov* (e-mail).

SUPPLEMENTARY INFORMATION:

Background: Congress established the hazardous materials safety permit (safety permit) requirement as part of the Hazardous Materials Transportation Uniform Safety Act of 1990 (''HMTUSA'') Public Law 101–615, 104 Stat. 3244 (Nov. 16, 1990). On January 1, 2000, the Federal Motor Carrier Safety Administration (FMCSA) was established as a separate administration within the U.S. Department of Transportation pursuant to the Motor Carrier Safety Improvement Act of 1999. FMCSA assumed responsibility for the enforcement of hazardous materials transportation laws by motor vehicle transportation. On June 30, 2004, FMCSA issued a Final Rule containing the regulations implementing the safety permit program. 69 FR 39350.

The Final Rule, codified at 49 CFR Part 385, identifies who must hold a safety permit, establishes the application process for a safety permit, and the conditions that must be satisfied before FMCSA will issue a safety permit to a carrier. Those conditions are set out in 49 CFR 385.407.

Section 385.407 requires that a carrier must have a ''Satisfactory'' safety rating, must certify that it has a satisfactory security program, and must be properly registered with the Pipeline and Hazardous Materials Safety Administration (PHMSA). 49 CFR 385.407(a)(1), 385.407(b) & (c). Section 385.407(a)(2) additionally states that FMCSA will not issue a safety permit to a motor carrier that * * *:

(ii) Has a crash rate in the top 30 percent of the national average as indicated in the FMCSA Motor Carrier Management Information System (MCMIS); or

(iii) Has a driver, vehicle, hazardous materials, or total out-of-service rate in the top 30 percent of the national average as indicated in the MCMIS.

The safety permit requirement became effective for motor carriers on the date after January 1, 2005, when the motor carrier was required to file a Motor Carrier Identification Report Form (MCS–150) according to a schedule set forth in 49 CFR 390.19(a). A motor carrier is required to file its MCS–150 form every two years. Thus, the safety permit requirement was implemented over the course of two years as motor carriers subject to the permit requirement reached the date for filing their MCS–150. The application for the safety permit was incorporated into the MCS–150, as an expanded form entitled ''MCS–150B or Combined Motor Carrier Identification Report and HM Permit Application.''

On or about January 3, 2005, the Office of Enforcement and Compliance (OEC) published on its public Web site [1] the formula for determining the national average, the crash rates and driver, vehicle and hazmat out-of-service (OOS) rates that established the threshold for the ''top 30 percent of the national average,'' and other information about calculating these rates. The website also explained how a carrier can calculate its own crash and OOS rates. For OOS rates, OEC explained that it determined the top 30 percent of the national average as follows:

To calculate this percentage for (OOS) Rate, FMCSA looked at the driver, vehicle, or HM OOS percentage rates of all carriers (HM and non-HM) for calendar years 2003 and 2004. FMCSA then determined what the numerical value was that resulted in 70 percent of the carriers having a driver, vehicle, or HM OOS percentage rate lower than that figure, and 30 percent of the carriers having a driver, vehicle, or HM OOS percentage rate higher than that figure.

The published guidance also instructed carriers on how to calculate their OOS percentage rates:

Divide the total number of out-of-service inspections from the previous twelve month time period for each category by the total number of inspections for that category for the same twelve month time period. For example, if for the previous twelve month time period a motor carrier had twenty driver inspections and two of these resulted in an out-of-service condition then the Driver out-of-service rate would be 0.10. ($2 \div 20 \times 100\% = 10\%$)

The OEC Web site provided notice to the regulated community on how FMCSA would establish the national averages and cut-offs for the top, or worst-performing, 30 percent of the motor carrier population. Using these formulas, FMCSA established the thresholds for crash rates, vehicle, driver, and hazardous materials OOS rates and published these thresholds on its Web site in January 2005. The thresholds remained effective for the first two years of the program. In January 2007, using data for calendar years 2005 and 2006, FMCSA recalculated the top thirty percent of the national average and published the threshold crash rates, driver, vehicle, and hazardous materials OOS rates that would be effective in 2007 and 2008. The threshold rates were as follows:

	Motor carrier crash rate	Driver OOS rate	Vehicle OOS rate	Hazmat OOS rate
2005 & 2006	0.125	8.92%	33.3%	5.88%

[1] *http://www.safersys.org/HazMatRatesPost.aspx#OOSRates.*

	Motor carrier crash rate	Driver OOS rate	Vehicle OOS rate	Hazmat OOS rate
2007 & 2008	0.125	9.52%	33.33%	6.06%

Challenges to the Rule

Over the course of the two-year implementation period of the safety permit requirement, two motor carriers that were denied safety permits challenged the adequacy of the notice to the regulated community of FMCSA's method for calculating the top thirty percent of the national average and the crash and OOS rates for individual carriers. Despite the clear and accessible notice on the agency's public Web site of the threshold rates and the method by which these rates and those of individual carriers are calculated, the challenging motor carriers asserted that this notice was insufficient because it was not published in the **Federal Register**. FMCSA maintains its position that adequate and fair notice was provided to the regulated community of the method by which it would apply the conditions for issuing a safety permit under 49 CFR 385.407. Nevertheless, to foreclose further challenges, FMCSA is restating its methodology through this publication in the **Federal Register**.

Subpart E—Hazardous Materials Safety Permits

Calculating Crash Rates

Under 49 CFR 385.407(a)(2)(ii), FMCSA may not issue a safety permit to a motor carrier that has a crash rate in the top 30 percent of the national average as indicated in the MCMIS. To calculate the threshold rate above which a motor carrier's crash rate will fall into the top, or worst-performing, 30 percent of the national average, FMCSA looked at all carriers in its census (HM and non-HM) that had more than one crash during the previous two-years. To calculate the national average, FMCSA:

(1) Determined the number of crashes for each qualifying carrier over a two-year period.

(2) Determined the number of power units that the carrier operated over the two year period.

(3) For each carrier, divided the number of crashes by the number of power units times 2 to determine each carrier's crash rate, i.e., [(# of crashes) ÷ (# of power units × 2) = crash rate].

(4) Using these rates, determined the numerical value that resulted in 70 percent of the carriers having a crash rate lower than that figure, and 30 percent of the carriers having a crash rate higher than that figure.

The resulting numerical value represents the threshold for the worst-performing 30 percent of the national average. The threshold crash rate will be recalculated every two years using the crash data from the previous two years. FMCSA examines two years of data in order to evaluate crash rates that accurately represent occurrences in the industry and that will remain consistent throughout the two-year period during which carriers are required to apply for a safety permit. (The calculations to determine crash rates have been performed in this manner since the inception of the program in January 2005. Information on the Web site erroneously indicated that only one year of data was considered in setting the national averages when in fact two years of data has consistently been used.)

FMCSA examines one year of crash data to determine the crash rate for an individual carrier that is applying for a safety permit. The carrier will divide the number of crashes for the previous twelve-month period by the total number of power units that it operated during that twelve-month period. For example, if a motor carrier had 2 crashes and 10 power units, the crash rate would be 0.20 based upon a calculation of (2 = 10 = 0.20). FMCSA examines one year of data to remain consistent with FMCSA practice of reviewing one year of records during a compliance review. FMCSA does not consider a single crash to be statistically valid. Thus, crash rates will be calculated only for carriers with more than one crash in the previous twelve-month period.

Calculating Out-of-Service (OOS) Rates

Under 49 CFR 385.407(a)(2)(iii), FMCSA may not issue a safety permit to a motor carrier that has a driver, vehicle, hazardous material or total out-of-service (OOS) rate in the top 30 percent of the national average as indicated in the MCMIS. To calculate the threshold rates above which a motor carrier's rate will fall into the top, or worst-performing, 30 percent of the national average for each of the listed categories, FMCSA separately examined the driver, vehicle, or hazmat OOS rate of all the carriers in its census. OEC did not include carriers that only had one inspection and only considered hazmat carriers in the calculation for the hazmat OOS rate. OEC examined two years of data, initially for calendar years 2003 and 2004, and subsequently, for calendar years 2005 and 2006.

In each category, OEC determined the OOS rate for each qualifying carrier in the census by dividing the total number of OOS violations by the total number of inspections over the two-year period. For the hazmat OOS rate, the total number of hazmat OOS violations was divided by the total number of hazmat inspections over the two-year period. OEC then determined the numerical value that resulted in 70 percent of the carriers having a driver, vehicle, or hazmat OOS rate lower than that figure, and 30 percent of the carriers having a driver, vehicle, or hazmat OOS percentage rate higher than that figure. These numbers established the threshold above which a carrier falls into the top, or worst-performing, 30 percent of the national average in each category. OEC determined that looking at a total OOS rate was redundant and that total OOS rates were adequately considered by the examination of OOS rates in each of the three categories. The threshold rates representing the cut-off for the top thirty percent of the national average will be recalculated every two years on the first workday of the year. The first calculations for the national average were made on January 3, 2005 using the available MCMIS data for calendar years 2003 and 2004, the second calculations for the national average were made on January 3, 2007, using the available MCMIS data for calendar years 2005 and 2006.

A motor carrier calculates its OOS rate in each of the three categories by examining the number of inspections and OOS violations during the preceding twelve-month period. The carrier must then divide the number of OOS violations for the category by the total number of inspections for that category. The resulting figure is the motor carrier's OOS rate for the particular category. For example, if during the previous twelve-month period, a motor carrier had twenty driver inspections and two of these resulted in an OOS condition, the driver OOS rate would be 0.10 (2 ÷ 20 = 0.10 or 10%). Each of the OOS categories, Driver, Vehicle, and Hazardous Materials, shall be calculated separately. FMCSA does not consider a single OOS inspection in any category to be statistically valid and thus will not deny a permit to a carrier based upon an OOS

rate that results from a single OOS inspection.

Issued on: October 31, 2007.

John H. Hill,

Administrator.

[FR Doc. E7–21833 Filed 11–6–07; 8:45 am]

BILLING CODE 4910–EX–P

Proposed Rules

Federal Register
Vol. 72, No. 215
Wednesday, November 7, 2007

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

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

9 CFR Part 88

[Docket No. APHIS–2006–0168]

RIN 0579–AC49

Commercial Transportation of Equines to Slaughter

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Proposed rule.

SUMMARY: We are proposing to amend the regulations regarding the commercial transportation of equines to slaughter to add a definition of *equine for slaughter* and make other changes that will extend the protections afforded by the regulations to equines bound for slaughter but delivered first to an assembly point, feedlot, or stockyard. This action would further ensure the humane treatment of such equines by helping to ensure that the unique and special needs of equines in commercial transportation to slaughter are met.

DATES: We will consider all comments that we receive on or before January 7, 2008.

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

Federal eRulemaking Portal: Go to *http://www.regulations.gov*, select ''Animal and Plant Health Inspection Service'' from the agency drop-down menu, then click ''Submit.'' In the Docket ID column, select APHIS–2006–0168 to submit or view public comments and to view supporting and related materials available electronically. Information on using Regulations.gov, including instructions for accessing documents, submitting comments, and viewing the docket after the close of the comment period, is available through the site's ''User Tips'' link.

Postal Mail/Commercial Delivery: Please send four copies of your comment (an original and three copies) to Docket No. APHIS–2006–0168, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238. Please state that your comment refers to Docket No. APHIS–2006–0168.

Reading Room: You may read any comments that we receive on this docket in our reading room. The reading room is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue, SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690–2817 before coming.

Other Information: Additional information about APHIS and its programs is available on the Internet at *http://www.aphis.usda.gov.*

FOR FURTHER INFORMATION CONTACT: Dr. Timothy Cordes, Senior Staff Veterinarian, Equine Programs, National Center for Animal Health Programs, VS, APHIS, 4700 River Road Unit 46, Riverdale, MD 20737–1231; (301) 734–3279.

SUPPLEMENTARY INFORMATION:

Background

On December 7, 2001, we published in the **Federal Register** (66 FR 63588–63617, Docket No. 98–074–2) a final rule that established regulations concerning the commercial transportation of equines for slaughter. That rulemaking was initiated under the provisions of the Federal Agriculture Improvement and Reform Act of 1996 (the Act), in which Congress, recognizing that equines being transported to slaughter have unique and special needs, authorized the Secretary of Agriculture to issue guidelines for the regulation of the commercial transportation of equines for slaughter by persons regularly engaged in that activity in the United States (see 7 U.S.C. 1901 note).

The regulations in 9 CFR part 88 (the regulations) contain minimum standards to ensure the humane movement of equines for slaughter via commercial transportation. The regulations cover, among other things, the food, water, and rest provided to such equines prior to their transportation to slaughter, standards for conveyances used to transport equines to slaughter, and certain paperwork required to accompany equines during such transportation. The regulations also require the owner/shipper of the equines to take certain actions to ensure the safety and humane treatment of equines during loading and transportation for slaughter, including seeking immediate assistance from an equine veterinarian for any equine in obvious physical distress. In addition, the regulations prohibit the commercial transportation to slaughtering facilities of equines considered to be unfit for travel, the use of electric prods on equines in commercial transportation to slaughter, and, after December 7, 2006, the use of double-deck trailers for commercial transportation of equines to slaughtering facilities.

The Act defines ''equine for slaughter'' as ''any member of the Equidae family being transferred to a slaughter facility, including an assembly point, feedlot, or stockyard.'' The regulations in 9 CFR part 88 apply to equines moved in commercial transportation to slaughtering establishments but not to equines bound for slaughter but moved first to an assembly point, feedlot or stockyard. When the regulations were established in 2001, we believed that equines transported to slaughtering establishments were at high risk of being treated inhumanely, and that equines transported to assembly points, feedlots, or stockyards were likely to be treated well, either to bring more money at slaughter or to be sold for other purposes. Five years later, it appears that equines in commercial transportation to slaughtering facilities, specifically, are being treated humanely, in accordance with the regulations.

As the regulations are written, equines sold as slaughter horses may be transported first to an assembly point, for example, in a double-deck trailer and without any of the other protections afforded by the regulations, such as receiving adequate water and food prior to loading. We believe that equines may be delivered to these intermediate points en route to slaughter for the sole purpose of avoiding compliance with the regulations. In particular, since December 7, 2006, when the regulations no longer allowed double-deck trailers to transport equines to slaughtering facilities, truckers who wish to continue using double-deck trailers for slaughter

horses have an incentive to transport them to assembly points, feedlots, or stockyards, where the horses could then be reloaded onto straight-deck trailers for the final leg of the trip to the slaughtering plant. We have received numerous reports of this situation occurring. Given these developments, it now appears that equines that are bound for slaughter but are delivered first to an assembly point, feedlot, or stockyard are at higher risk for inhumane treatment.

To close this loophole, we are proposing to amend the regulations to add a definition for the term *equine for slaughter* to read ''any member of the Equidae family being transferred to a slaughter facility, including an assembly point, feedlot, or stockyard.'' We also propose to amend § 88.2(b), § 88.3(a) introductory text, § 88.3(b), § 88.4(a) introductory text, and § 88.4(b)(4), (c), (d), and (e) by replacing the words ''equines to a slaughtering facility'', ''equines to slaughtering facilities'', ''equines in commercial transportation to slaughtering facilities'', ''equine to the slaughtering facility'', and ''equines in commercial transportation to a slaughtering facility'' with the term ''equines for slaughter''. Lastly, we are proposing to amend § 88.4(b) introductory text by replacing the words ''transit to the slaughtering facility'' with the words ''commercial transportation of equines for slaughter''.

We would consider equines delivered to an assembly point, feedlot, or stockyard to be equines for slaughter and subject to the regulations unless the owner/shipper presents an official certificate of veterinary inspection and the original copy of a negative equine infectious anemia test chart, or other documents that indicate the names and addresses of the consigner, consignee, owner, and examining veterinarian for any equine being shipped, as evidence that the equines are not equines for slaughter.

Executive Order 12866 and Regulatory Flexibility Act

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

The Regulatory Flexibility Act (RFA) requires agencies to evaluate the potential effects of their rules on small entities. The analysis that follows represents an initial regulatory flexibility analysis in accordance with the requirements of the RFA. Because data on the commercial transport of equines to intermediate points en route to slaughter is sparse at best, we were not able to conduct a comprehensive analysis of the proposed rule's potential economic impact. Accordingly, we welcome public comment that would enable us to more fully assess the proposal's impact. We are particularly interested in public comment on the impact of the ban on double-deck trailers for use in transporting equines for slaughter.

APHIS's regulations in 9 CFR part 88 are designed to help ensure the humane commercial transport of equines to slaughter. Specifically, the regulations require that:

- For a period of not less than 6 consecutive hours immediately prior to the equines being loaded on the conveyance for transport, each equine be provided access to food and water and the opportunity to rest;
- Any equine that has been on the conveyance for 28 consecutive hours or more without food, water, and the opportunity to rest be offloaded and, for at least 6 consecutive hours, provided with food, water, and the opportunity to rest;
- Each equine be provided with enough space on the conveyance to ensure that no animal is crowded in a way likely to cause injury or discomfort;
- Stallions and other aggressive equines be segregated from each other and all other equines on the conveyance;
- Electric prods be used only in life-threatening situations; and
- An owner-shipper certificate be completed for each equine prior to departing for the slaughtering facility. Among other things, the certificate must certify the equine's fitness to travel and note any special care and handling needs during transit.[1]

At present, the regulations apply only to equines moved directly to slaughtering establishments, and not to equines bound for slaughter but moved first to an assembly point, feedlot, or stockyard. This proposed rule would amend the regulations to make equines delivered to intermediate points en route to slaughter subject to the same regulations as those moved directly to slaughtering establishments. This proposed rule is intended to ensure the humane treatment of equines delivered to intermediate points en route to slaughter.

Equines are generally slaughtered for their meat, which is sold for human consumption, primarily outside the United States.[2] In 2005, the United States exported 39.5 million pounds of horse, ass, and mule meat, with a value of $61.1 million. Of the total volume exported in 2005, 35.3 million pounds, or 89 percent, was shipped to five countries (Belgium, France, Mexico, Russia, and Switzerland).[3]

From 2003 through 2005, an average of 70,094 equines were slaughtered annually in federally inspected U.S. slaughtering facilities.[4] During that period, and at the time this analysis was prepared, there were three slaughtering facilities that accepted equines in the continental United States: Two were located in Texas and one in Illinois. However, following a Federal appeals court ruling, the two facilities in Texas are now closed. Following an unsuccessful challenge to a State law to stay open, the Illinois facility is also closed.

APHIS estimates that there are no more than 100 entities in the U.S. currently involved in the commercial transportation of equines to slaughter. As discussed below, the transport of slaughter equines to intermediate points is not uncommon. Based on the average number of equines slaughtered in the United States each year between 2003 and 2005 (approximately 70,000) and on the estimated number of potentially affected shippers (approximately 100), the average number of equines transported annually per shipper is 700.

Economic Effects on Owners and Commercial Shippers

The ''path'' from source supplier (farmer, rancher, pet owner, etc.) to slaughtering facility can vary. However, the most common scenario and the one used for the purpose of this analysis is as follows: The source suppliers transport their equines to local auction markets, where the equines are sold to persons who purchase the equines for the specific purposes of selling them to a slaughtering facility. (Hereafter, for the purposes of this initial regulatory flexibility analysis, we will refer to persons who sell equines for slaughter as ''owners''; however, in some cases, the owners use agents to conduct some aspect of the business of purchasing equines and transporting and selling them to slaughtering facilities. We will use the term ''owner'' to refer to either

[1] An equine is considered fit to travel if it: (1) Can bear weight on all four limbs; (2) can walk unassisted; (3) is not blind in both eyes; (4) is older than 6 months of age; and (5) is not likely to give birth in transit. The owner or commercial shipper must sign the certificate, and it must accompany the equine to the slaughtering facility.

[2] Horses account for almost all equines slaughtered in the United States.

[3] Source: *World Trade Atlas* (U.S. Census Bureau).

[4] Source: USDA (NASS), *Livestock Slaughter Summary* (2003, 2004, 2005).

the actual owners or their agents.) The owners consider price lists published by the slaughtering facilities for equines (the price varies in relation to the weight of the equine and the quality of the meat), transportation costs, and profit requirements to establish the maximum prices that they will pay for equines at local auctions. Because the owners cannot usually purchase enough slaughter-quality equines at any one auction to make it economically feasible to ship the animals directly from the auction site to the slaughtering facility, the owners transport the equines back to their own farms or feedlots where the equines are kept until such time as the owners can accumulate more equines from other auctions. When enough equines have been accumulated to comprise a shipment, the owners transport the equines to the slaughtering facility. In an estimated 75 percent of cases, owners hire commercial shippers to move the equines to the slaughtering facilities; in the remaining estimated 25 percent of cases, owners transport the equines to slaughter in their own conveyances.

Based on the slaughter scenario described above, this proposed rule has the potential to economically affect owners who purchase equines at local auction markets and then transport the animals to their farms, feedlots, or other assembly points prior to shipping them on to slaughter. (The owners' farms and feedlots are intermediate stops en route to slaughter.) However, the proposed rule also has the potential to affect owners and commercial shippers who transport equines from the owners' farms or feedlots to assembly points, feedlots, and stockyards prior to the animals' final delivery to a slaughtering facility. We are aware that such transport to intermediate points between the owner's farms or feedlots and the slaughtering facility occurs but we do not know the extent of that transport. However, we have no reason to believe it is significant.

The proposed rule is likely to have little or no impact on most owners who transport equines from local auction markets to their farms or feedlots. There are several reasons. First, equines sold for slaughter at auctions usually have access to food, water, and rest for at least 6 hours prior to being transported to the owners' farms and feedlots. Sellers at auction markets have an incentive to provide equines with food and water because malnourished equines have a reduced slaughter value. Furthermore, most slaughter equines tend to be in their pens at auction markets for at least 6 hours, since it usually takes at least that long for them to be sold. Indeed, it is not uncommon for slaughter horses to be sold at the end of an auction session, after the saddle horses are sold. The requirement that equines have access to food, water, and rest for at least 6 consecutive hours immediately prior to the animals being loaded on the conveyance should not be a problem for owners who transport equines from auction sites.

Second, owners typically purchase equines at auction markets that are in relatively close proximity to their farms and feedlots. It is unlikely, therefore, that equines acquired at auctions will have to be offloaded for feeding, rest, etc., while en route to the owners' farms or feedlots, since it is unlikely that the trip will take longer than 28 hours.

Third, the proposed rule would require that, during transport to intermediate points, equines be provided with enough space to ensure that they are not crowded in a way that is likely to cause injury or discomfort. The proposed rule would specifically ban the use of double-deck trailers for such transport, as those types of conveyances are a source of animal injury and discomfort. However, owners who transport equines from local auction markets to their farms or feedlots generally do not do so using double-deck trailers. The transport to owner farms and feedlots almost always occurs in smaller capacity conveyances, such as straight-deck and goose-neck trailers.[5] That owners transport the animals back to their own farms or feedlots (rather than to slaughtering facilities directly) only because they cannot purchase enough slaughter-quality equines at any one auction is, in itself, an indication that they have no need for the higher capacity double-deck trailers for such transport. Although overcrowding can also occur in single-deck (also called straight-deck) trailers, there is no evidence to suggest that it is an issue for owners who pick up slaughter equines at auction markets.

Fourth, the restriction on the use of electric prods should not pose a burden because effective, low-cost substitutes are available for use in non-life-threatening situations. For example, fiberglass poles with flags attached, which cost no more than about $10 each, are considered to be an effective alternative to electric prods. (Any current use of electric prods by transporters of slaughter equines probably derives from the traditional use of these devices to assist in moving other livestock, such as cattle and swine.)

Finally, available data suggest that the segregation of stallions and other aggressive equines is already a common transport practice. Owners have an incentive to make sure that aggressive equines are segregated because equines that arrive at the slaughtering facilities injured as the result of biting and kicking en route command lower market values. Furthermore, relatively few stallions are transported for slaughter. USDA personnel stationed at two of the slaughtering facilities have estimated that no more than about 5 percent of equines arriving for slaughter are stallions. Accordingly, the requirement that stallions and other aggressive equines be segregated during transport to slaughter is not likely to have a significant economic effect on owners who pick up equines at various auction markets.

As indicated above, the proposed rule also has the potential to affect owners and commercial shippers who transport equines from the owner's farms or feedlots to assembly points, feedlots, and stockyards prior to the animals' final delivery to a slaughtering facility. These entities are more likely to be affected by the proposed rule than owners who transport equines from auction markets to their farms and feedlots only, because they are more likely to be using double-deck trailers. (This is because equines are typically moved from owners' farms and feedlots only when enough equines have been accumulated to comprise a full shipment, a situation which is likely to foster use of the higher-capacity double-deck trailers.) Nonetheless, we believe that owners and commercial shippers who transport equines from owners' farms or feedlots to intermediate points prior to the animals' final delivery to a slaughtering facility are likely to be in compliance with most parts of the proposed rule.

Nor should the ''28-hour'' rule pose a problem for the vast majority of owners and commercial shippers who transport equines from owners' farms or feedlots to intermediate points prior to the animals' final shipment to a slaughtering facility. Even in a worst-case scenario in terms of travel distance (i.e., equines transported from farms or feedlots on the east or west coasts to border crossing points in closest proximity to the slaughtering facilities in Mexico, which are all located in the central part of the United States), the overwhelming majority of trips should take less than 28 hours. Assuming an average highway speed of 55 mph and

[5] Double-deck livestock trailers can carry up to about 45 equines each; single-deck trailers can carry up to about 38 equines each. Prior to the ban that became effective December 8, 2006, double-deck trailers were most often used for transporting equines to slaughter facilities.

two different drivers, and allowing 1.5 hours for loading and 2 hours for refueling and meal stops, even a trip as long as 1,300 miles would take only about 27 hours.[6]

Double-deck trailers can carry more equines than single-deck trailers, and owners and shippers who are using the former will be affected by the reduction in the number of equines that could be transported in a single conveyance. However, for affected owners and commercial shippers, the ban on double-deck trailers is likely to be mitigated by several factors. First, commercial shippers can use their double-deck trailers to transport other livestock and produce. In this regard, it has been estimated that double-deck trailers in general carry equines no more than about 10 percent of the time they are in use. Second, owners who cannot find another use for the double-deck trailers can trade them for single-deck trailers. Owners should be able to sell their serviceable trailers at fair market value to transporters of commodities other than equines.

In conclusion, we believe that most transporters to intermediate points are already in compliance with most or all of the proposed rule's requirements. Those that are not now in compliance are likely to be owners and commercial shippers who transport equines from owners' farms or feedlots to intermediate points prior to the animals' final delivery to a slaughtering facility, since their load volume fosters the use of the higher capacity double-deck trailers. While we know that transport to intermediate points between the owners' farms or feedlots and the slaughtering facility occurs, we do not believe it is at a level that this proposed rule would result in any significant economic impacts.

Impact on Horse Slaughtering Facilities

The proposed rule also has the potential to economically affect the horse slaughtering facilities, to the extent that it could negatively affect the supply of slaughter horses. As indicated above, there are currently no horse slaughtering facilities operating in the United States, however, the possibility exists that such facilities could open in the future. As a result of the ban on double-deck trailers, for example, fewer transporters may be willing to haul slaughter horses, and those that are willing will have to do it in smaller capacity single-deck trailers. A decline in supply has implications for the slaughtering facility since it may lead to an increase in the price they pay to acquire horses. Nevertheless, as indicated above, we believe that most transporters to intermediate points are already in compliance with most or all of the proposed rule's requirements, including the prohibition on double-deck trailers.

Impact on Small Entities

As indicated above, it is estimated that no more than about 100 entities are potentially affected by the proposed rule, most of whom are equine owners and commercial shippers. Although we do not have specific information on the annual receipts of these entities, it is reasonable to assume that most are small by U.S. Small Business Administration (SBA) standards. This assumption is based on composite data for providers of the same and similar services in the United States. In 2002, the most recent year for which data is available, there were 44,933 U.S. establishments in North American Industry Classification System (NAICS) categories 48422 and 48423, which comprise firms primarily engaged in specialized freight trucking, including the transportation of livestock. The per-establishment average gross receipts for all 44,933 establishments that year was $0.9 million, well below the SBA's small-entity threshold of $23.5 million. Similarly, in 2002, there were 1,048 U.S. establishments in NAICS 42459, a classification category that includes horse dealers. For all 1,048 establishments, the per-establishment average number of employees that year was 7, well below the SBA's small-entity threshold of 100 employees for those firms.[7]

APHIS has not identified any duplication, overlap, or conflict of this proposed rule with other Federal rules.

Alternatives

In developing the current regulations, APHIS opted for a number of alternatives designed to lessen the economic effects of the regulations on affected small entities, including a deferral, for 5 years, of the effective date for the prohibition on double-deck trailers.[8] The ban on double-deck trailers under the current regulations took effect December 8, 2006, which means that owner-shippers that currently use double-deck trailers to transport equines to intermediate points would face a ban on the use of those trailers under the proposed rule.

Public comment on the proposed rule's economic impact is invited, especially comment on any impact for small entities stemming from prohibition on the use of double-deck trailers to move equines to intermediate points, such as stockyards and feedlots, before moving them to a slaughter facility.

Executive Order 12372

This program/activity is listed in the Catalog of Federal Domestic Assistance under No. 10.025 and is subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials. (See 7 CFR part 3015, subpart V.)

Executive Order 12988

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. If this proposed rule is adopted: (1) All State and local laws and regulations that are in conflict with this rule will be preempted; (2) no retroactive effect will be given to this rule; and (3) administrative proceedings will not be required before parties may file suit in court challenging this rule.

Paperwork Reduction Act

In accordance with section 3507(j) of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the information collection and recordkeeping requirements included in this proposed rule have been submitted for approval to the Office of Management and Budget (OMB). Please send written comments to the Office of Information and Regulatory Affairs, OMB, Attention: Desk Officer for APHIS, Washington, DC 20503. Please state that your comments refer to Docket No. APHIS–2006–0168. Please send a copy of your comments to: (1) Docket No. APHIS–2006–0168, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238, and (2) Clearance Officer, OCIO, USDA, room 404–W, 14th Street and Independence Avenue, SW., Washington, DC 20250. A comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication of this proposed rule.

This proposed rule would amend the regulations in 9 CFR part 88 to provide for the humane treatment of equines en route to slaughter facilities through intermediate points. We are soliciting

[6] It is common transport practice to use two different drivers on long trips. This practice allows the equines to be transported virtually nonstop because one person can drive while the other rests, thereby avoiding federally mandated rest periods that apply in a single-driver situation.

[7] Source: SBA and U.S. Census Bureau (2002 Economic Census).

[8] The final rule published in 2001 noted that a 5-year deferral allows slaughter facilities time to respond to the expected decline in the number of transporters willing to haul horses to slaughter, including time to budget and to arrange for financing of equipment they may need to acquire if they must haul horses on their own because commercial shippers and owners will not.

comments from the public (as well as affected agencies) concerning our information collection and recordkeeping requirements. These comments will help us:

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

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

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

(4) Minimize the burden of the information collection on those who are to respond (such as through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology; e.g., permitting electronic submission of responses).

Estimate of burden: Public reporting burden for this collection of information is estimated to average 0.834960937 hours per response.

Respondents: Owners and shippers of slaughter horses and drivers of vehicles of equines for slaughter.

Estimated annual number of respondents: 130.

Estimated annual number of responses per respondent: 39.38461538.

Estimated annual number of responses: 5,120.

Estimated total annual burden on respondents: 4,275 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

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

E-Government Act Compliance

The Animal and Plant Health Inspection Service is committed to compliance with the E-Government Act to promote the use of the Internet and other information technologies, to provide increased opportunities for citizen access to Government information and services, and for other purposes. For information pertinent to E-Government Act compliance related to this proposed rule, please contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 734–7477.

List of Subjects in 9 CFR Part 88

Animal welfare, Horses, Reporting and recordkeeping requirements, Transportation.

Accordingly, we are proposing to amend 9 CFR part 88 as follows:

PART 88—COMMERCIAL TRANSPORTATION OF EQUINES FOR SLAUGHTER

1. The authority citation for part 88 continues to read as follows:

Authority: 7 U.S.C. 1901, 7 CFR 2.22, 2.80, 371.4.

2. Section 88.1 is amended by adding, in alphabetical order, a new definition for *equine for slaughter* to read as follows:

§ 88.1 Definitions.

* * * * *

Equine for slaughter. Any member of the Equidae family being transferred to a slaughter facility, including an assembly point, feedlot, or stockyard.

* * * * *

§ 88.2 [Amended]

3. In § 88.2, paragraph (b) is amended by removing the words ''equines to a slaughtering facility'' and adding the words ''equines for slaughter'' in their place.

§ 88.3 [Amended]

4. Section 88.3 is amended as follows:

a. In paragraph (a), introductory text, by removing the words ''equines to slaughtering facilities'' and adding the words ''equines for slaughter'' in their place.

b. In paragraph (b), by removing the words ''Equines in commercial transportation to slaughtering facilities'' and adding the words ''Equines for slaughter'' in their place.

§ 88.4 [Amended]

5. Section 88.4 is amended as follows:

a. In paragraph (a), introductory text, by removing the words ''equines to a slaughtering facility'' and adding the words ''equines for slaughter'' in their place.

b. In paragraph (a)(3), by removing the words ''transit to the slaughtering facility'' and adding the words ''throughout transit to slaughter'' in their place.

c. In paragraph (b), introductory text, by removing the words ''transit to the slaughtering facility'' and adding the words ''commercial transportation of equines for slaughter'' in their place.

d. In paragraph (b)(4), by removing the words ''equine to the slaughtering facility'' and adding the words ''equines for slaughter'' in their place.

e. In paragraph (c), by removing the words ''equines in commercial transportation to a slaughtering facility'' both times they occur and adding the words ''equines for slaughter'' in their place.

f. In paragraphs (d) and (e), by removing the words ''equines to a slaughtering facility'' and adding the words ''equines for slaughter'' in their place.

Done in Washington, DC, this 1st day of November 2007.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. E7–21896 Filed 11–6–07; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2007–0163; Directorate Identifier 2007–NM–046–AD]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 737–300, –400, –500, –600, –700, –700C, –800, and –900 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for certain Boeing Model 737–300, –400, –500, –600, –700, –700C, –800, and –900 series airplanes. This proposed AD would require installing a new circuit breaker, relays, and wiring to allow the flightcrew to turn off electrical power to the in-flight entertainment (IFE) systems and other non-essential electrical systems through a switch in the flight compartment, and doing other specified actions. This proposed AD results from an IFE systems review. We are proposing this AD to ensure that the flightcrew is able to turn off electrical power to IFE systems and other non-essential electrical systems through a switch in the flight compartment. The flightcrew's inability to turn off power to IFE systems and other non-essential electrical systems during a non-normal or emergency situation could result in the inability to control smoke or fumes in the airplane flight deck or cabin.

DATES: We must receive comments on this proposed AD by December 24, 2007.

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

• *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.

- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this AD, contact Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124–2207.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Shohreh Safarian, Aerospace Engineer, Systems and Equipment Branch, ANM–130S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 917–6418; fax (425) 917–6590.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2007–0163; Directorate Identifier 2007–NM–046–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

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

Discussion

The Federal Aviation Administration (FAA) completed a review of in-flight entertainment (IFE) systems installed on transport category airplanes. The review focused on the interface between the IFE system and airplane electrical system, with the objective of determining if any unsafe conditions exist with regard to the interface.

The type of IFE systems considered for review were those that contain video monitors (cathode ray tubes or liquid crystal displays, either hanging above the aisle or mounted on individual seat backs or seat trays), or complex circuitry (i.e., power supplies, electronic distribution boxes, extensive wire routing, relatively high power consumption, multiple layers of circuit protection, etc.). In addition, in-seat power supply systems that provide power to more than 20 percent of the total passenger seats were also considered for the review. The types of IFE systems not considered for review include systems that provide only audio signals to each passenger seat, ordinary in-flight telephone systems (e.g., one telephone handset per group of seats or bulkhead-mounted telephones), systems that have only a video monitor on the forward bulkhead(s) (or a projection system) to provide passengers with basic airplane and flight information, and in-seat power supply systems that provide power to less than 20 percent of the total passenger seats.

Items considered during the review include the following:

- Can the electrical bus(es) supplying power to the IFE system be de-energized when necessary without removing power from systems that might be required for continued safe flight and landing?
- Can IFE system power be removed when required without pulling IFE system circuit breakers (i.e., is there a switch (dedicated to the IFE system or a combination of loads) located in the flight deck or cabin that can be used to remove IFE power?)?
- If the IFE system requires changes to flightcrew procedures, has the airplane flight manual (AFM) been properly amended?
- If the IFE system requires changes to cabin crew procedures, have they been properly amended?
- Does the IFE system require periodic or special maintenance?

In all, we reviewed approximately 180 IFE systems. The review results indicate that unsafe conditions exist on some IFE systems installed on various transport category airplanes. These conditions can be summarized as:

- Electrical bus(es) supplying power to the IFE system cannot be de-energized when necessary without removing power from systems that might be required for continued safe flight and landing.
- Power cannot be removed from the IFE system when required without pulling IFE system circuit breakers (i.e., there is no switch dedicated to the IFE system or combination of systems for the purpose of removing power).
- Installation of the IFE system has affected crew (flightcrew and/or cabin crew) procedures, but the procedures have not been properly revised.

Currently, certain Boeing Model 737–300, –400, –500, –600, –700, –700C, –800, and –900 series airplanes do not have a switch in the flight compartment allowing the flightcrew to turn off power to IFE systems and other non-essential electrical systems, in the event of smoke or fumes. The flightcrew's inability to turn off electrical power to IFE systems and other non-essential electrical systems, if not corrected, could result in the inability to control smoke or fumes in the airplane flight deck or passenger cabin during a non-normal or emergency situation.

Relevant Service Information

We have reviewed Boeing Service Bulletin 737–24–1145, dated March 4, 2004, for Model 737–300, –400, and –500 series airplanes. Boeing Service Bulletin 737–24–1145 describes procedures for installing a new circuit breaker, relays, and wiring to allow the flightcrew to turn off electrical power to IFE systems through the IFE/galley switch and for doing other specified actions. The other specified actions include rerouting the wiring between the IFE relays, disconnect panels, and circuit breakers; replacing the lightplate assembly at the P5–13 module assembly with a new lightplate assembly; and testing the IFE control systems.

We have also reviewed Boeing Service Bulletin 737–24–1147, Revision 1, dated March 1, 2007, for Model 737–600, –700, –700C, –800, and –900 series airplanes. Boeing Service Bulletin 737–24–1147 describes procedures for installing a new circuit breaker, relays, and wiring to allow the flightcrew to turn off electrical power to the IFE systems and other non-essential electrical systems through a utility switch in the flight compartment. Part 1 of the Work Instructions, which is applicable to Groups 1 and 2 airplanes, describes procedures for changing the wiring on the E4–2 shelf assembly and testing the changed electrical control system to ensure it operates correctly. For Group 2 airplanes, Part 1 also describes procedures for installing new wiring and changing certain wiring between a terminal bus and circuit breaker.

Part 2 of the Work Instructions, which is applicable to Groups 3 through 139 airplanes, describes the following procedures:

- Installing a circuit breaker on the P6–11 panel door, a new terminal board and two new relays on the aft wall of the P6 electrical panel, a new relay adapter plate on the relay panel assembly, new wires W40 between the relays, terminal board, and the P6 disconnect panel assemblies, and a new relay on the relay plate assembly; and installing new wires W40/W44 and changing the wiring between the relays, circuit breakers, and disconnect panel assemblies.
- Replacing the P5–13 module assembly with a new improved or modified P5–13 module assembly and installing new wires W2510 between the P5 overhead panel and the P6 electrical panel.
- Changing the wiring W422 on the E4–2 shelf assembly and installing new wires W44 between the E4–2 shelf assembly and P6 electrical panel.
- Testing the electrical supply and IFE control systems to ensure that they operate correctly.

Part 3 of the Work Instructions, which is applicable to Groups 140 through 169 airplanes, describes procedures for making a wiring change to a certain wire bundle for the printer and testing the printer and changed systems to ensure they operate correctly.

Boeing Service Bulletin 737–24–1145 specifies concurrent accomplishment of Boeing Component Service Bulletin 69–37321–31–03, dated August 21, 2003, for Model 737–300 series airplanes equipped with P5–13 module assembly, part number (P/N) 69–37321–81. Boeing Component Service Bulletin 69–37321–31–03 describes procedures for replacing the lightplate assembly at the P5–13 module assembly with a new lightplate assembly and reidentifying and testing the modified P5–13 module assembly.

Boeing Service Bulletin 737–24–1147 specifies concurrent accomplishment of Boeing Component Service Bulletin 285A1840–24–02, dated August 28, 2003, for Model 737–600, –700, –700C, –800, and –900 series airplanes equipped with P5–13 module assembly, P/N 285A1840–3 or –4. Boeing Component Service Bulletin 285A1840–24–02 describes procedures for modifying the P5–13 module assembly. The modification includes installing new analog and interface printed wire assemblies (PWAs) on the processor PWA, new toggle switches on the new front panel assembly, a new PWA cable between the analog and interface PWAs, new standoff posts on the interface and processor PWAs, the new front panel assembly on the new standoff posts, and a new light plate on the modified module assembly.

Boeing Service Bulletin 737–24–1147 specifies prior or concurrent accomplishment of Boeing Service Bulletin 737–23–1189, dated June 27, 2002, for two Model 737–800 series airplanes. Boeing Service Bulletin 737–23–1189 describes procedures for installing wiring for the No. 4 video display unit (VDU) cluster, an INOP marker, and stow clip at the P6–1 circuit breaker panel; rerouting certain wiring for the No. 4 VDU cluster between stations 685 and 767; and doing a continuity test of the newly installed and rerouted wire bundles.

Accomplishing the actions specified in the service information is intended to adequately address the unsafe condition.

FAA's Determination and Requirements of the Proposed AD

We have evaluated all pertinent information and identified an unsafe condition that is likely to exist or develop on other airplanes of this same type design. For this reason, we are proposing this AD, which would require accomplishing the actions specified in the service information described previously.

Costs of Compliance

There are about 1,617 airplanes of the affected design in the worldwide fleet. The following table provides the estimated costs, at an average labor rate of $80 per hour, for U.S. operators to comply with this proposed AD.

ESTIMATED COSTS

Model	Action	Work hours	Parts	Cost per airplane	Number of U.S.-registered irplanes	Fleet cost
Model 737–300, –400, and –500 series airplanes.	Installation of circuit breaker, relays, and wiring.	Up to 31	Up to $2,925	$5,405	1	$5,405
Model 737–300 series airplanes ..	Concurrent modification of P5–13 module assembly.	1	2,327	2,407	1	2,407
737–600, –700, –700C, –800, and –900 series airplanes.	Installation of circuit breaker, relays, and wiring.	Up to 52	Up to 10,968	15,128	586	8,865,008
	Concurrent modification of P5–13 module assembly.	4	9,241	9,561	586	5,602,746
737–800 series airplanes	Installation of wiring for the No. 4 VDU.	12	3,372	4,332	2	8,664

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

1. Is not a ''significant regulatory action'' under Executive Order 12866;

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

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

We prepared a regulatory evaluation of the estimated costs to comply with this proposed AD and placed it in the AD docket. See the **ADDRESSES** section for a location to examine the regulatory evaluation.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. The Federal Aviation Administration (FAA) amends § 39.13 by adding the following new airworthiness directive (AD):

Boeing: Docket No. FAA–2007–0163; Directorate Identifier 2007–NM–046–AD.

Comments Due Date

(a) The FAA must receive comments on this AD action by December 24, 2007.

Affected ADs

(b) None.

Applicability

(c) This AD applies to the Boeing airplanes identified in paragraphs (c)(1) and (c)(2) of this AD, certificated in any category.

(1) Model 737–300, –400, and –500 series airplanes, as identified in Boeing Service Bulletin 737–24–1145, dated March 4, 2004.

(2) Model 737–600, –700, –700C, –800, and –900 series airplanes, as identified in Boeing Service Bulletin 737–24–1147, Revision 1, dated March 1, 2007.

Unsafe Condition

(d) This AD results from an in-flight entertainment (IFE) systems review. We are issuing this AD to ensure that the flightcrew is able to turn off electrical power to IFE systems and other non-essential electrical systems through a switch in the flight compartment. The flightcrew's inability to turn off power to IFE systems and other non-essential electrical systems during a non-normal or emergency situation could result in the inability to control smoke or fumes in the airplane flight deck or cabin.

Compliance

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

Install Circuit Breaker, Relays, and Wiring on Model 737–300, –400, and –500 Series Airplanes

(f) For Model 737–300, –400, and –500 series airplanes: Within 60 months after the effective date of this AD, install a new circuit breaker, relays, and wiring to allow the flightcrew to turn off electrical power to the IFE systems through the IFE/galley switch and do all other specified actions as applicable, by accomplishing all the applicable actions specified in the Accomplishment Instructions of Boeing Service Bulletin 737–24–1145, dated March 4, 2004.

Concurrently Modify P5–13 Module Assembly on Model 737–300 Series Airplanes

(g) For Model 737–300 series airplanes identified as Group 6 airplanes in Boeing Service Bulletin 737–24–1145, dated March 4, 2004, and equipped with P5–13 module assembly part number (P/N) 69–37321–81: Prior to or concurrently with accomplishing the actions required by paragraph (f) of this AD, replace the lightplate assembly of the P5–13 module assembly with a new lightplate assembly and reidentify and test the modified P5–13 module assembly, in accordance with Boeing Component Service Bulletin 69–37321–31–03, dated August 21, 2003.

Install Circuit Breaker, Relays, and Wiring on Model 737–600, –700, –700C, –800, and –900 Series Airplanes

(h) For Model 737–600, –700, –700C, –800, and –900 series airplanes: Within 60 months after the effective date of this AD, install a new circuit breaker, relays, and wiring, as applicable, to allow the flightcrew to turn off electrical power to the IFE systems and other non-essential electrical systems through a utility switch in the flight compartment, by accomplishing all of the applicable actions specified in Parts 1, 2, or 3 of the Work Instructions of Boeing Service Bulletin 737–24–1147, Revision 1, dated March 1, 2007.

Concurrently Modify P5–13 Module Assembly on Model 737–600, –700, –700C, –800, and –900 Series Airplanes

(i) For Model 737–600, –700, –700C, –800, and –900 series airplanes identified as Groups 1 through 139 inclusive in Boeing Service Bulletin 737–24–1147, Revision 1, dated March 1, 2007, and equipped with P5–13 module assembly P/N 285A1840–3 or –4: Prior to or concurrently with accomplishing the actions required by paragraph (h) of this AD, modify the P5–13 module assembly, in accordance with Boeing Component Service Bulletin 285A1840–24–02, dated August 28, 2003.

Wiring Installation for the Video Display Unit (VDU)

(j) For Model 737–800 series airplanes identified in paragraph 1.A.1. of Boeing Service Bulletin 737–23–1189, dated June 27, 2002: Prior to or concurrently with accomplishing the actions required by paragraph (h) of this AD, install wiring for the No. 4 VDU cluster, an INOP marker, and stow clip at the P6–1 circuit breaker panel; reroute certain wiring for the No. 4 VDU cluster between stations 685 and 767; and do a continuity test of the newly installed and rerouted wiring; in accordance with Boeing Service Bulletin 737–23–1189, dated June 27, 2002.

Alternative Methods of Compliance (AMOCs)

(k)(1) The Manager, Seattle Aircraft Certification Office, FAA, has the authority to approve AMOCs for this AD, if requested in accordance with the procedures found in 14 CFR 39.19.

(2) To request a different method of compliance or a different compliance time for this AD, follow the procedures in 14 CFR 39.19. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

Issued in Renton, Washington, on October 15, 2007.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E7–21843 Filed 11–6–07; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 301

[REG–209020–86]

RIN 1545–AC09

Foreign Tax Credit: Notification of Foreign Tax Redeterminations

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Partial withdrawal of notice of proposed rulemaking and notice of proposed rulemaking by cross-reference to temporary regulations.

SUMMARY: This document withdraws portions of the notice of proposed rulemaking published on June 23, 1988, relating to sections 905(c) and 6689 (the 1988 proposed regulations). In addition, in the Rules and Regulations section of this issue of the **Federal Register**, the IRS and the Treasury Department are issuing temporary regulations relating to a taxpayer's obligation under section 905(c) of the Internal Revenue Code to

notify the IRS of a foreign tax redetermination. The IRS and the Treasury Department are also issuing temporary regulations on Procedure and Administration under section 6689 relating to the civil penalty for failure to notify the IRS of a foreign tax redetermination as required under section 905(c). These temporary regulations affect taxpayers that have paid foreign taxes which have been redetermined and provide guidance needed to comply with statutory changes made to the applicable law by the Taxpayer Relief Act of 1997 and the American Jobs Creation Act of 2004. The text of those temporary regulations also serves as the text of these proposed regulations.

DATES: Written or electronic comments and requests for a public hearing must be received by February 5, 2008.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–209020–86), room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–209020–90), Courier's Desk, Internal Revenue Service, 1111 Constitution Ave., NW., Washington, DC or sent electronically via the Federal eRulemaking Portal at *www.regulations.gov* (IRS REG–209020–86).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Teresa Burridge Hughes, (202) 622–3850 (not a toll-free number); concerning the submission of comments, Kelly Banks, (202) 622–7180 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collections of information contained in this notice of proposed rulemaking have been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collection of information should be sent to the Office of Management and Budget, Attn: Desk Officer for the Department of Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, SE:W:CAR:MP:T:T:SP, Washington, DC 20224. Comments on the collection of information should be received by January 7, 2008. Comments are specifically requested concerning:

Whether the proposed collections of information is necessary for the proper performance of the functions of the IRS, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the proposed collections of information;

How the quality, utility, and clarity of the information to be collected may be enhanced;

How the burden of complying with the proposed collections of information may be minimized, including through the application of automated collection techniques or other forms of information technology; and

Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of service to provide information.

The collections of information in this notice of proposed rulemaking are in § 1.905–4. This information is required to enable the IRS to verify the amounts of the foreign tax redeterminations and to determine the amount of the penalty under section 6689, if a taxpayer fails to notify the IRS of a foreign tax redetermination. This information will be used by the IRS for examination purposes. The collections of information are mandatory. The likely respondents are individuals and business or other for-profit institutions.

Estimated total annual reporting: 54,000 hours.

The estimated annual burden per respondent varies from 3 hours to 8 hours, depending on individual circumstances, with an estimated average of 4.2 hours.

Estimated number of respondents: 13,000.

Estimated frequency of responses: Annually.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Background and Explanation of Provisions

On June 23, 1988, the IRS published in the **Federal Register** a notice of proposed rulemaking (53 FR 23659) (INTL–061–86) (the 1988 proposed regulations) that would have provided rules with respect to the time and manner of reporting a foreign tax redetermination and to the penalty under section 6689. Written comments were received; however, no hearing was requested or held. Subsequently, section 1102(a)(1) and 1102(a)(2) of the Taxpayer Relief Act of 1997, Public Law 105–34 (111 Stat. 788, 963–966 (1997)), amended section 905(c), effective for taxes paid or accrued in taxable years beginning after December 31, 1997. Subsequently, section 408(a) of the American Jobs Creation Act of 2004, Public Law 108–357 (118 Stat. 1418, 1499 (2004)), modified section 986(a), effective for taxable years beginning after December 31, 2004. In light of the comments received on the 1988 proposed regulations and the statutory changes to sections 905(c) and 986(a), sections of the 1988 proposed regulations are revised and other sections are withdrawn. The preamble to the temporary regulations explains the temporary regulations and these proposed regulations.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to the following regulations, §§ 1.905–3, 1.905–4, 1.905–5, and 301.6689–1. With respect to § 1.905–4, it is hereby certified that this regulation will not have a significant economic impact on a substantial number of small entities. This certification is based on the fact that the collection of information requirement under § 1.905–4 that is imposed on small entities flows directly from section 905(c), which states that, ''[T]he taxpayer shall notify the Secretary,'' of a foreign tax redetermination that may result in a redetermination of the taxpayer's United States tax liability. In order for the taxpayer to satisfy this notification requirement, information with respect to all foreign tax redeterminations must be collected. Therefore, a regulatory flexibility analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, this regulation has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small businesses.

Comments and Requests for a Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. All

comments will be available for public inspection and copying. A public hearing may be scheduled if requested in writing by any person that timely submits written or electronic comments. If a public hearing is scheduled, notice of the date, time, and place for the public hearing will be published in the **Federal Register**.

Drafting Information

The principal author of this document is Teresa Burridge Hughes, Office of Associate Chief Counsel (International). However, other personnel from the IRS and the Treasury Department participated in its development.

List of Subjects

26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

26 CFR Part 301

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, Reporting and recordkeeping requirements.

Partial Withdrawal of a Notice of Proposed Rulemaking

Under the authority of 26 U.S.C. 7805, § 1.905–3(d)(2)(iii) and (iv) and § 1.905–3(d)(4) of the notice of proposed rulemaking (INTL–061–86, REG–209020–86) published in the **Federal Register** on June 23, 1988 (53 FR 23659) are withdrawn.

Proposed Amendments to the Regulations

Accordingly, 26 CFR parts 1 and 301 are proposed to be amended as follows:

PART 1—INCOME TAXES

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

Authority: 26 U.S.C. 7805 * * *

Par. 2. Section 1.905–3 is added to read as follows:

§ 1.905–3 Adjustments to United States tax liability and to the pools of post-1986 undistributed earnings and post-1986 foreign income taxes as a result of a foreign tax redetermination.

[The text of this section is the same as the text of § 1.905–3T(a) through (e) published elsewhere in this issue of the **Federal Register**.]

Par. 3. Section 1.905–4 is added to read as follows:

§ 1.905–4 Notification of foreign tax redetermination.

[The text of this section is the same as the text of § 1.905–4T(a) through (f)(2) published elsewhere in this issue of the **Federal Register**.]

§ 1.905–5 Foreign tax redeterminations and currency translation rules for foreign tax redeterminations occurring in taxable years beginning prior to January 1, 1987 (temporary).

[The text of this section is the same as the text of § 1.905–5T(a) through (f) published elsewhere in this issue of the **Federal Register**.]

PART 301—PROCEDURE AND ADMINISTRATION

Par. 4. The citation authority for part 301 continues to read as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 5. Section 301.6689–1 is added to read as follows:

§ 301.6689–1 Failure to file notice of redetermination of foreign tax.

(a) [The text of the proposed amendments to § 301.6689–1(a) is the same as the text of § 301.6689–1T(a) published elsewhere in this issue of the **Federal Register**.]

(b) through (d) [Reserved]. For further guidance, see § 301.6689–1T(b) through (d).

(e) [The text of the proposed amendments to § 301.6689–1(e)(1) is the same as the text of § 301.6689–1T(e)(1) published elsewhere in this issue of the **Federal Register**.]

Kevin M. Brown,

Deputy Commissioner for Services and Enforcement.

[FR Doc. E7–21727 Filed 11–6–07; 8:45 am]

BILLING CODE 4830–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2007–1009; FRL–8492–7]

Approval and Promulgation of Air Quality Implementation Plans; State of Delaware Transportation Conformity Regulations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve a State Implementation Plan (SIP) revision submitted by the State of Delaware. This revision establishes the State's transportation conformity requirements. After they have been approved, the State regulations will govern transportation conformity determinations in the State of Delaware. This action is being taken under the Clean Air Act.

DATES: Written comments must be received on or before December 7, 2007.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA–R03–OAR–2007–1009 by one of the following methods:

A. *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.

. *E-mail: febbo.carol@epa.gov*.

C. *Mail:* EPA–R03–OAR–2007–1009, Carol Febbo, Chief, Energy, Radiation and Indoor Environment Branch, Mailcode 3AP23, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

D. *Hand Delivery:* At the previously-listed EPA Region III address. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R03–OAR–2007–1009. EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at *www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or e-mail. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *www.regulations.gov*, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the electronic docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material,

is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the Delaware Department of Natural Resources & Environmental Control, 89 Kings Highway, P.O. Box 1401, Dover, Delaware 19903.

FOR FURTHER INFORMATION CONTACT: Martin Kotsch, (215) 814–3335, or by e-mail at *kotsch.martin@epa.gov*.

SUPPLEMENTARY INFORMATION: Throughout this document whenever ''we'', ''us'', or ''our'' is used, we mean EPA.

Table of Contents

I. What Is Transportation Conformity?
II. What Is the Background for This Action?
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I. What Is Transportation Conformity?

Transportation conformity is required under section 176(c) of the Clean Air Act to ensure that Federally supported highway, transit projects, and other activities are consistent with (conform to) the purpose of the SIP. Conformity currently applies to areas that are designated nonattainment, and those redesignated to attainment after 1990 (maintenance areas), with plans developed under section 175A of the Clean Air Act for the following transportation related criteria pollutants: ozone, particulate matter ($PM_{2.5}$ and PM_{10}), carbon monoxide (CO), and nitrogen dioxide (NO_2). Conformity to the purpose of the SIP means that transportation activities will not cause new air quality violations, worsen existing violations, or delay timely attainment of the relevant national ambient air quality standards (NAAQS). The transportation conformity regulation is found in 40 CFR part 93 and provisions related to conformity SIPs are found in 40 CFR 51.390.

II. What Is the Background for This Action?

On August 10, 2005, the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU) was signed into law. SAFETEA–LU revised certain provisions of section 176(c) of the Clean Air Act, related to transportation conformity. Prior to SAFETEA–LU, states were required to address all of the Federal conformity rule's provisions in their conformity SIPs. After SAFETEA–LU, states' SIPs were required to contain all or portions of only the following three sections of the Federal rule, modified as appropriate to each state's circumstances: 40 CFR 93.105 (consultation procedures); 40 CFR 93.122(a)(4)(ii) (written commitments to implement certain kinds of control measures); and 40 CFR 93.125(c) (written commitments to implement certain kinds of mitigation measures). States are no longer required to submit conformity SIP revisions that address the other sections of the Federal conformity rule.

III. What Did the State Submit and How Did We Evaluate It?

On July 9, 2007, the Delaware Department of Natural Resources and Environmental Control (DNREC) submitted a revision to its State Implementation Plan (SIP) for Transportation Conformity purposes. The SIP revision consists of the State Regulation 1132, Delaware Transportation Conformity Regulation. This SIP revision addresses the three provisions of the EPA Conformity Rule required under SAFETEA–LU: 40 CFR 93.105 (consultation procedures); 40 CFR 93.122(a)(4)(ii) (control measures) and, 40 CFR 93.125(c) (mitigation measures).

We reviewed the submittal to assure consistency with the February 14, 2006 ''Interim Guidance for Implementing the Transportation Conformity provisions in the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU).'' The guidance document can be found at *http://epa.gov/otaq/stateresources/transconf/policy.htm*. The guidance document states that each state is only required to address and tailor the aforementioned three sections of the Federal Conformity Rule to be included in their state conformity SIPs.

EPA's review of Delaware's proposed SIP indicates that it is consistent with EPA's guidance in that it includes the three elements specified by SAFETEA–LU. Consistent with the EPA Conformity Rule at 40 CFR 93.105 (consultation procedures), Regulation 1132(3) identifies the appropriate agencies, procedures and allocation of responsibilities as required under 40 CFR 93.105 for consultation procedures. In addition, Regulation 1132(3) provides for appropriate public consultation/public involvement consistent with 40 CFR 93.105. With respect to the requirements of 40 CFR 93.122(a)(4)(ii) and 40 CFR 93.125(c), Regulation 1132(4) specifies that written commitments for control measures and mitigation measures for meeting these requirements will be provided as needed.

IV. What Action Is EPA Taking Today?

EPA is proposing to approve the Delaware SIP revision for Transportation Conformity, which was submitted on July 9, 2007. This revision is being proposed under a procedure called parallel processing, whereby EPA proposes rulemaking action concurrently with the state's procedures for amending its regulations. If the proposed revision is changed in areas other than those identified in this action, EPA will evaluate those changes and may publish another notice of proposed rulemaking. If no changes are made, EPA will publish a Final Rulemaking Notice on the revisions. The final rulemaking action by EPA will occur only after the SIP revision has been adopted by the State of Delaware and submitted formally to EPA for incorporation into the SIP. EPA is soliciting public comments on the issues discussed in this document. These comments will be considered before taking final action.

V. Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this proposed action is not a ''significant regulatory action'' and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001). This proposed action merely proposes to approve state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

Because this rule proposes to approve pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104–4). This proposed rule also does not have tribal implications because it will not have a substantial direct effect on one or

more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have Federalism implications because it does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely proposes to approve a state rule implementing a Federal requirement, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This proposed rule also is not subject to Executive Order 13045 ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), because it approves a state rule implementing a Federal standard.

In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This proposed rule to approve Delaware's transportation conformity regulation does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Intergovernmental relations, Nitrogen dioxide, Ozone, Particulate matter, Volatile organic compounds.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: October 29, 2007.

Donald S. Welsh,

Regional Administrator, Region III.

[FR Doc. E7–21853 Filed 11–6–07; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2007–0215; FRL–8493–3]

Approval and Promulgation of Air Quality Implementation Plans; West Virginia; 110(a)(1) 8-Hour Ozone Maintenance Plan and Amendments to the 1-Hour Ozone Maintenance Plan

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve State Implementation Plan (SIP) revisions submitted by West Virginia. These revisions pertain to: the maintenance plan prepared by West Virginia to maintain the 8-hour national ambient air quality standard (NAAQS) for ozone in Greenbrier County, which is designated attainment for the ozone NAAQS; and two amendments to the existing 1-hour ozone maintenance plan, which include (a) removal of the obligation to submit a maintenance plan for the 1-hour NAAQS eight years after approval of the initial 1-hour maintenance plan, and (b) removal of the State's obligation to implement contingency measures upon a violation of the 1-hour NAAQS. The purpose of this proposed approval is to ensure Federal enforceability of the state air program plan and to maintain consistency between the State-adopted plan and the approved SIP. This action is being taken under the Clean Air Act (CAA).

DATES: Written comments must be received on or before December 7, 2007.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA–R03–OAR–2007–0215, by one of the following methods:

A. *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.

B. E-mail: powers.marilyn@epa.gov.

C. *Mail:* EPA–R03–OAR–2007–0215, Marilyn Powers, Acting Branch Chief, Air Quality Planning Branch, Mailcode 3AP21, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

D. *Hand Delivery:* At the previously-listed EPA Region III address. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R03–OAR–2007–0215. EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at *www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or e-mail. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *www.regulations.gov*, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the electronic docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the West Virginia Department of Environmental Protection, Division of Air Quality, 601 57th Street SE., Charleston, West Virginia 25304.

FOR FURTHER INFORMATION CONTACT: Irene Shandruk, (215) 814–2166, or by e-mail at *shandruk.irene@epa.gov*.

SUPPLEMENTARY INFORMATION: On November 29, 2006, the West Virginia Department of Environmental Protection (WVDEP) submitted a revision to its State Implementation Plan (SIP) for

approval of the section 110(a)(1) 8-hour Ozone Maintenance Plan for Greenbrier County, West Virginia, and for concurrent approval of two amendments to the existing 1-hour ozone maintenance plan.

I. Background

Section 110(a)(1) of the Clean Air Act (CAA) requires, in part, that states submit to EPA plans to maintain any NAAQS promulgated by EPA. EPA interprets this provision to require that areas that were maintenance areas for the 1-hour ozone NAAQS but attainment for the 8-hour ozone NAAQS submit a plan to demonstrate the continued maintenance of the 8-hour ozone NAAQS. EPA established June 15, 2007, three years after the effective date of the initial 8-hour ozone designations, as the deadline for submission of plans for these areas.

On May 20, 2005, EPA issued guidance that applies, in part, to areas that are designated attainment/unclassifiable for the 8-hour ozone standard and that had an approved 1-hour ozone maintenance plan. The purpose of the guidance, referred to as section 110(a)(1) guidance, is to assist the states in the development of a SIP which addresses the maintenance requirements found in section 110(a)(1) of the CAA. There are five components of the section 110(a)(1) maintenance plan which are: (1) An attainment inventory, which is based on actual typical summer day emissions of volatile organic compounds (VOCs) and oxides of nitrogen (NO_X) for a ten-year period from a base year as chosen by the state; (2) a maintenance demonstration which shows how the area will remain in compliance with the 8-hour ozone standard for 10 years after the effective date of designations (June 15, 2004); (3) a commitment to continue to operate air quality monitors; (4) a contingency plan that will ensure that a violation of the 8-hour ozone NAAQS is promptly addressed; and (5) an explanation of how the State will track the progress of the maintenance plan.

II. Summary of SIP Revision

The WVDEP 8-hour ozone maintenance plan addresses the components of the section 110(a)(1) 8-hour ozone maintenance plan as outlined in EPA's May 20, 2005 guidance. West Virginia has requested approval of its 8-hour ozone maintenance plan for Greenbrier County, as well as concurrent approval of two amendments to its existing 1-hour ozone maintenance plan.

Emissions Inventory: An emissions inventory is an itemized list of emission estimates for sources of air pollution in a given area for a specified time period. WVDEP has provided a comprehensive and current emissions inventory for NO_X and VOCs. WVDEP has chosen to use 2002 as the base year from which it will project emissions. The maintenance plan also includes an explanation of the methodology used for determining the anthropogenic (area and mobile sources) emissions. There are no Title V point sources located in Greenbrier County, so a 2002 point source inventory was not compiled. The inventory is based on emissions from a typical ozone season day. The term ''typical'' refers to emissions being emitted during a typical weekday during the months where ozone concentrations are typically the highest.

Maintenance Demonstration and Tracking Progress: With regard to demonstrating continued maintenance of the 8-hour ozone standard, West Virginia projects that the total emissions from Greenbrier County will decrease during the ten-year maintenance period. WVDEP has projected emissions for 10 years from the effective date of initial designations, or 2014. In 2002, the total anthropogenic emissions in Greenbrier County were 7.7 tons/ozone season day for VOCs and 7.4 tons/ozone season day for NO_X. The projected 2014 anthropogenic emissions from Greenbrier County are 7.0 tons/ozone season day for VOCs and 4.9 tons/ozone season day for NO_X. As such, the plan demonstrates that, from an emissions projections standpoint, emissions are projected to decrease.

It is important to note that the formation of ozone is dependent on a number of variables which cannot be estimated through emissions growth and reduction calculations. A few of these variables include weather and the transport of ozone precursors from outside the maintenance area. In the Section 110(a)(1) maintenance plan, WVDEP had indicated that the state will track the progress of the maintenance plan by updating the emissions inventory for Greenbrier County approximately every three years. The emissions inventory update will include point, area, and mobile emissions. Information from these future updates will be compared with the projected growth estimates for the 2002 base inventory data to track maintenance of the standard.

Ambient Monitoring: With regard to the ambient air monitoring component of the maintenance plan, West Virginia commits to continue operating air quality monitoring stations in accordance with 40 CFR Part 58 throughout the maintenance period to verify maintenance of the 8-hour ozone standard, and will submit quality-assured ozone data to EPA through the AIRS system.

Contingency Measures: EPA interprets Section 110(a)(1) of the CAA to require that the state develop a contingency plan that will ensure that any violation of a NAAQS is promptly corrected. The purposes of the contingency measures, as outlined in West Virginia's maintenance plan, is to accordingly select and adopt one or more measures outlined in the maintenance plan so as to assure continued attainment in the event that a violation of the ozone NAAQS is measured. Violation of the 8-hour ozone standard would trigger one or more of the control measures outlined in the plan.

Approval of two amendments to West Virginia's existing 1-hour maintenance plan has also been requested by WVDEP. Section 175A(b) requires that maintenance plans be updated. The 1-hour maintenance plan for Greenbrier County extends to 2005, but no update has been developed. West Virginia identifies the most important reason for this being that available resources are being devoted to attainment and maintenance of the 8-hour standard since the 8-hour standard is considered by the State to be more protective than the former 1-hour standard upon which the current maintenance plan is based. As such, West Virginia is amending this existing maintenance plan, which is codified at 40 CFR 52.2420(e), for the Greenbrier County 1-hour maintenance area by removing the State's obligation to submit a maintenance plan for the 1-hour NAAQS eight years after approval of the initial 1-hour maintenance plan, and is requesting approval of these amendments.

The WVDEP is requesting approval of the section 110(a)(1) 8-hour ozone maintenance plan for Greenbrier County, West Virginia as a revision to its SIP. This plan demonstrates how the State intends to maintain the 8-hour NAAQS for ozone. Additionally, WVDEP requested that pursuant to 40 CFR 51.905(e)(1), EPA concurrently approve two amendments to the existing 1-hour ozone maintenance plan: (1) Removal of the obligation to submit a maintenance plan for the 1-hour NAAQS 8 years after approval of the initial 1-hour maintenance plan; and (2) removal of the State's obligation to implement contingency measures upon a violation of the 1-hour NAAQS. West Virginia's SIP submittal meets the CAA requirements for SIP submittals.

III. Proposed Action

EPA's review of this material indicates that West Virginia has addressed the components of a maintenance plan pursuant to EPA's May 20, 2005 guidance. EPA is proposing to approve the West Virginia SIP revision for Greenbrier County, which was submitted on November 29, 2006. EPA is soliciting public comments on the issues discussed in this document. These comments will be considered before taking final action.

IV. Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this proposed action is not a ''significant regulatory action'' and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355 (May 22, 2001)). This action merely proposes to approve state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule proposes to approve pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104–4). This proposed rule also does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999), because it merely proposes to approve a state rule implementing a Federal requirement, and does not alter the relationship or the distribution of power and responsibilities established in the CAA. This proposed rule also is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because it approves a state rule implementing a Federal standard.

In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the CAA. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. As required by section 3 of Executive Order 12988 (61 FR 4729, February 7, 1996), in issuing this proposed rule, EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct. EPA has complied with Executive Order 12630 (53 FR 8859, March 15, 1988) by examining the takings implications of the rule in accordance with the ''Attorney General's Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings'' issued under the executive order.

This action proposing approval of the section 110(a)(1) 8-hour Ozone Maintenance Plan for Greenbrier County, West Virginia, and for concurrent approval of two amendments to the existing 1-hour ozone maintenance plan does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Nitrogen dioxide, Ozone, Reporting and Recordkeeping, Volatile organic compounds.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: October 29, 2007.

Donald S. Welsh,

Regional Administrator, Region III.

[FR Doc. E7–21866 Filed 11–6–07; 8:45 am]

BILLING CODE 6560–50–P

Notices

Federal Register
Vol. 72, No. 215
Wednesday, November 7, 2007

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

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

[Docket Number: AMS–ST–07–0129; ST–07–03]

Plant Variety Protection Board; Open Meeting

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice of meeting.

SUMMARY: This notice sets forth the schedule and proposed agenda of a forthcoming meeting of the Plant Variety Protection Board.

DATES: November 14–15, 2007, 8:30 a.m. to 5 p.m., open to the public.

ADDRESSES: The meeting will be held in the United States Department of Agriculture, National Agricultural Library, 10301 Baltimore Blvd., Beltsville, Maryland.

FOR FURTHER INFORMATION CONTACT: Mrs. Janice M. Strachan, Plant Variety Protection Office, Science and Technology Programs, Agricultural Marketing Service, United States Department of Agriculture, Telephone number (301) 504–5518, fax (301) 504–5291, or e-mail *PVPOmail@usda.gov.*

SUPPLEMENTARY INFORMATION: Pursuant to the provisions of section 10(a) of the Federal Advisory Committee Act, (U.S.C. App.2) this notice is given regarding a Plant Variety Protection (PVP) Board meeting. The board is constituted under section 7 of the PVP Act (7 U.S.C. 2327). The proposed agenda for the meeting will include discussions of: (1) The accomplishments of the PVP Office, (2) The financial status of the PVP Office, (3) PVP Office information technology infrastructure, (4) Discussion of current program operations and long term strategic plan, and (5) Other related topics. Upon entering the National Agricultural Library Building, visitors should inform security personnel that they are attending the PVP Board Meeting. Identification will be required to be admitted to the building. Security personnel will direct visitors to the registration table located outside of Room 1400. Registration upon arrival is necessary for all participants.

If you require accommodations, such as sign language interpreter, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**. Minutes of the meeting will be available for public review 30 days following the meeting at the address listed under **FOR FURTHER INFORMATION CONTACT**. The minutes will also be posted on the Internet Web site *http://www.ams.usda.gov/science/PVPO/PVPindex.htm.*

Dated: November 1, 2007.

Lloyd C. Day,

Administrator, Agricultural Marketing Service.

[FR Doc. E7–21831 Filed 11–6–07; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Forest Service

Notice of New Fee Site; Federal Lands Recreation Enhancement Act (Title VIII, Pub. L. 108–447)

AGENCY: Coronado National Forest, USDA Forest Service, Tucson, AZ.

ACTION: Notice of New Fee Site.

SUMMARY: The Coronado National Forest proposes to begin charging a new $150.00 per day fee for rental of the Half Moon Ranch located 9 miles west of Sunsites, Arizona. Rental of the Cabin includes overnight use. Rental of the cabin and other facilities within the Arizona National Forests has shown that the public appreciates and enjoys the availability of historic rental facilities. Funds from the rentals will be used for the continued operation and maintenance of the Half Moon Ranch.

DATES: Half Moon Ranch will become available for rent July, 2008.

ADDRESSES: Coronado National Forest, 300 West Congress, Tucson, AZ 85701.

FOR FURTHER INFORMATION CONTACT: Kathy Makansi, Archaeologist, Coronado National Forest, (520) 760–2502.

SUPPLEMENTARY INFORMATION: The Federal Recreation Lands Enhancement Act (Title VII, Pub. L. 108–447) directed the Secretary of Agriculture to publish a six month advance notice in the **Federal Register** whenever new recreation fee areas are established. The Coronado National Forest currently has one other rental facility. This facility is booked regularly throughout the rental season. A business analysis for the rental of the Half Moon Ranch shows that people desire having this sort of recreation experience on the Coronado National Forest. A market analysis indicates that the $150.00 daily fee is both reasonable and acceptable for this sort of unique recreation experience. People wanting to rent the Half Moon Ranch will need to do so through the National Recreation Reservation Service, at *http://www.recreation.gov* or by calling 1–877–444–6777. The National Recreation Reservation Service charges a $9 fee per reservation.

Dated: November 1, 2007.

Jeanine Derby,

Forest Supervisor, Coronado National Forest.

[FR Doc. 07–5549 Filed 11–6–07; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–867]

Certain Automotive Replacement Glass Windshields from The People's Republic of China: Notice of Decision of the Court of International Trade Not in Harmony

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

SUMMARY: On August 3, 2007, the United States Court of International Trade (''Court'') entered a final judgment sustaining the fourth remand results made by the Department of Commerce (''the Department'') pursuant to the Court's remand of the antidumping duty order on Certain Automotive Replacement Glass Windshields from the People's Republic of China (''PRC'') in *Changchun Pilkington Safety Glass Co., Ltd., et al. v. United States*, consol. Ct. No. 02–00312, Slip Op 07–118 (August 3, 2007) (''*Pilkington*''). This case arises out of the Department's *Antidumping Duty Order: Automotive Replacement Glass Windshields from the People's Republic*

of China, 67 FR 16087 (April 4, 2002) (''Order''). The final judgment in this case was not in harmony with the Department's *Final Determination of Sales at Less Than Fair Value: Certain Automotive Replacement Glass Windshields From the People's Republic of China*, 67 FR 6482 (February 12, 2002) (''*Final Determination*''), and accompanying Issues and Decisions Memorandum (''Decision Memo''), as amended at 67 FR 11670 (March 15, 2002), covering the period of investigation (''POI''), July 1, 2000 through December 31, 2000.

EFFECTIVE DATE: November 7, 2007.

FOR FURTHER INFORMATION CONTACT: Paul Stolz, AD/CVD Operations, Office 8, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington DC 20230; telephone (202) 482–4474.

SUPPLEMENTARY INFORMATION:

Background

In separate actions, plaintiffs, Fuyao Glass Industry Group Co., Ltd. (''Fuyao''), Xinyi Automotive Glass Co., Ltd. (''Xinyi''), Changchun Pilkington Safety Glass, Co., Ltd, Guilin Pilkington Safety Glass Co., Ltd., and Wuhan Yaohua Pilkington Safety Glass Co., Ltd. (collectively ''Pilkington''), and Benxun Automotive Glass Co., Ltd. (''Benxun'') [1] contested several aspects of the *Final Determination*, including the Department's decision to disregard certain market economy inputs.[2] On February 15, 2006, while the cases were consolidated, the Court remanded the Department's decision regarding certain market economy inputs to the Department. *See Fuyao Glass Industry Group Co., Ltd. v. United States*, Consol. Court No. 02–00282, 2006 Ct. Int'l Trade Lexis 21, Slip Op. 2006–21 (CIT February 15, 2006) (''*Fuyao Glass III*''). In its remand to the Department, the Court concluded with respect to the standard applied in the Department's analysis that the Department must conduct its analysis ''in accordance with the court's finding with respect to the use of the word 'are' rather than 'may be' when applying its subsidized price methodology.'' *Fuyao Glass III*, Slip Op. P. 9. The Court further directed the Department to either (1) ''concur with the court's conclusions with respect to substantial evidence, or (2) re–open the record . . .'' *Fuyao Glass III*, Slip Op. P. 7. The Court concluded that it does not find the Department's determination, *i.e.*, that prices from South Korea and Indonesia are subsidized, is supported by substantial record evidence. *See Fuyao Glass III*, Slip Op. p. 16. Pursuant to the Court's ruling, and under respectful protest, the Department concurred that the record evidence does not contain substantial evidence to support a conclusion that prices from South Korea and Indonesia are subsidized. *See Viraj Group v. United States*, 343 F.3d 1371, 1376 (Fed. Cir. 2003). Because the Court found that the evidence on the record does not support the Department's determination to disregard prices from South Korea and Indonesia, in the remand results, the Department determined to calculate the dumping margin for Fuyao and Xinyi, mandatory respondents, based upon prices the plaintiffs actually paid to suppliers located in South Korea and Indonesia. As a result of its remand determination, the Department calculated zero margins for both Fuyao and Xinyi.

In *Fuyao Glass Industry Group Co. v. United States*, Consol. Court No. 02–00282, (Orders of November 2, 2006 and December 19, 2006) (''*Fuyao Glass IV*''), the Court then granted the Department's request for a voluntary remand and instructed the Department to devise a reasonable methodology to calculate an antidumping margin for Pilkington and Benxun, taking into consideration the zero margins assigned to Fuyao and Xinyi. On January 8, 2007, the Court severed Fuyao's and Xinyi's actions, Court Nos. 02–00282 and 02–00321, from the consolidated action, and designated Pilkington's action, Court No. 02–00312, as the lead case, under which Court Nos. 02–00319 and 02–00320 were consolidated. On May 10, 2007, and June 28, 2007, respectively, the Court issued final judgments in Court Nos. 02–00282 and 02–00321, wherein it affirmed the Department's third remand results with respect to Fuyao's and Xinyi's actions. The Department then completed its voluntary remand in which it devised a reasonable methodology to calculate an antidumping margin for Pilkington and Benxun, taking into consideration the zero margins assigned to Fuyao and Xinyi. Specifically, on remand, the Department identified the control numbers (''CONNUMS'') shared by the Pilkington Plaintiffs, Benxun, Fuyao and Xinyi, as reported in their questionnaire responses, and ''impute{d} Fuyao's and Xinyi's CONNUM–specific margins to the matching CONNUMs of the {the Pilkington Plaintiffs} and Benxun.'' Commerce then weight–averaged those CONNUM–specific margins, which resulted in the *de minimis* antidumping margin of 1.47 percent for the Pilkington Plaintiffs and Benxun.

On August 3, 2007, the Court issued a final judgement, wherein it affirmed the Department's fourth remand results with respect to Pilkington and Benxun.

Timken Notice

In its decision in *Timken Co., v. United States*, 893 F.2d 337, 341 (Fed. Cir. 1990) (''*Timken*''), the United States Court of Appeals for the Federal Circuit held that, pursuant to section 516A(e) of the Tariff Act of 1930, as amended (''the Act''), the Department must publish a notice of a court decision that is not ''in harmony'' with a Department determination. The Court's decision in *Pilkington* on August 3, 2007, constitutes a final decision of that court that is not in harmony with the Department's *Final Determination*. This notice is published in fulfillment of the publication requirements of *Timken*. Accordingly, the Department will issue an amended final determination and revised instructions to U.S. Customs and Border Protection if the Court's decision is not appealed or if it is affirmed on appeal.

This notice is issued and published in accordance with section 516A(c)(1) of the Act.

Dated: October 31, 2007.

Stephen J. Claeys,

Acting Assistant Secretary for Import Administration.

[FR Doc. E7–21875 Filed 11–6–07; 8:45 am]

BILLING CODE 3510–DS–S

[1] On July 20, 2004, the Department determined that Shenzhen CSG Autoglass Co., Ltd. (''CSG'') is the successor-in-interest to Benxun. The amended final results of this segment of the proceeding will apply to entries made by CSG on or subsequent to July 20, 2004.

[2] Court Nos. 02–00282, 02–00312, 02–00320 and 02–00321. On August 2, 2002, the Court consolidated these actions into Court No. 02–00282.

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–867]

Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order Pursuant to Court Decision: Certain Automotive Replacement Glass Windshields from the People's Republic of China

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

EFFECTIVE DATE: November 7, 2007.

SUMMARY: On June 28, 2007, the United States Court of International Trade (''Court'') entered a final judgement in *Xinyi Automotive Glass v. United*

States, Ct. No. 02–00321, Judgment (CIT, June 28, 2007) (''*Xinyi v. United States*'') sustaining the third remand results made by the Department of Commerce (''the Department'') pursuant to the Court's remand of the final determination with respect to *Certain Automotive Replacement Glass Windshields from the People' Republic of China* (''PRC'') in Slip Op. 06–21 (CIT, February 15, 2006). This case arises out of the Department's *Antidumping Duty Order on Certain Automotive Replacement Glass Windshields from the People's Republic of China*, 67 FR 16087 (April 4, 2002) (''AD Order''). As there is now a final and conclusive court decision in this case, the Department is amending the final determination and antidumping duty order of this investigation.

FOR FURTHER INFORMATION CONTACT: Paul Stolz or Robert Bolling, AD/CVD Operations, Office 8, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–4474 and (202) 482–3434, respectively.

SUPPLEMENTARY INFORMATION:

Background

This case arises out of the Department's AD Order and *Final Determination of Sales at Less Than Fair Value: Certain Automotive Replacement Glass Windshields From the People's Republic of China*, 67 FR 6482 (February 12, 2002) (''*Final Determination*''), and accompanying Issues and Decisions Memorandum (''Decision Memo''), as amended at 67 FR 11670 (March 15, 2002), covering the period of investigation (''POI''), July 1, 2000, through December 31, 2000. Following publication of the *Final Determination*, Fuyao Glass Industry Group Co., Ltd. et al. (''Fuyao''), Xinyi Automotove Glass (Shenzhen) Co., Ltd. (''Xinyi''),[1] Shenzhen Benxun Automotove Glass Co., Ltd. (Benxun),[2] and Changchun Pilkington Safety Glass, Co., Ltd., Guilin Pilkington Safety Glass Co., Ltd., and Wuhan Yao hua Pilkington Safety Glass Co., Ltd. (collectively ''Pilkington'') filed lawsuits with the Court challenging the Department's *Final Determination*.[3] Plaintiffs, Fuyao, Xinyi, Benxun, and Pilkington, initially in separate lawsuits, contested several aspects of the *Final Determination*, including the Department's decision to disregard certain market economy inputs. On August 2, 2002, all law suits challenging the *Final Determination*, including Xinyi's lawsuit, were consolidated into *Fuyao Glass Industry Group Co., Ltd. v. United States*, Consol. Court No. 02–00282. On February 15, 2006, while the cases were still consolidated, the Court issued its third remand concerning the Department's decision concerning certain market economy inputs. *See Fuyao Glass Industry Group Co. v. United States*, Consol. Court No. 02–00282, Slip Op. 2006–21, (CIT, February 15, 2006). In its remand to the Department, the Court concluded with respect to the standard applied in the Department's analysis, that the Department must conduct its analysis ''in accordance with the Court's finding with respect to the use of the word 'are' rather than 'may be' when applying its subsidized price methodology.'' *Id.* at 9. The Court further directed the Department to either (1) ''concur with the court's conclusions with respect to substantial evidence, or (2) re–open the record . . .'' *Id.* at 7. The Court concluded that it does not find the Department's determination, that prices from South Korea and Indonesia are subsidized, is supported by substantial record evidence. *Id.* at 16. Pursuant to the Court's ruling, and under respectful protest, the Department concurred that the record evidence does not contain substantial evidence to support a conclusion that prices from South Korea and Indonesia are subsidized. *See Viraj Group v. United States*, 343 F.3d 1371, 1376 (Fed. Cir. 2003). Because the Court found that the evidence on the record does not support the Department's determination to disregard prices from South Korea and Indonesia, in the remand results, the Department determined to calculate the dumping margin for Fuyao and Xinyi based upon prices the plaintiffs actually paid to suppliers located in South Korea and Indonesia.

On January 8, 2007, Xinyi's action was severed from the consolidated action. *See* Court Order of January 8, 2007, in Ct. No. 02–00282. On June 28, 2007, the Court issued a final judgment, wherein it affirmed the Department's third remand results with respect to Xinyi's action, *Xinyi v. United States*. On September 13, 2007, consistent with the decision in *Timken Co. v. United States*, 893 F.2d 337 (Fed. Cir. 1990), the Department notified the public that the Court's decision was not in harmony with the Department's final determination. *See Certain Automotive Replacement Glass Windshields from The People's Republic of China: Notice of Decision of the Court of International Trade Not in Harmony*, 72 FR 52344 (September 13, 2007). No party appealed the Court's decision. As there is now a final and conclusive court decision in this case, we are amending our *Final Determination.*

Amended Final Determination

As the litigation in this case has concluded, the Department is amending the *Final Determination* to reflect the results of our third remand determination. The revised dumping margin in the amended final determination is as follows:

Exporter	Margin (percent)
Xinyi Automotive Glass (Shenzhen) Co., Ltd.	0.00

The PRC–wide rate continues to be 124.5 percent as determined in the Department's *Final Determination*. The Department intends to issue instructions to U.S. Customs and Border Protection (''CBP'') fifteen days after publication of this notice, to revise the cash deposit rates for the company listed above, effective as of the publication date of this notice. Because Xinyi obtained a preliminary injunction, we will also instruct CBP to liquidate all entries, without regard to antidumping duties.

This notice is published in accordance with sections 735(d) and 777(i) of the Tariff Act of 1930, as amended.

Dated: October 31, 2007.

Stephen J. Claeys,

Acting Assistant Secretary for Import Administration.

[FR Doc. E7–21876 Filed 11–6–07; 8:45 am]

BILLING CODE 3510–DS–S

[1] Fuyao and Xinyi were mandatory respondents during the POI.

[2] The Department determined that Shenzhen CSG Automotive Glass Co., Ltd. is a successor-in-interest to Benxun. See Notice of Final Results of Antidumping Duty Changed Circumstances Review: Automotive Replacement Glass Windshields From the People's Republic of China, 69 FR 43388 (July 20, 2004).

[3] Court Nos. 02–00282, 02–00312, 02–00320, and 02–00321.

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–867]

Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order Pursuant to Court Decision: Certain Automotive Replacement Glass Windshields From the People's Republic of China

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

DATES: *Effective Date:* November 7, 2007.

SUMMARY: On May 10, 2007, the United States Court of International Trade (''Court'') sustained the *Final Results of Redetermination Pursuant to Court Remand, Fuyao Glass Industry Group Co., Ltd. et al.*, v. *United States* (February 15, 2006) (''*Third Remand Redetermination*'') made by the Department of Commerce (''the Department'') pursuant to the Court's third remand of the final determination of the less-than-fair-value investigation of Certain Automotive Replacement Glass Windshields from the People's Republic of China (''PRC''). *See Fuyao Glass Industry Group Co.* v. *United States*, Consol. Court No. 02–00282, Slip Op. 06–21 (CIT February 15, 2006) (''*Fuyao Glass III*''). As there is now a final and conclusive court decision in this case, the Department is amending the final determination and antidumping duty order of this investigation.

FOR FURTHER INFORMATION CONTACT: Paul Stolz or Robert Bolling, AD/CVD Operations, Office 8, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–4474 and (202) 482–3434, respectively.

SUPPLEMENTARY INFORMATION:

Background

This case arose out of the Department's *Antidumping Duty Order on Certain Automotive Replacement Glass Windshields From the PRC*, 67 FR 16087 (April 4, 2002) and the Department's *Final Determination of Sales at Less Than Fair Value: Certain Automotive Replacement Glass Windshields From the People's Republic of China*, 67 FR 6482 (February 12, 2002) (''*Final Determination*''), and accompanying Issues and Decisions Memorandum (''Decision Memo''), as amended at 67 FR 11670 (March 15, 2002), covering the period of investigation (''POI''), July 1, 2000, through December 31, 2000. Following publication of the *Final Determination*, in separate actions, Fuyao Glass Industry Group Co., Ltd. *et al.* (''Fuyao''), Xinyi Automotive Glass (Shenzhen) Co., Ltd. (''Xinyi''),[1] Shenzhen Benxun Automotive Glass Co., Ltd. (Benxun),[2] and Changchun Pilkington Safety Glass, Co., Ltd., Guilin Pilkington Safety Glass Co., Ltd., and Wuhan Yao hua Pilkington Safety Glass Co., Ltd. (collectively ''Pilkington'') filed lawsuits with the Court challenging the Department's *Final Determination*.[3] Collectively, the plaintiffs contested several aspects of the *Final Determination*, including the Department's decision to disregard certain market economy inputs. On August 2, 2002, all lawsuits challenging the *Final Determination*, including Xinyi's lawsuit, were consolidated into *Fuyao Glass Industry Group Co., Ltd.* v. *United States*, Consol. Court No. 02–00282. On February 15, 2006, while the cases were still consolidated, the Court issued a third remand order to the Department concerning its decision regarding certain market economy inputs. *See Fuyao Glass III.* The Court concluded with respect to the standard applied in the Department's analysis, that the Department must conduct its analysis ''in accordance with the court's finding with respect to the use of the word 'are' rather than 'may be' when applying its subsidized price methodology.'' *Id.* at 9. The Court further directed the Department to either (1) ''concur with the court's conclusions with respect to substantial evidence, or (2) re-open the record * * *.'' *Id.* at 7. The Court concluded that it does not find the Department's determination, that prices from South Korea and Indonesia are subsidized, is supported by substantial record evidence. *See id.* at 16. Pursuant to the Court's ruling, and under respectful protest, the Department concurred that the record evidence does not contain substantial evidence to support a conclusion that prices from South Korea and Indonesia are subsidized. *See Viraj Group* v. *United States*, 343 F.3d 1371, 1376 (Fed. Cir. 2003). Because the Court found that the evidence on the record does not support the Department's determination to disregard prices from South Korea and Indonesia, in the remand results, the Department determined to calculate the dumping margin for Fuyao and Xinyi based upon prices the plaintiffs actually paid to suppliers located in South Korea and Indonesia.

On January 8, 2007, Fuyao's action was severed from the consolidated action. *See* Court Order of January 8, 2007, in Ct. No. 02–00282. On May 10, 2007, the Court issued a final judgment wherein it affirmed the Department's third remand results with respect to Fuyao's action. On May 30, 2007, consistent with the decision in *Timken Co.* v. *United States*, 893 F.2d 337 (Fed. Cir. 1990), the Department notified the public that the Court's decision was not in harmony with the Department's final determination. *See Certain Automotive Replacement Glass Windshields From the People's Republic of China: Notice of Decision of the Court of International Trade Not in Harmony*, 72 FR 29969 (May 30, 2007). No party appealed the Court's decision. As there is now a final and conclusive court decision in this case, we are amending our *Final Determination*.

Amended Final Determination

As the litigation in this case has concluded, the Department is amending the *Final Determination* to reflect the results of our third remand determination. The revised dumping margin in the amended final determination is as follows:

Exporter	Margin (percent)
Fuyao Glass Industry Group Co., Ltd	0.00

The PRC-wide rate continues to be 124.5 percent as determined in the Department's *Final Determination*. The Department intends to issue instructions to U.S. Customs and Border Protection (''CBP'') fifteen days after publication of this notice, to revise the cash deposit rates for the company listed above, effective as of the publication date of this notice. Because Fuyao obtained a preliminary injunction, we will also instruct CBP to liquidate all entries without regard to antidumping duties.

This notice is published in accordance with sections 735(d) and 777(i) of the Tariff Act of 1930, as amended.

[1] Fuyao and Xinyi were mandatory respondents during the POI.

[2] The Department determined that Shenzhen CSG Automotive Glass Co., Ltd. is a successor-in-interest to Benxun. *See Notice of Final Results of Antidumping Duty Changed Circumstances Review: Automotive Replacement Glass Windshields From the People's Republic of China*, 69 FR 43388 (July 20, 2004).

[3] Court Nos. 02–00282, 02–00312, 02–00320, and 02–00321.

Dated: October 31, 2007.

Stephen J. Claeys,

Acting Assistant Secretary for Import Administration.

[FR Doc. E7–21877 Filed 11–6–07; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–122–840]

Notice of Preliminary Results of Antidumping Duty Administrative Review: Carbon and Certain Alloy Steel Wire Rod From Canada

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

SUMMARY: The Department of Commerce (the Department) is conducting an administrative review of the antidumping duty order on carbon and certain alloy steel wire rod from Canada for the period October 1, 2005, to September 30, 2006 (the POR). We preliminarily determine that sales of subject merchandise by Ivaco Rolling Mills 2004 L.P. and Sivaco Ontario (a division of Sivaco Wire Group 2004 L.P.) (collectively referred to as ''Ivaco'') have been made below normal value (NV). If these preliminary results are adopted in our final results, we will instruct U.S. Customs and Border Protection (CBP) to assess antidumping duties on appropriate entries. Interested parties are invited to comment on these preliminary results. We will issue the final results no later than 120 days from the publication of this notice.

The Department recently concluded a changed circumstance review in which it determined that, as of the publication of that final changed circumstance review, ''(1) Ivaco Rolling Mills 2004 L.P. is the successor-in-interest to Ivaco Rolling Mills L.P.; and (2) Sivaco Ontario, a division of Sivaco Wire Group 2004 L.P., is the successor-in-interest to Ivaco Inc. for antidumping duty cash deposit purposes.'' *See Notice of Final Results of Antidumping Duty Changed Circumstances Review: Carbon and Certain Alloy Steel Wire Rod from Canada*, 72 FR 15102 (March 30, 2007) (Ivaco Changed Circumstances Review). Sivaco Ontario (a Division of Sivaco Wire Group 2004 L.P.) was also identified as the successor-in-interest to Sivaco Ontario. *See* CBP Message Number 7116210, April 26, 2007. The results of this administrative review, for cash deposit purposes, will apply to Ivaco Rolling Mills 2004 L.P. and to Sivaco Ontario (a division of Sivaco Wire Group 2004 L.P). Assessment instructions issued subsequent to the final results would apply to unliquidated entries of not only Ivaco Rolling Mills 2004 L.P. and Sivaco Ontario (a division of Sivaco Wire Group 2004 L.P.), but also those of Ivaco Rolling Mills L.P., Ivaco Inc., and Sivaco Ontario.

Note that Ivaco Rolling Mills 2004 L.P. is referred to below as IRM, and Sivaco Ontario (a division of Sivaco Wire Group 2004 L.P.) is referred to below as Sivaco Ontario (even though ''Sivaco Ontario'' was the name of the predecessor company to Sivaco Ontario (a division of Sivaco Wire Group 2004 L.P.)).

DATES: *Effective Dates:* November 7, 2007.

FOR FURTHER INFORMATION CONTACT: Steve Bezirganian or Robert James, AD/CVD Operations, Office 7, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street & Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–1131 or (202) 482–0649, respectively.

SUPPLEMENTARY INFORMATION:

Background

On October 29, 2002, the Department published in the **Federal Register** an antidumping duty order on carbon and certain alloy steel wire rod (steel wire rod) from Canada. *See Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Carbon and Certain Alloy Steel Wire Rod from Canada*, 67 FR 65944 (October 29, 2002) (Order). On October 2, 2006, the Department issued a notice of opportunity to request an administrative review of this order for the October 1, 2005 through September 30, 2006 POR. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 71 FR 57920 (October 2, 2006). On October 31, 2006, Mittal Canada Inc. (formerly Ispat Sidbec Inc.) (Mittal Canada) requested an administrative review of its entries that were subject to the antidumping duty order for this period. On that same date, the Department received a request from petitioners (Mittal Steel USA Inc.—Georgetown, Gerdau USA Inc., Nucor Steel Connecticut Inc., Keystone Consolidated Industries, Inc., and Rocky Mountain Steel Mills) for a review of Ivaco, Inc. and Ivaco Rolling Mills L.P. (which petitioners referred to collectively as ''Ivaco''). Ivaco Rolling Mills 2004 L.P. and Sivaco Ontario, a division of Sivaco Wire Group 2004 L.P., also requested a review of their entries. On November 27, 2006, the Department published the notice of initiation of this antidumping duty administrative review. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 71 FR 68535 (November 27, 2006).[1] Mittal Canada subsequently withdrew its request for review, and the Department rescinded the administrative review with respect to Mittal Canada. *See Partial Rescission of Antidumping Duty Administrative Review: Carbon and Certain Alloy Steel Wire Rod from Canada*, 72 FR 51408 (September 7, 2007).

Ivaco submitted a response to section A of the Department's questionnaire on January 16, 2007, and a response to sections B, C, and D of the Department's questionnaire on February 21, 2007. In response to the Department's supplemental questionnaire dated June 8, 2007, Ivaco submitted a supplemental response for sections A, B, and C on July 13, 2007. In response to the Department's supplemental questionnaire dated September 12, 2007, Ivaco submitted a supplemental response, for sections A, B, C, and D on October 3, 2007. In response to the Department's supplemental questionnaire dated October 10, 2007, Ivaco submitted a supplemental response, for section C on October 17, 2007. On October 11, 2007, petitioners submitted comments regarding Ivaco's claims with respect to levels of trade and certain Ivaco costs, and, on October 19, 2007, Ivaco submitted a response to petitioners' comments on those issues.

The Department is considering IRM and Sivaco Ontario as part of the same entity (referred to collectively in this notice as ''Ivaco''), consistent with the Department's treatment of these companies in previous proceedings. *See, e.g., Notice of Final Results of Antidumping Duty Administrative Review: Carbon and Certain Alloy Steel Wire Rod from Canada*, 72 FR 26591 (May 10, 2007) and *Ivaco Changed Circumstance Review*, 72 FR 15102.

Scope of the Order

The merchandise subject to this order is certain hot-rolled products of carbon steel and alloy steel, in coils, of approximately round cross section, 5.00

[1] The Department's initiation notice referenced the following companies: Mittal Canada Inc. (formerly Ispat Sidbec Inc.); Ivaco Rolling Mills 2004 L.P.; and Sivaco Ontario Processing (a division of Sivaco Wire Group 2004 L.P.). The Department, for these preliminary results, is considering that a combined entity referenced as ''Ivaco'' encompasses the following: Ivaco Rolling Mills L.P.; Ivaco Rolling Mills 2004 L.P.; Ivaco, Inc.; Sivaco Ontario; and Sivaco Ontario (a division of Sivaco Wire Group 2004 L.P.).

mm or more, but less than 19.00 mm, in solid cross-sectional diameter.

Specifically excluded are steel products possessing the above-noted physical characteristics and meeting the Harmonized Tariff Schedule of the United States (''HTSUS'') definitions for (a) stainless steel; (b) tool steel; (c) high nickel steel; (d) ball bearing steel; and (e) concrete reinforcing bars and rods. Also excluded are (f) free machining steel products (*i.e.*, products that contain by weight one or more of the following elements: 0.03 percent or more of lead, 0.05 percent or more of bismuth, 0.08 percent or more of sulfur, more than 0.04 percent of phosphorus, more than 0.05 percent of selenium, or more than 0.01 percent of tellurium).

Also excluded from the scope are 1080 grade tire cord quality wire rod and 1080 grade tire bead quality wire rod. Grade 1080 tire cord quality rod is defined as: (i) Grade 1080 tire cord quality wire rod measuring 5.0 mm or more but not more than 6.0 mm in cross-sectional diameter; (ii) with an average partial decarburization of no more than 70 microns in depth (maximum individual 200 microns); (iii) having no non-deformable inclusions greater than 20 microns and no deformable inclusions greater than 35 microns; (iv) having a carbon segregation per heat average of 3.0 or better using European Method NFA 04–114; (v) having a surface quality with no surface defects of a length greater than 0.15 mm; (vi) capable of being drawn to a diameter of 0.30 mm or less with 3 or fewer breaks per ton, and (vii) containing by weight the following elements in the proportions shown: (1) 0.78 percent or more of carbon, (2) less than 0.01 percent of aluminum, (3) 0.040 percent or less, in the aggregate, of phosphorus and sulfur, (4) 0.006 percent or less of nitrogen, and (5) not more than 0.15 percent, in the aggregate, of copper, nickel and chromium.

Grade 1080 tire bead quality rod is defined as: (i) Grade 1080 tire bead quality wire rod measuring 5.5 mm or more but not more than 7.0 mm in cross-sectional diameter; (ii) with an average partial decarburization of no more than 70 microns in depth (maximum individual 200 microns); (iii) having no non-deformable inclusions greater than 20 microns and no deformable inclusions greater than 35 microns; (iv) having a carbon segregation per heat average of 3.0 or better using European Method NFA 04–114; (v) having a surface quality with no surface defects of a length greater than 0.2 mm; (vi) capable of being drawn to a diameter of 0.78 mm or larger with 0.5 or fewer breaks per ton; and (vii) containing by weight the following elements in the proportions shown: (1) 0.78 percent or more of carbon, (2) less than 0.01 percent of soluble aluminum, (3) 0.040 percent or less, in the aggregate, of phosphorus and sulfur, (4) 0.008 percent or less of nitrogen, and (5) either not more than 0.15 percent, in the aggregate, of copper, nickel and chromium (if chromium is not specified), or not more than 0.10 percent in the aggregate of copper and nickel and a chromium content of 0.24 to 0.30 percent (if chromium is specified).

For purposes of the grade 1080 tire cord quality wire rod and the grade 1080 tire bead quality wire rod, an inclusion will be considered to be deformable if its ratio of length (measured along the axis—that is, the direction of rolling—of the rod) over thickness (measured on the same inclusion in a direction perpendicular to the axis of the rod) is equal to or greater than three. The size of an inclusion for purposes of the 20 microns and 35 microns limitations is the measurement of the largest dimension observed on a longitudinal section measured in a direction perpendicular to the axis of the rod.

The designation of the products as ''tire cord quality'' or ''tire bead quality'' indicates the acceptability of the product for use in the production of tire cord, tire bead, or wire for use in other rubber reinforcement applications such as hose wire. These quality designations are presumed to indicate that these products are being used in tire cord, tire bead, and other rubber reinforcement applications, and such merchandise intended for the tire cord, tire bead, or other rubber reinforcement applications is not included in the scope. However, should petitioners or other interested parties provide a reasonable basis to believe or suspect that there exists a pattern of importation of such products for other than those applications, end-use certification for the importation of such products may be required. Under such circumstances, only the importers of record would normally be required to certify the end use of the imported merchandise.

All products meeting the physical description of subject merchandise that are not specifically excluded are included in this scope. The products subject to this order are currently classifiable under subheadings 7213.91.3011, 7213.91.3015, 7213.91.3092, 7213.91.4500, 7213.91.6000, 7213.99.0030, 7213.99.0090, 7227.20.0000, 7227.90.6010, and 7227.90.6080 of the HTSUS. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of this order is dispositive.

Export Price and Constructed Export Price

For the price to the United States, we used, as appropriate, export price (EP) or constructed export price (CEP), as defined in sections 772(a) and 772(b) of the Tariff Act of 1930, as amended (the Act), respectively. Section 772(a) of the Act defines EP as the price at which the subject merchandise is first sold before the date of importation by the producer or exporter outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States, as adjusted under section 772(c) of the Act.

Section 772(b) of the Act defines CEP as the price at which the subject merchandise is first sold in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter, as adjusted under sections 772(c) and (d) of the Act.

Ivaco made both EP and CEP transactions. We calculated an EP for sales where the merchandise was sold directly by Ivaco to the first unaffiliated purchaser in the United States prior to importation, and CEP was not otherwise warranted based on the facts on the record. We calculated a CEP for sales made by Ivaco after importation to the United States (where the merchandise was located at an unaffiliated processor facility or unaffiliated distributor warehouse at the time of sale).

For EP sales, we made additions to the starting price (gross unit price), where appropriate, for freight revenue received by Ivaco (reimbursement by customers for freight charges paid by Ivaco) and for billing errors (debit-note price adjustments made by Ivaco), and deductions, where appropriate, for billing adjustments (including credit-note price adjustments made by Ivaco), early payment discounts and rebates, and movement expenses in accordance with section 772(c)(2)(A) of the Act. Movement expenses included inland freight, warehousing expenses, and brokerage fees. For CEP sales, we made adjustments to the starting price as for the EP transactions described above. However, consistent with our treatment of these expenses in recent administrative reviews, we re-categorized freight from one unaffiliated processor in the United States to another unaffiliated processor in the

United States as further manufacturing costs. *See Notice of Final Results of Antidumping Duty Administrative Review: Carbon and Certain Alloy Steel Wire Rod from Canada*, 71 FR 3822 (January 24, 2006) and accompanying Issues and Decision Memorandum at Comment 1; and *Notice of Preliminary Results of Antidumping Duty Administrative Review and Notice of Initiation of Changed Circumstances Review: Carbon and Certain Alloy Steel Wire Rod from Canada*, 71 FR 64921, 64923 (November 6, 2006) (unchanged in final results, 72 FR 26591 (May 10, 2007)). In addition, in accordance with section 772(d)(1) and (2) of the Act, we deducted from the starting price those selling expenses that were incurred in selling the subject merchandise in the United States, including direct selling expenses (imputed credit expenses and warranty expenses), imputed inventory carrying costs, and further manufacturing. Finally, in accordance with section 772(d)(3) of the Act, we deducted an amount of profit allocated to the expenses deducted under sections 772(d)(1) and (2) of the Act. *See* the October 31, 2007, Memorandum from Steve Bezirganian, Analyst, through Robert James, Program Manager, entitled ''Analysis Memorandum for Ivaco Rolling Mills 2004 L.P. and Sivaco Ontario, a division of Sivaco Wire Group 2004 L.P.: Carbon and Certain Alloy Steel Wire Rod from Canada (A–122–840)'' (Ivaco Analysis Memorandum).

Normal Value

A. Selection of Comparison Markets

Section 773(a)(1) of the Act directs that NV be based on the price at which the foreign like product is sold in the home market, provided that the merchandise is sold in sufficient quantities (or value, if quantity is inappropriate) and that there is not a particular market situation that prevents a proper comparison with sales to the United States. The statute contemplates that quantities (or value) will normally be considered insufficient if they are less than five percent of the aggregate quantity (or value) of sales of the subject merchandise to the United States. *See* section 773(a)(1) of the Act.

We found that Ivaco had a viable home market for steel wire rod. *See* Ivaco Analysis Memorandum. Ivaco submitted home market sales data for purposes of the calculation of NV. In deriving NV, we made adjustments as detailed in the ''Calculation of Normal Value Based on Comparison Market Prices'' section below.

B. Cost of Production Analysis

Because we disregarded below-cost sales in the most recently completed segment of the proceeding, we had reasonable grounds to believe or suspect that home market sales of the foreign like product by the respondent were made at prices below the cost of production (COP) during the POR. *See Notice of Preliminary Results of Antidumping Duty Administrative Review: Carbon and Certain Alloy Steel Wire Rod from Canada*, 70 FR 41681, 41684 (July 20, 2005) (unchanged in final results, 71 FR 3822 (January 24, 2006)); and section 773(b) of the Act. Therefore, we required Ivaco to file a response to Section D of the Department's Questionnaire.

1. Calculation of Cost of Production

In accordance with section 773(b)(3) of the Act, we calculated the weighted-average COP, by model, based on the sum of materials, fabrication, and general and administrative (G&A) expenses.

2. Test of Comparison Market Sales Prices

We compared the weighted-average COPs for the respondent to its home market sales prices of the foreign like product, as required under section 773(b) of the Act, to determine whether these sales had been made at prices below the COP within an extended period of time (*i.e.*, normally a period of one year) in substantial quantities and whether such prices were sufficient to permit the recovery of all costs within a reasonable period of time. On a model-specific basis, we compared the COP to the home market prices, less any applicable movement charges, discounts, rebates, and direct and indirect selling expenses.

3. Results of the COP Test

We disregard below-cost sales where (1) 20 percent or more of the respondent's sales of a given product during the POR were made at prices below the COP in accordance with sections 773(b)(2)(B) and (C) of the Act, and (2) based on comparisons of price to weighted-average COPs for the POR, we determine that the below-cost sales of the product were at prices which would not permit recovery of all costs within a reasonable time period, in accordance with section 773(b)(2)(D) of the Act. We found that Ivaco made sales below cost and we disregarded such sales where appropriate.

C. Calculation of Normal Value Based on Comparison-Market Prices

We determined NV for Ivaco as follows. We made adjustments to the gross price to account for billing adjustments, and deducted discounts and rebates. We deducted home market packing costs and added U.S. packing costs, in accordance with sections 773(a)(6)(A) and (B) of the Act. We also deducted home market movement expenses pursuant to sections 773(a)(6)(B) of the Act. In addition, we made adjustments for differences in circumstances of sale (COS) pursuant to section 773(a)(6)(C)(iii) of the Act. Specifically, we made adjustments for Ivaco's EP transactions by deducting direct selling expenses incurred for home market sales (*i.e.*, credit expenses and warranty expenses) and adding U.S. direct selling expenses (*i.e.*, credit expenses and warranty expenses). *See* section 773(a)(6)(C)(iii) of the Act, and 19 CFR 351.410(c). Where we compared Ivaco's U.S. sales to home market sales of merchandise, we made adjustments, where appropriate, for physical differences in the merchandise in accordance with section 773(a)(6)(C)(ii) of the Act.

D. Arm's-Length Sales

The respondent reported sales of the foreign like product to affiliated customers. To test whether these sales to affiliated customers were made at arm's length, where possible, we compared the prices of sales to affiliated and unaffiliated customers, net of all movement charges, direct selling expenses, and packing. Where the price to that affiliated party was, on average, within a range of 98 to 102 percent of the price of the same or comparable merchandise sold to the unaffiliated parties at the same level of trade, we determined that the sales made to the affiliated party were at arm's length. *See Modification Concerning Affiliated Party Sales in the Comparison Market*, 67 FR 69186 (November 15, 2002). Ivaco's sales to affiliated parties that were determined not to be at arm's length were disregarded in our comparison to U.S. sales.

E. Calculation of Normal Value Based on Constructed Value

Section 773(a)(4) of the Act provides that, where NV cannot be based on comparison-market sales, NV may be based on constructed value (CV). Accordingly, for those models of steel wire rod for which we could not determine the NV based on comparison-market sales, either because there were no sales of a comparable product or all

sales of the comparison products failed the COP test, we based NV on CV.

Section 773(e)(1) of the Act provides that CV shall be based on the sum of the cost of materials and fabrication for the imported merchandise plus amounts for selling, general, and administrative expenses (SG&A), profit, and U.S. packing expenses. We calculated the cost of materials and fabrication based on the methodology described in the COP section of this notice. We based SG&A and profit on the actual amounts incurred and realized by the respondent in connection with the production and sale of the foreign like product in the ordinary course of trade, for consumption in the comparison market, in accordance with section 773(e)(2)(A) of the Act.

We made adjustments to CV for differences in COS in accordance with section 773(a)(8) of the Act and 19 CFR 351.410. For CEP and EP comparisons, we deducted direct selling expenses incurred for home market sales (*i.e.*, credit expenses and warranty expenses). *See* Section 773(a)(6)(C)(iii) of the Act; and 19 CFR 351.410(c). For EP sales, we added U.S. direct selling expenses (*i.e.*, credit expenses and warranty expenses) to the NV.

F. Level of Trade/Constructed Export Price Offset

In accordance with section 773(a)(1)(B) of the Act, we determine NV based on sales in the comparison market at the same level of trade (LOT) as the EP and CEP sales, to the extent practicable. When there are no sales at the same LOT, we compare U.S. sales to comparison market sales at a different LOT. When NV is based on CV, the NV LOT is that of the sales from which we derive SG&A expenses and profit.

Pursuant to 19 CFR 351.412(c)(2), to determine whether comparison market sales were at a different LOT, we examine stages in the marketing process and selling functions along the chain of distribution between the producer and the unaffiliated (or arm's-length) customers. The Department identifies the LOT based on: the starting price or constructed value (for normal value); the starting price (for EP sales); and the starting price, as adjusted under section 772(d) of the Act (for CEP sales). If the comparison-market sales were at a different LOT and the differences affect price comparability, as manifested in a pattern of consistent price differences between the sales on which NV is based and comparison-market sales at the LOT of the export transaction, we will make an LOT adjustment under section 773(a)(7)(A) of the Act.

Finally, if the NV LOT is more remote from the factory than the CEP LOT and there is no basis for determining whether the differences in LOT between NV and CEP affected price comparability, we will grant a CEP offset, as provided in section 773(a)(7)(B) of the Act. *See, e.g. Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate from South Africa,*, 62 FR 61731, 61732–33 (November 19, 1997).

Ivaco reported home market sales in two channels of distribution: (1) Direct sales by IRM and (2) direct sales by Sivaco Ontario. Ivaco reported U.S. EP sales in two channels of distribution: (1) Direct sales by IRM to U.S. customers and (2) direct sales by Sivaco Ontario to U.S. customers. Finally, Ivaco reported U.S. CEP sales in one channel of distribution: (1) Direct sales by IRM to U.S. customers made from the facilities of unaffiliated U.S. processors or unaffiliated U.S. warehouses. Ivaco claims that all of IRM's home market and U.S. sales are at one LOT, and that all of Sivaco's home market and U.S. sales are at another, more advanced, LOT. Ivaco states that the Department should calculate a LOT adjustment when sales by IRM are matched to sales by Sivaco. Ivaco also states that, if the Department determines that IRM's U.S. CEP sales are at a different LOT from all Ivaco's home market sales, the Department should grant a CEP offset.

To determine whether there were multiple LOTs, we examined the selling functions performed by Ivaco for its customers. We found few differences in selling functions across the various channels of distribution and, based on this examination, we preliminarily determine that Ivaco sold merchandise at one LOT in both markets. *See* the October 31, 2007 memorandum from Steve Bezirganian, through Robert James, to Richard Weible, ''Level of Trade Analysis for Ivaco Rolling Mills 2004 L.P. and Sivaco Ontario, a division of Sivaco Wire Group 2004 L.P.: Carbon and Certain Alloy Steel Wire Rod from Canada (A–122–840).'' Consequently, there is no basis for calculating a level-of-trade adjustment or a CEP offset.

Currency Conversion

We made currency conversions into U.S. dollars in accordance with section 773A of the Act, based on exchange rates in effect on the date of the U.S. sale, as provided by the Federal Reserve Bank.

Preliminary Results of Review

As a result of this review, we preliminarily determine that the following weighted-average margin exists for the period October 1, 2005, through September 30, 2006:

Producer/exporter	Weighted-average margin (percentage)
Ivaco Rolling Mills 2004 L.P.	4.44
Sivaco Ontario, a division of Sivaco Wire Group 2004 L.P.	4.44

In accordance with 19 CFR 351.224(b), the Department will disclose calculations performed within five days of publication of this notice. Interested parties may submit case briefs and/or written comments no later than 30 days after the date of publication of these preliminary results. *See* 19 CFR 351.309(c)(ii). Rebuttal briefs and rebuttals to written comments, limited to issues raised in such briefs or comments, may be filed no later than five days after submission of case briefs. *See* 19 CFR 351.309(d). Parties who submit arguments are requested to submit with the argument (1) a statement of the issues, (2) a brief summary of the arguments, and (3) a table of authorities. Further, parties submitting written comments should provide the Department with an additional copy of the public version of any such comments on diskette. An interested party may request a hearing within 30 days of publication of these preliminary results. *See* 19 CFR 351.310(c). Any hearing, if requested, will be held two days after the date for submission of rebuttal briefs, or the first working day thereafter. The Department will issue the final results of this administrative review, which will include the results of its analysis of issues raised in any such comments, within 120 days of publication of these preliminary results, pursuant to section 751(a)(3) of the Act.

Assessment

Upon completion of this administrative review, pursuant to 19 CFR 351.212(b), the Department will calculate an assessment rate on all appropriate entries. The Department will issue assessment instructions directly to CBP on or after 41 days following the publication of the final results of review, pursuant to 19 CFR 356.8(a). We will calculate importer-specific duty assessment rates on the basis of the ratio of the total amount of antidumping duties calculated for the examined sales to the total entered

value of the examined sales for that importer.[2]

The Department clarified its ''automatic assessment'' regulation on May 6, 2003. *See Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 68 FR 23954 (May 6, 2003) (Assessment Policy Notice). This clarification will apply to entries of subject merchandise during the period of review produced by companies included in these final results of reviews for which the reviewed companies did not know that the merchandise it sold to the intermediary (*e.g.*, a reseller, trading company, or exporter) was destined for the United States. In such instances, we will instruct CBP to liquidate unreviewed entries at the all-others rate if there was no rate calculated in this review for the intermediary involved in the transaction. *See Assessment Policy Notice*, 68 FR at 23954, for a full discussion of this clarification.

Cash Deposit Requirements

The following deposit rates will be effective upon publication of the final results of this administrative review for all shipments of steel wire rod from Canada entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided by section 751(a)(1) of the Act: (1) The cash deposit rates for Ivaco will be the rates established in the final esults of this review, except if a rate is less than 0.5 percent, and therefore *de minimis*, the cash deposit will be zero; (2) for previously reviewed or investigated companies not listed above, the cash deposit rate will continue to be the company-specific rate published for the most recent period; (3) if the exporter is not a firm covered in this review, a prior review, or the less-than-fair-value (LTFV) investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and (4) if neither the exporter nor the manufacturer is a firm covered in this or any previous review conducted by the Department, the cash deposit rate will be 8.11 percent, the ''All Others'' rate established in the LTFV investigation.

These cash deposit requirements, when imposed, shall remain in effect util publication of the final results of the next administrative review.

This notice serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entities during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

These preliminary results are issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: October 31, 2007.

Stephen J. Claeys,

Acting Assistant Secretary for Import Administration.

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BILLING CODE 35–DS–P

[2] According to Ivaco, IRM served as the importer for almost all of the U.S. sales of IRM, and Sivaco Ontario served as the importer for all of the U.S. sales of Sivaco Ontario. Because IRM and Sivaco Ontario are considered part of the same entity, there is in effect only one importer, so only one importer-specific assessment rate has been calculated for application to entries imported by IRM or Sivaco Ontario. In addition, for several reported U.S. sales of IRM, Ivaco indicates it cannot identify the importer. Ivaco states these sales involved galvanized wire rod that was exported to the United States by the U.S. customer. Separate company-specific assessment rates have been calculated for application to entries associated with such transactions. *See* Ivaco Analysis Memorandum.

DEPARTMENT OF COMMERCE

International Trade Administration

[A–201–830]

Preliminary Results of Antidumping Duty Administrative Review: Carbon and Alloy Steel Wire Rod From Mexico

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

SUMMARY: In response to requests by interested parties, the Department of Commerce (''the Department'') is conducting an administrative review of the antidumping duty order on carbon and alloy steel wire rod (''wire rod'') from Mexico for the period of review (''POR'') October 1, 2005, through September 30, 2006.

We preliminarily determine that during the POR, Hylsa Puebla, S.A. de C.V. (''Hylsa'') made sales at less than normal value (''NV''). If these preliminary results are adopted in the final results of this administrative review, we will instruct U.S. Customs and Border Protection (''CBP'') to assess antidumping duties equal to the difference between the export price (''EP'') and NV.

DATES: *Effective Dates:* November 7, 2007.

FOR FURTHER INFORMATION CONTACT: John Conniff or Jolanta Lawska, AD/CVD Operations, Office 3, Import Administration, Room 1870, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–1009 or (202) 482–8362, respectively.

SUPPLEMENTARY INFORMATION:

Background

On October 29, 2002, the Department published in the **Federal Register** the antidumping duty order on wire rod from Mexico; *see Notice of Antidumping Duty Orders: Carbon and Certain Alloy Steel Wire Rod from Brazil, Indonesia, Mexico, Moldova, Trinidad and Tobago, and Ukraine,* 67 FR 65945 (October 29, 2002). On October 2, 2006, the Department published in the **Federal Register** the notice of *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review*, 71 FR 57920 (October 2, 2006).

On October 31, 2006, we received a request for review from petitioners,[1] with respect to Hylsa and Siderurgica Lazaro Cardenas Las Truchas S.A. de C.V. (''Sicartsa''). This review was requested in accordance with 19 CFR 351.213(b)(2).

On November 27, 2006, we published the notice of initiation of this antidumping duty administrative review covering the period October 1, 2005, through September 30, 2006. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 71 FR 68535 (November 27, 2006).

On December 28, 2006, petitioners withdrew their request for a review of Sicartsa pursuant to 19 CFR 351.213(d)(1). On May 25, 2007, we published in the **Federal Register** the notice of rescission for Sicartsa; *see Certain Carbon and Alloy Steel Wire Rod from Mexico: Notice of Partial Rescission of Antidumping Duty Administrative Review*, 72 FR 29300 (May 25, 2007).

On February 5, 2007, Hylsa submitted its section A response to the Department's December 8, 2006, initial questionnaire. On February 12, 2007, Hylsa submitted its sections B–C response to the Department's initial questionnaire. On June 11, 2007, Hylsa submitted its supplemental questionnaire response to the

[1] The petitioners are Mittal Steel USA Inc., Gerdau USA Inc., Nucor Steel Connecticut Inc., Keystone Consolidated Industries, Inc., and Rocky Mountain Steel Mills (collectively ''the petitioners'').

Department's May 4, 2007, questionnaire for sections A–C. On September 6, 2007, Hylsa submitted its second supplemental questionnaire response to the Department's August 23, 2007, questionnaire for sections A–C. On September 20, 2007, Hylsa submitted its third supplemental questionnaire response to the Department's September 10, 2007, questionnaire for sections A–C.

On February 20, 2007, Hylsa submitted its section D response to the Department's December 7, 2007, questionnaire. On July 16, 2007, Hylsa submitted its supplemental questionnaire response to the Department's June 18, 2007, questionnaire for section D. On September 13, 2007, Hylsa submitted its second questionnaire response to the Department's August 23, 2007, questionnaire for section D. On October 10, 2007, Hylsa submitted its third supplemental questionnaire response to the Department's October 3, 2007, questionnaire for section D.

On March 30, 2007, the petitioners submitted comments with respect to Hylsa. On May 17, 2007, the Department published a notice extending the time period for issuing the preliminary results of the fourth administrative review from July 3, 2007, to October 31, 2007. *See Carbon and Certain Alloy Steel Wire Rod from Mexico: Extension of Time Limits for the Preliminary Results of Antidumping Duty Administrative Review*, 72 FR 27801 (May 17, 2007).

Scope of Review

The merchandise subject to this order is certain hot-rolled products of carbon steel and alloy steel, in coils, of approximately round cross section, 5.00 mm or more, but less than 19.00 mm, in solid cross-sectional diameter.

Specifically excluded are steel products possessing the above-noted physical characteristics and meeting the Harmonized Tariff Schedule of the United States (''HTSUS'') definitions for (a) stainless steel; (b) tool steel; (c) high nickel steel; (d) ball bearing steel; and (e) concrete reinforcing bars and rods. Also excluded are (f) free machining steel products (*i.e.*, products that contain by weight one or more of the following elements: 0.03 percent or more of lead, 0.05 percent or more of bismuth, 0.08 percent or more of sulfur, more than 0.04 percent of phosphorus, more than 0.05 percent of selenium, or more than 0.01 percent of tellurium).

Also excluded from the scope are 1080 grade tire cord quality wire rod and 1080 grade tire bead quality wire rod. This grade 1080 tire cord quality rod is defined as: (i) Grade 1080 tire cord quality wire rod measuring 5.0 mm or more but not more than 6.0 mm in cross-sectional diameter; (ii) with an average partial decarborization of no more than 70 microns in depth (maximum individual 200 microns); (iii) having no non-deformable inclusions greater than 20 microns and no deformable inclusions greater than 35 microns; (iv) having a carbon segregation per heat average of 3.0 or better using European Method NFA 04–114; (v) having a surface quality with no surface defects of a length greater than 0.15 mm; (vi) capable of being drawn to a diameter of 0.30 mm or less with 3 or fewer breaks per ton, and (vii) containing by weight the following elements in the proportions shown: (1) 0.78 percent or more of carbon, (2) less than 0.01 percent of aluminum, (3) 0.040 percent or less, in the aggregate, of phosphorus and sulfur, (4) 0.006 percent or less of nitrogen, and (5) not more than 0.15 percent, in the aggregate, of copper, nickel and chromium.

This grade 1080 tire bead quality rod is defined as: (i) Grade 1080 tire bead quality wire rod measuring 5.5 mm or more but not more than 7.0 mm in cross-sectional diameter; (ii) with an average partial decarborization of no more than 70 microns in depth (maximum individual 200 microns); (iii) having no non-deformable inclusions greater than 20 microns and no deformable inclusions greater than 35 microns; (iv) having a carbon segregation per heat average of 3.0 or better using European Method NFA 04–114; (v) having a surface quality with no surface defects of a length greater than 0.2 mm; (vi) capable of being drawn to a diameter of 0.78 mm or larger with 0.5 or fewer breaks per ton; and (vii) containing by weight the following elements in the proportions shown: (1) 0.78 percent or more of carbon, (2) less than 0.01 percent of soluble aluminum, (3) 0.040 percent or less, in the aggregate, of phosphorus and sulfur, (4) 0.008 percent or less of nitrogen, and (5) either not more than 0.15 percent, in the aggregate, of copper, nickel and chromium (if chromium is not specified), or not more than 0.10 percent in the aggregate of copper and nickel and a chromium content of 0.24 to 0.30 percent (if chromium is specified).

For purposes of the grade 1080 tire cord quality wire rod and the grade 1080 tire bead quality wire rod, an inclusion will be considered to be deformable if its ratio of length (measured along the axis—that is, the direction of rolling—of the rod) over thickness (measured on the same inclusion in a direction perpendicular to the axis of the rod) is equal to or greater than three. The size of an inclusion for purposes of the 20 microns and 35 microns limitations is the measurement of the largest dimension observed on a longitudinal section measured in a direction perpendicular to the axis of the rod. This measurement methodology applies only to inclusions on certain grade 1080 tire cord quality wire rod and certain grade 1080 tire bead quality wire rod that are entered, or withdrawn from warehouse, for consumption on or after July 24, 2003.

The designation of the products as ''tire cord quality'' or ''tire bead quality'' indicates the acceptability of the product for use in the production of tire cord, tire bead, or wire for use in other rubber reinforcement applications such as hose wire. These quality designations are presumed to indicate that these products are being used in tire cord, tire bead, and other rubber reinforcement applications, and such merchandise intended for the tire cord, tire bead, or other rubber reinforcement applications is not included in the scope. However, should petitioners or other interested parties provide a reasonable basis to believe or suspect that there exists a pattern of importation of such products for other than those applications, end-use certification for the importation of such products may be required. Under such circumstances, only the importers of record would normally be required to certify the end use of the imported merchandise.

All products meeting the physical description of subject merchandise that are not specifically excluded are included in this scope.

The products under review are currently classifiable under subheadings 7213.91.3010, 7213.91.3090, 7213.91.4510, 7213.91.4590, 7213.91.6010, 7213.91.6090, 7213.99.0031, 7213.99.0038, 7213.99.0090, 7227.20.0010, 7227.20.0020, 7227.20.0090, 7227.20.0095, 7227.90.6051, 7227.90.6053, 7227.90.6058, and 7227.90.6059 of the HTSUS. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of this proceeding is dispositive.[2]

Product Comparisons

In accordance with section 771(16) of the Tariff Act of 1930, as amended (''the Act''), all products produced by the respondents covered by the description

[2] Effective January 1, 2004, CBP reclassified certain HTSUS numbers related to the subject merchandise. See *http://hotdocs.usitc.gov/tariff_chapters_current/toc.html*.

in the ''Scope of Review'' section, above, and sold in Mexico during the POR are considered to be foreign like products for purposes of determining appropriate product comparisons to U.S. sales. We have relied on eight criteria to match U.S. sales of subject merchandise to comparison-market sales of the foreign like product or constructed value (''CV''): grade range, carbon content range, surface quality, deoxidation, maximum total residual content, heat treatment, diameter range, and coating. These characteristics have been weighted by the Department where appropriate. Where there were no sales of identical merchandise in the home market made in the ordinary course of trade to compare to U.S. sales, we compared U.S. sales to the next most similar foreign like product on the basis of the characteristics listed above.

Comparisons to Normal Value

To determine whether sales of wire rod from Mexico were made in the United States at less than NV, we compared the EP to the NV, as described in the ''Export Price'' and ''Normal Value'' sections of this notice. In accordance with section 777A(d)(2) of the Act, we calculated monthly weighted-average prices for NV and compared these to individual U.S. transactions.

Export Price

For the price to the United States, we used EP in accordance with section 772(a) of the Act. We calculated EP when the merchandise was sold by the producer or exporter outside of the United States directly to the first unaffiliated purchaser in the United States prior to importation and when constructed export price was not otherwise warranted based on the facts on the record. We based EP on the packed cost-insurance-freight (''CIF''), ex-factory, free-on-board (''FOB''), or delivered prices to the first unaffiliated customer in, or for exportation to, the United States.

In accordance with section 772(c)(2) of the Act, we made deductions, where appropriate, for movement expenses including inland freight from plant or warehouse to port of exportation, foreign brokerage, handling and loading charges, U.S. brokerage, and U.S. inland freight expenses (freight from port to the customer) and insurance. We also adjusted EP for billing adjustments.

In accordance with 19 CFR 351.401(e)(2) and in keeping with our practice, we added interest, freight, and other revenue (*i.e.*, Mexican and U.S. brokerage and handling) where applicable. *See, e.g., Light-Walled Rectangular Pipe and Tube from Mexico: Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 69 FR 19400, 19406 (April 13, 2004); unchanged in *Light-Walled Rectangular Pipe and Tube From Mexico: Notice of Final Determination of Sales at Less Than Fair Value*, 69 FR 53677 (September 2, 2004).

Normal Value

A. Selection of Comparison Markets

To determine whether there was a sufficient volume of sales in the home market to serve as a viable basis for calculating NV, we compared Hylsa's volume of home market sales of the foreign like product to the volume of its U.S. sales of the subject merchandise. Pursuant to sections 773(a)(1)(B) and 773(a)(1)(C) of the Act, because Hylsa had an aggregate volume of home market sales of the foreign like product that was greater than five percent of its aggregate volume of U.S. sales of the subject merchandise, we determined that the home market was viable.

B. Arm's-Length Test

Hylsa reported sales of the foreign like product to affiliated end-users and affiliated resellers. The Department calculates the NV based on a sale to an affiliated party only if it is satisfied that the price to the affiliated party is comparable to the price at which sales are made to parties not affiliated with the producer or exporter, *i.e.*, sales at arm's-length. *See* 19 CFR 351.403(c). To test whether these sales were made at arm's-length, we compared the starting prices of sales to affiliated and unaffiliated customers net of all movement charges, direct selling expenses, discounts and packing. In accordance with the Department's current practice, if the prices charged to an affiliated party were, on average, between 98 and 102 percent of the prices charged to unaffiliated parties for merchandise identical or most similar to that sold to the affiliated party, we consider the sales to be at arm's-length prices. *See* 19 CFR 351.403(c); *see also Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade*, 67 FR 69186, 69187 (November 15, 2002). Conversely, where sales to the affiliated party did not pass the arm's-length test, all sales to that affiliated party have been excluded from the NV calculation. *Id.* Some of Hylsa's sales did not pass the arm's-length test and were excluded from the NV calculation.

C. Cost of Production (''COP'') Analysis

1. Calculation of COP

Before making any comparisons to NV, we conducted a COP analysis of Hylsa, pursuant to section 773(b) of the Act, to determine whether the respondents' comparison market sales were made below the COP. We calculated the COP based on the sum of the cost of materials and fabrication for the foreign like product, plus amounts for selling, general, and administrative expenses (''SG&A'') and packing, in accordance with section 773(b)(3) of the Act. We adjusted Hylsa's reported general and administrative expenses to account for certain costs. The Department normally includes these costs in the calculation of COP. *See* October 31, 2007, memorandum to the file, ''Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Results—Hylsa Puebla S.A. de C.V.'' from Gina K. Lee, Accountant, to Neal M. Halper, Director, Office of Accounting.

2. Test of Comparison Market Prices

As required under section 773(b)(2) of the Act, we compared the weighted-average COP to the per-unit price of the comparison market sales of the foreign like product, to determine whether these sales had been made at prices below the COP within an extended period of time in substantial quantities, and whether such prices were sufficient to permit the recovery of all costs within a reasonable period of time. In accordance with the statute and the Department's practice, we determined the net comparison market prices for the below-cost test by subtracting from the gross unit price any applicable movement charges, discounts, rebates, direct and indirect selling expenses (also subtracted from the COP), and packing expenses. We also adjusted the gross unit price for billing adjustments and interest revenue. *See* section 773(b) of the Act; *see also Certain Steel Concrete Reinforcing Bars From Turkey: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review and Notice of Intent Not To Revoke in Part*, 69 FR 25063, 25066 (May 5, 2004); unchanged in *Certain Steel Concrete Reinforcing Bars From Turkey: Final Results, Rescission of Antidumping Duty Administrative Review in Part, and Determination Not To Revoke in Part*, 69 FR 64731 (November 8, 2004).

3. Results of the COP Test

Pursuant to section 773(b)(2)(C)(i) of the Act, where less than 20 percent of

sales of a given product were at prices less than the COP, we did not disregard any below-cost sales of that product because we determined that the below-cost sales were not made in ''substantial quantities.'' Where 20 percent or more of a respondent's sales of a given product during the POR were at prices less than the COP, we determined such sales to have been made in ''substantial quantities.'' *See* section 773(b)(2)(C) of the Act. The sales were made within an extended period of time in accordance with section 773(b)(2)(B) of the Act, because they were made over the course of the POR. In such cases, because we compared prices to POR-average costs, we also determined that such sales were not made at prices which would permit recovery of all costs within a reasonable period of time, in accordance with section 773(b)(2)(D) of the Act. Therefore, for Hylsa, for purposes of this administrative review, we disregarded below-cost sales of a given product and used the remaining sales as the basis for determining NV, in accordance with section 773(b)(1) of the Act. *See* the October 31, 2007, memorandum to the file, ''Preliminary Calculation Memorandum for Hylsa S.A. de C.V.'' (''Calculation Memorandum for Hylsa'') from Jolanta Lawska, Case Analyst, Office of AD/CVD Operations III, available in the Central Records Unit (''CRU'') Import Administration, Washington, DC, HCHB Building, Room B for our calculation methodology and results.

D. Calculation of Normal Value Based on Comparison Market Prices

We calculated NV based on ex-works, FOB or delivered prices to comparison market customers. We calculated the starting price taking into account, where necessary, billing adjustments and early payment discounts. Pursuant to section 773(a)(6)(B)(ii) of the Act, we made deductions from the starting price, when appropriate, for handling, loading, inland freight, and inland insurance. In accordance with 19 CFR 351.402, we added interest revenue, where applicable. In accordance with sections 773(a)(6)(A) and (B) of the Act, we added U.S. packing costs and deducted comparison market packing, respectively. In addition, we made circumstance of sale (''COS'') adjustments for direct expenses, including imputed credit expenses, and warranty expenses in accordance with section 773(a)(6)(C)(iii) of the Act.

When comparing U.S. sales with comparison market sales of similar, but not identical, merchandise, we also made adjustments for physical differences in the merchandise in accordance with section 773(a)(6)(C)(ii) of the Act and 19 CFR 351.411. We based this adjustment on the difference in the variable cost of manufacturing for the foreign like product and subject merchandise, using POR-average costs.

Sales of wire rod purchased by the respondents from unaffiliated producers and resold in the comparison market were treated in the same manner described above in the ''Export Price'' section of this notice.

E. Level of Trade

In accordance with section 773(a)(1)(B) of the Act, we determined NV based on sales in the comparison market at the same level of trade as the EP sales, to the extent practicable. When there were no sales at the same LOT, we compared U.S. sales to comparison market sales at a different LOT.

Pursuant to 19 CFR 351.412, to determine whether comparison market sales were at a different LOT, we examined stages in the marketing process and selling functions along the chain of distribution between the producer and the unaffiliated (or arm's-length) customers. If the comparison-market sales were at a different LOT and the differences affect price comparability, as manifested in a pattern of consistent price differences between the sales on which NV is based and comparison-market sales at the LOT of the export transaction, we will make an LOT adjustment under section 773(a)(7)(A) of the Act.

In its questionnaire response, Hylsa did not claim a LOT adjustment. *See* Hylsa's Section A questionnaire response dated February 12, 2007, at page 29. Moreover, based on our analysis of the facts of this administrative review, we preliminarily determine that there is no substantial difference in the selling functions between the sales on which NV is based and the export transactions. All of Hylsa's U.S. sales are reported as EP sales. Thus, we have matched EP sales to sales in the home market without regard to level of trade and made no level of trade adjustment.

For a detailed description of our LOT methodology and a summary of Hylsa's LOT findings for these preliminary results, *see* page 3 of the October 31, 2007, calculation memorandum for Hylsa.

Currency Conversion

For purposes of these preliminary results, we made currency conversions in accordance with section 773A(a) of the Act, based on the official exchange rates published by the Federal Reserve Bank.

Preliminary Results of Review

As a result of our review, we preliminarily determine that the following percentage weighted-average margins exist for the period October 1, 2005, through September 30, 2006:

Manufacturer/exporter	Margin (percent)
Hylsa	17.78

The Department will disclose calculations performed within five days of the date of publication of this notice to the parties of this proceeding in accordance with 19 CFR 351.224(b). An interested party may request a hearing within 30 days of publication of these preliminary results. *See* 19 CFR 351.310(c). Any hearing, if requested, will be held 37 days after the date of publication, or the first working day thereafter, unless the Department alters the date pursuant to 19 CFR 351.310(d). Interested parties may submit case briefs no later than 30 days after the date of publication of these preliminary results of review. *See* 19 CFR 351.310(c). Rebuttal briefs limited to issues raised in the case briefs, may be filed no later than 35 days after the date of publication. *See* 19 CFR 351.310(d). Parties who submit arguments are requested to submit with the argument (1) a statement of the issue, and (2) a brief summary of the argument. Further, parties submitting written comments are requested to provide the Department with an additional copy of the public version of any such comments on diskette. The Department will issue the final results of this administrative review, which will include the results of its analysis of issues raised in any such comments, or at a hearing, within 120 days of publication of these preliminary results.

Assessment Rate

Upon completion of this administrative review, the Department shall determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries. After 41 days of publication of the final results of this administrative review, if any importer-specific *ad valorem* rates calculated in the final results are above *de minimis* (*i.e.*, at or above 0.5 percent), the Department will issue appraisement instructions directly to CBP to assess antidumping duties on appropriate entries. The total customs value is based on the entered value reported for each importer for all U.S. entries of subject merchandise purchased during the POR for consumption in the United States.

The Department clarified its ''automatic assessment'' regulation on May 6, 2003. *See Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 68 FR 23954 (May 6, 2003). This clarification will apply to entries of subject merchandise during the POR produced by the companies included in these preliminary results for which the reviewed companies did not know their merchandise was destined for the United States. In such instances, we will instruct CBP to liquidate unreviewed entries at the ''All Others'' rate if there is no rate for the intermediate company or companies involved in the transaction.

Cash Deposit Requirements

To calculate the cash deposit rate for Hylsa in this administrative review, we divided the total dumping margins by the total net value for this company's sales during the review period.

The following deposit rates will be effective upon publication of the final results of this administrative review for all shipments of wire rod from Mexico entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided by section 751(a)(2)(C) of the Act: (1) The cash deposit rates for the companies listed above will be the rates established in the final results of this review, except if the rate is less than 0.5 percent and, therefore, *de minimis*, the cash deposit will be zero; (2) for previously reviewed or investigated companies not listed above, the cash deposit rate will continue to be the company-specific rate published for the most recent final results in which that manufacturer or exporter participated; (3) if the exporter is not a firm covered in this review, a prior review, or the original less than fair value (''LTFV'') investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent final results for the manufacturer of the merchandise; and (4) if neither the exporter nor the manufacturer is a firm covered in this or any previous review conducted by the Department, the cash deposit rate will be 20.11 percent, the ''All Others'' rate established in the LTFV investigation. *See Notice of Final Determination of Sales at Less than Fair Value: Carbon and Certain Alloy Steel Wire Rod From Mexico*, 67 FR 55800 (August 30, 2002).

These cash deposit requirements, when imposed, shall remain in effect until publication of the final results of the next administrative review.

Notification to Importers

This notice serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

This administrative review is issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: October 31, 2007.

Stephen J. Claeys,

Acting Assistant Secretary for Import Administration.

[FR Doc. E7–21870 Filed 11–6–07; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–274–804]

Carbon and Alloy Steel Wire Rod From Trinidad and Tobago: Final Results of Antidumping Duty Administrative Review

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

SUMMARY: On July 6, 2007, the Department of Commerce (the Department) published the preliminary results of the antidumping duty (AD) administrative review on carbon and alloy steel wire rod (wire rod) from Trinidad and Tobago. This review covers one producer of subject merchandise. The period of review (POR) is October 1, 2005, through September 30, 2006. *See Carbon and Certain Alloy Steel Wire Rod from Trinidad and Tobago; Preliminary Results of Antidumping Duty Administrative Review,* 72 FR 36955 (July 6, 2007) (*Preliminary Results*). Based on our analysis of comments received, these final results do not differ from the preliminary results. The final results are listed below in the *Final Results of Review* section.

DATES: *Effective Dates:* November 7, 2007.

FOR FURTHER INFORMATION CONTACT: Stephanie Moore or Dennis McClure, AD/CVD Operations, Office 3, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–3692 or (202) 482–5973, respectively.

SUPPLEMENTARY INFORMATION:

Background

On July 6, 2007, the Department published the preliminary results of the administrative review of the AD order on wire rod from Trinidad and Tobago. *See Preliminary Results.* This review covers imports of wire rod from Mittal Steel Point Lisas Limited and its affiliates Mittal Steel North America (MSNA) and Walker Wire (Ispat) Inc. (collectively Mittal) during the POR, October 1, 2005, through September 30, 2006. We invited interested parties to comment on the *Preliminary Results.*

On August 6, 2007, we received a case brief from the petitioners: ISG Georgetown Inc., Gerdau Ameristeel U.S. Inc., Keystone Consolidated Industries, Inc., and North Star Steel Texas, Inc. On August 10, 2007, we extended Mittal's deadline for submitting its rebuttal brief. On August 13, 2007, we received Mittal's rebuttal brief.

Scope of the Order

The merchandise subject to this order is certain hot-rolled products of carbon steel and alloy steel, in coils, of approximately round cross section, 5.00 mm or more, but less than 19.00 mm, in solid cross-sectional diameter.

Specifically excluded are steel products possessing the above-noted physical characteristics and meeting the Harmonized Tariff Schedule of the United States (HTSUS) definitions for (a) stainless steel; (b) tool steel; (c) high nickel steel; (d) ball bearing steel; and (e) concrete reinforcing bars and rods. Also excluded are (f) free machining steel products (*i.e.*, products that contain by weight one or more of the following elements: 0.03 percent or more of lead, 0.05 percent or more of bismuth, 0.08 percent or more of sulfur, more than 0.04 percent of phosphorus, more than 0.05 percent of selenium, or more than 0.01 percent of tellurium).

Also excluded from the scope are 1080 grade tire cord quality wire rod and 1080 grade tire bead quality wire rod. This grade 1080 tire cord quality rod is defined as: (i) Grade 1080 tire cord quality wire rod measuring 5.0 mm or more but not more than 6.0 mm in cross-sectional diameter; (ii) with an average partial decarburization of no more than 70 microns in depth (maximum individual 200 microns); (iii) having no non-deformable inclusions greater than 20 microns and no deformable inclusions greater than 35

microns; (iv) having a carbon segregation per heat average of 3.0 or better using European Method NFA 04–114; (v) having a surface quality with no surface defects of a length greater than 0.15 mm; (vi) capable of being drawn to a diameter of 0.30 mm or less with 3 or fewer breaks per ton; and, (vii) containing by weight the following elements in the proportions shown: (1) 0.78 percent or more of carbon, (2) less than 0.01 percent of aluminum, (3) 0.040 percent or less, in the aggregate, of phosphorus and sulfur, (4) 0.006 percent or less of nitrogen, and (5) not more than 0.15 percent, in the aggregate, of copper, nickel and chromium.

This grade 1080 tire bead quality rod is defined as: (i) Grade 1080 tire bead quality wire rod measuring 5.5 mm or more but not more than 7.0 mm in cross-sectional diameter; (ii) with an average partial decarburization of no more than 70 microns in depth (maximum individual 200 microns); (iii) having no non-deformable inclusions greater than 20 microns and no deformable inclusions greater than 35 microns; (iv) having a carbon segregation per heat average of 3.0 or better using European Method NFA 04–114; (v) having a surface quality with no surface defects of a length greater than 0.2 mm; (vi) capable of being drawn to a diameter of 0.78 mm or larger with 0.5 or fewer breaks per ton; and (vii) containing by weight the following elements in the proportions shown: (1) 0.78 percent or more of carbon, (2) less than 0.01 percent of soluble aluminum, (3) 0.040 percent or less, in the aggregate, of phosphorus and sulfur, (4) 0.008 percent or less of nitrogen, and (5) either not more than 0.15 percent, in the aggregate, of copper, nickel and chromium (if chromium is not specified), or not more than 0.10 percent in the aggregate of copper and nickel and a chromium content of 0.24 to 0.30 percent (if chromium is specified).

For purposes of the grade 1080 tire cord quality wire rod and the grade 1080 tire bead quality wire rod, an inclusion will be considered to be deformable if its ratio of length (measured along the axis—that is, the direction of rolling—of the rod) over thickness (measured on the same inclusion in a direction perpendicular to the axis of the rod) is equal to or greater than three. The size of an inclusion for purposes of the 20 microns and 35 microns limitations is the measurement of the largest dimension observed on a longitudinal section measured in a direction perpendicular to the axis of the rod. This measurement methodology applies only to inclusions on certain grade 1080 tire cord quality wire rod and certain grade 1080 tire bead quality wire rod that are entered, or withdrawn from warehouse, for consumption on or after July 24, 2003. *See Carbon and Certain Alloy Steel Wire Rod from Brazil, Canada, Indonesia, Mexico, Moldova, Trinidad and Tobago, and Ukraine: Final Results of Changed Circumstances Review,* 68 FR 64079, 64081 (November 12, 2003).

The designation of the products as ''tire cord quality'' or ''tire bead quality'' indicates the acceptability of the product for use in the production of tire cord, tire bead, or wire for use in other rubber reinforcement applications such as hose wire. These quality designations are presumed to indicate that these products are being used in tire cord, tire bead, and other rubber reinforcement applications, and such merchandise intended for the tire cord, tire bead, or other rubber reinforcement applications is not included in the scope. However, should petitioners or other interested parties provide a reasonable basis to believe or suspect that there exists a pattern of importation of such products for other than those applications, end-use certification for the importation of such products may be required. Under such circumstances, only the importers of record would normally be required to certify the end use of the imported merchandise.

All products meeting the physical description of subject merchandise that are not specifically excluded are included in this scope.

The products under review are currently classifiable under subheadings 7213.91.3010, 7213.91.3090, 7213.91.4510, 7213.91.4590, 7213.91.6010, 7213.91.6090, 7213.99.0031, 7213.99.0038, 7213.99.0090, 7227.20.0010, 7227.20.0020, 7227.20.0090, 7227.20.0095, 7227.90.6051, 7227.90.6053, 7227.90.6058, and 7227.90.6059 of the HTSUS. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of this order is dispositive.

Analysis of Comments Received

The sole issue raised in the case and rebuttal briefs by parties to this administrative review are addressed in the *Issues and Decision Memorandum* to David M. Spooner, Assistant Secretary for Import Administration, from Stephen J. Claeys, Deputy Assistant Secretary (*Decision Memorandum*), which is hereby adopted by this notice. The issue concerns the ''Methodology for Calculating Imputed Expenses for CEP Sales.'' The *Decision Memorandum* is on file in the Central Records Unit in Room B–099 of the main Commerce building, and can also be accessed directly on the Web at *http://www.ia.ita.doc.gov/frn*. The paper copy and electronic version of the *Decision Memorandum* are identical in content.

Final Results of Review

As noted above, there have been no changes from the *Preliminary Results*. However, we have attached a Decision Memorandum to this **Federal Register** notice addressing the methodology used to calculate imputed credit expenses. For further details of the issues addressed in this proceeding, see the *Preliminary Results*.

As a result of this review, we find that the following weighted-average dumping margin exists for the period October 1, 2005, through September 30, 2006:

Producer/ manufacturer	Weighted-average margin
Mittal Steel Point Lisas Limited.	0.40% *(i.e., de minimis)*

Assessment Rates

The Department will determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries, pursuant to section 751(a)(1)(B) of the Tariff Act of 1930, as amended (the Act) and 19 CFR 351.212(b). The Department calculated importer-specific duty assessment rates on the basis of the ratio of the total antidumping duties calculated for the examined sales to the total entered value of the examined sales for that importer. Where the assessment rate is above *de minimis,* we will instruct CBP to assess duties on all entries of subject merchandise by that importer. The Department intends to issue assessment instructions to CBP 15 days after the date of publication of these final results of review.

The Department clarified its ''automatic assessment'' regulation on May 6, 2003 (68 FR 23954). This clarification will apply to entries of subject merchandise during the POR produced by Mittal where Mittal did not know its merchandise was destined for the United States. In such instances, we will instruct CBP to liquidate unreviewed entries at the ''All Others'' rate if there is no rate for the intermediate company(ies) involved in the transaction. For a full discussion of this clarification, see *Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003).

Cash Deposit Requirements

The following deposit requirements will be effective upon publication of the final results of this administrative review for all shipments of wire rod from Trinidad and Tobago, entered or withdrawn from warehouse, for consumption on or after the publication date of these final results, as provided by section 751(a) of the Act: (1) For Mittal no cash deposit will be required; (2) for merchandise exported by producers or exporters not covered in this review, but covered in the less-than-fair-value (LTFV) investigation or a previous review, the cash deposit rate will continue to be the most recent company-specific rate established in the final determination or final results; (3) if the exporter is not a firm covered in this review, a previous review, or the LTFV investigation, but the producer is, the cash deposit rate will be the rate established for the producer of the subject merchandise for the most recent period; and (4) if neither the exporter nor the producer is a firm covered in this review, a previous review, or the LTFV investigation, the cash deposit rate will be 11.40 percent, the ''All Others'' rate established in the investigation. *See Notice of Final Determination of Sales at Less Than Fair Value: Carbon and Certain Alloy Steel Wire Rod From Trinidad and Tobago,* 67 FR 55788 (August 30, 2002). These deposit requirements shall remain in effect until further notice.

Reimbursement of Duties

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the presumption that reimbursement of antidumping duties occurred and the subsequent increase in antidumping duties by the amount of antidumping duties reimbursed.

Administrative Protective Orders

This notice also serves as a reminder to parties subject to administrative protective orders (APOs) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation that is subject to sanction.

We are issuing and publishing these results and notice in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: November 1, 2007.

David M. Spooner,

Assistant Secretary for Import Administration.

[FR Doc. E7–21871 Filed 11–6–07; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–533–845]

Notice of Amended Preliminary Determination of Sales at Less Than Fair Value: Glycine From India

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

DATES: *Effective Date:* November 7, 2007.

SUMMARY: The purpose of this amended preliminary determination is to clarify an inadvertent error in the preliminary determination we issued on October 26, 2007, that imports of glycine from India are being, or are likely to be, sold in the United States at less than fair value, as provided in section 733(b) of the Tariff Act of 1930, as amended (the Act).

FOR FURTHER INFORMATION CONTACT: George Callen or Richard Rimlinger, AD/CVD Operations, Office 5, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–0180 and (202) 482–4477, respectively.

SUPPLEMENTARY INFORMATION:

Background

We initiated an antidumping investigation on glycine from India. See *Glycine from India, Japan, and the Republic of Korea: Initiation of Antidumping Duty Investigations,* 72 FR 20816 (April 26, 2007). On October 26, 2007, we issued our preliminary determination of sales at less than fair value (not yet published). We stated in our October 26, 2007, preliminary determination that we used total facts available, including an adverse inference, for one firm, Nutracare International/Salvi Chemical Industries (Salvi), which did not respond to our quantity and value (Q&V) questionnaire and, therefore, withheld requested information and significantly impeded this proceeding pursuant to section 776(a) of the Act. We stated further that, because it did not cooperate by not acting to the best of its ability, in reaching our preliminary determination we applied total adverse facts available to Salvi pursuant to section 776(b) of the Act.

There were nine firms in addition to Salvi which did not respond to our Q&V questionnaire and, to clarify our inadvertent error of omission of these firms, we are amending our preliminary determination. The firms which failed to respond to our request for information and for which we are applying adverse facts available in accordance with sections 776(a) and 776(b) of the Act are as follows: Abhiyan Media Pvt. Ltd., Ashok Alco-Chem, Ltd., Bimal Pharma, Pvt., Ltd., Euro Asian Industrial Co., EPIC Enzymes Pharmaceuticals & Industrial, Indian Chemical Industries, Kumar Industries, Sisco Research Laboratories Pvt. Ltd, and Sealink International, Inc.

Amended Preliminary Determination

We preliminarily determine that the following weighted-average dumping margins exist for the period January 1, 2006, through December 31, 2006:

Manufacturer/exporter	Weighted-average margin (percent)
Paras Intermediates Ltd.	0.00
Abhiyan Media Pvt. Ltd.	121.62
Advanced Exports/Aico Laboratories	121.62
Ashok Alco-Chem, Ltd.	121.62
Bimal Pharma, Pvt., Ltd.	121.62
Euro Asian Industrial Co.	121.62
EPIC Enzymes Pharmaceuticals & Industrial	121.62
Indian Chemical Industries	121.62
Kumar Industries	121.62

Manufacturer/exporter	Weighted-average margin (percent)
Nutracare International/Salvi Chemical Industries	121.62
Sisco Research Laboratories Pvt. Ltd.	121.62
Sealink International, Inc.	121.62
All Others	45.82

Suspension of Liquidation

In accordance with section 733(d) of the Act, we will instruct U.S. Customs and Border Protection (CBP) to suspend liquidation of all entries of glycine from India that are entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**. We will instruct CBP to require a cash deposit or the posting of a bond equal to the weighted-average margin, as indicated in the chart above, as follows: (1) The rates for the mandatory respondents except Paras will be the rates we have determined in this preliminary determination; (2) if the exporter is not a firm identified in this investigation but the producer is, the rate will be the rate established for the producer of the subject merchandise; (3) the rate for all other producers or exporters will be 45.82 percent. These suspension-of-liquidation instructions will remain in effect until further notice.

In accordance with 19 CFR 351.204(e)(2), because the weighted-average margin for Paras is zero, we will not instruct CBP to suspend liquidation of merchandise produced and exported by Paras.

International Trade Commission Notification

In accordance with section 733(f) of the Act, we have notified the ITC of our amended preliminary determination of sales at less than fair value. If our final antidumping determination is affirmative, the ITC will determine whether the imports covered by that determination are materially injuring, or threatening material injury to, the U.S. industry. The deadline for the ITC's determination would be the later of 120 days after the date of the preliminary determination or 45 days after the date of our final determination.

Public Comment

Interested parties are invited to comment on the amended preliminary determination. Interested parties may submit case briefs to the Department no later than seven days after the date of the issuance of the final verification report in this proceeding. Rebuttal briefs, the content of which is limited to the issues raised in the case briefs, must be filed within five days from the deadline for the submission of case briefs. Executive summaries should be limited to five pages total, including footnotes. Further, we request that parties submitting briefs and rebuttal briefs provide us with a copy of the public version of such briefs on diskette.

Section 774 of the Act provides that the Department will hold a hearing to afford interested parties an opportunity to comment on arguments raised in case or rebuttal briefs, provided that such a hearing is requested by an interested party. If a request for a hearing is made in this investigation, the hearing normally will be held two days after the deadline for submission of the rebuttal briefs at the U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230. Parties should confirm by telephone the time, date, and place of the hearing 48 hours before the scheduled time. Interested parties who wish to request a hearing, or to participate if one is requested, must submit a written request within 30 days of the publication of this notice. Requests should specify the number of participants and provide a list of the issues to be discussed. Oral presentations will be limited to issues raised in the briefs. We will make our final determination within 75 days after the date of the preliminary determination.

This determination is issued and published pursuant to sections 733(f) and 777(i)(1) of the Act.

Dated: November 1, 2007.

David M. Spooner,

Assistant Secretary for Import Administration.

[FR Doc. E7–21872 Filed 11–6–07; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–533–845]

Notice of Preliminary Determination of Sales at Less Than Fair Value: Glycine From India

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

DATES: *Effective Dates:* November 7, 2007.

SUMMARY: We preliminarily determine that imports of glycine from India are being, or are likely to be, sold in the United States at less than fair value, as provided in section 733(b) of the Tariff Act of 1930, as amended (the Act). Interested parties are invited to comment on this preliminary determination. We will make our final determination within 75 days after the date of this preliminary determination.

FOR FURTHER INFORMATION CONTACT: George Callen or Kristin Case, AD/CVD Operations, Office 5, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–0180 and (202) 482–3174, respectively.

SUPPLEMENTARY INFORMATION:

Background

On April 26, 2007, the Department of Commerce (the Department) published in the **Federal Register** the initiation of an antidumping investigation on glycine from India. See *Glycine from India, Japan, and the Republic of Korea: Initiation of Antidumping Duty Investigations,* 72 FR 20816 (April 26, 2007) (*Initiation Notice*). The Department set aside a period for all interested parties to raise issues regarding product coverage. See *Initiation Notice,* 72 FR at 20817. We did not receive comments regarding product coverage from any interested party.

On May 17, 2007, we issued the quantity-and-value (Q&V) questionnaire to all companies identified in the petition. In addition, we issued the Q&V questionnaire to companies in India for which we obtained public information indicating that the companies produced and/or exported glycine or pharmaceuticals. See the June 22, 2007, Memorandum to the File entitled ''Issuance of Quantity and Value Questionnaires to Potential Indian Respondents.'' We received responses from seven companies. Based on an analysis of U.S. Customs and Border Protection (CBP) import statistics of Indian glycine under the Harmonized Tariff Schedule of the United States (HTSUS) number 2922.49.4020,

Advanced Exports/Aico Laboratories (AICO), Nutracare International/Salvi Chemical Industries (Salvi), and Paras Intermediates (Paras) account for more than 75 percent of imports. AICO and Paras responded to our Q&V questionnaire; Salvi did not respond. We selected AICO and Paras as mandatory respondents.

On May 25, 2007, the International Trade Commission (ITC) published its affirmative preliminary determination that there is a reasonable indication that an industry in the United States is materially injured by reason of imports of glycine from India. See *Glycine from India, Japan, and Korea,* 72 FR 29352 (May 25, 2007).

Period of Investigation

The period of investigation is January 1, 2006, through December 31, 2006.

Scope of Investigation

The merchandise covered by this investigation is glycine, which in its solid, *i.e., crystallized,* form is a free-flowing crystalline material. Glycine is used as a sweetener/taste enhancer, buffering agent, reabsorbable amino acid, chemical intermediate, metal complexing agent, dietary supplement, and is used in certain pharmaceuticals. The scope of this investigation covers glycine in any form and purity level. Although glycine blended with other materials is not covered by the scope of this investigation, glycine to which relatively small quantities of other materials have been added is covered by the scope. Glycine's chemical composition is $C_2H_5NO_2$ and is normally classified under subheading 2922.49.4020 of the HTSUS.

The scope of this investigation also covers precursors of dried crystalline glycine, including, but not limited to, glycine slurry, *i.e.*, glycine in a non-crystallized form, and sodium glycinate. Glycine slurry is classified under the same HTSUS subheading as crystallized glycine (2922.49.4020) and sodium glycinate is classified under subheading HTSUS 2922.49.8000.

While HTSUS subheadings are provided for convenience and CBP purposes, our written description of the scope of this investigation is dispositive.

Issuance of Questionnaire

On June 26, 2007, we issued sections A, B, C, D, and E [1] of the antidumping questionnaire to AICO and Paras. Although we received timely responses from Paras, we did not receive timely responses from AICO, as described in detail below, despite granting several extensions of the applicable deadlines.

Use of Facts Otherwise Available

For the reasons discussed below, we determine that the use of facts otherwise available with an adverse inference is appropriate for the preliminary determination with respect to Salvi and AICO.

A. Use of Facts Available

Section 776(a)(2) of the Act provides that, if an interested party withholds information requested by the administering authority, fails to provide such information by the deadlines for submission of the information and in the form or manner requested, subject to sections 782(c)(1) and (e) of the Act, significantly impedes a proceeding under this title, or provides such information but the information cannot be verified as provided in section 782(i) of the Act, the administering authority shall use, subject to section 782(d) of the Act, facts otherwise available in reaching the applicable determination. Section 782(d) of the Act provides that, if the administering authority determines that a response to a request for information does not comply with the request, the administering authority shall promptly inform the responding party and provide an opportunity to remedy the deficient submission. Section 782(e) of the Act states further that the Department shall not decline to consider submitted information if all of the following requirements are met: (1) The information is submitted by the established deadline; (2) the information can be verified; (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination; (4) the interested party has demonstrated that it acted to the best of its ability; and (5) the information can be used without undue difficulties.

Salvi—Salvi did not respond to our Q&V questionnaire and, therefore, did not provide any information necessary to calculate an antidumping margin for the preliminary determination. On June 1, 2007, we sent Salvi a follow-up letter informing it that failure to respond might result in the application of facts available, including an adverse inference, in accordance with section 776 of the Act and pursuant to 19 CFR 351.308. Salvi still did not respond to our Q&V questionnaire and, thus, withheld requested information and significantly impeded this proceeding. Pursuant to section 776(a) of the Act, in reaching our preliminary determination, we have used total facts available for Salvi because it did not provide the data we needed to decide whether it should be selected as a mandatory respondent.

AICO—In this case, AICO did not provide pertinent information we requested that is necessary to calculate an antidumping margin for the preliminary determination. The following is a summary of our attempts to receive a complete response from AICO. On April 19, 2007, we initiated the less-than-fair value (LTFV) investigation of glycine from India. In that initiation, we also initiated an investigation of sales at prices below the cost of production in the comparison market. The statutory date of the preliminary determination at this time was September 6, 2007. On June 26, 2007, we issued our standard questionnaire. The section A response was due on July 16, 2007, 21 days from the issuance of the questionnaire, and the section B, C, and D responses were due on August 2, 2007, 39 days from the issuance of the questionnaire.

On July 10, 2007, AICO requested an extension of 45–60 days to submit its section A response. We granted AICO an additional 14 days, and the revised due date for its section A response was July 30, 2007. Four days after the extended deadline for its section A response and one day after the due date for AICO's sections B, C, and D responses, on August 3, 2007, we received from AICO an incomplete, two-page section A response and a request for a ''4–5 week'' extension of the deadline to submit section B, C, and D responses. We granted AICO a two-week extension until August 16, 2007, for its sections B, C, and D responses and also requested that it file a complete section A response at the same time it submitted its section B, C, and D responses.

On August 16, 2007, we received AICO's revised section A response and a request from AICO for a one-month extension for the submission of its section B, C, and D responses. We gave AICO a two-week extension for its section B, C, and D responses until August 30, 2007. On September 5, 2007, six days after the deadline, we received AICO's section B and C responses and a request for a two-week extension for

[1] Section A of the antidumping duty questionnaire requests general information concerning a company's corporate structure and business practices, the merchandise under investigation, and the manner in which it sells that merchandise in all of its markets. Section B requests a complete listing of all of the company's home-market sales of the foreign like product or, if the home market is not viable, of sales of the foreign like product in the most appropriate third-country market. Section C requests a complete listing of the company's U.S. sales of subject merchandise. Section D requests information about the cost of production of the foreign like product and the constructed value of the merchandise under investigation. Section E requests information on further-manufacturing activities.

its submission of its section D response, *i.e.*, until September 15, 2007.

On September 14, 2007, we informed AICO that, despite the fact that we had given it several extensions and a total of 66 days to respond to our original questionnaire, we had received AICO's section B and C responses six days after the due date. We also informed it that we had received its request for an additional extension of time to respond to section D of our questionnaire six days after the already-extended due date for the section D response. We declined to give AICO any further extensions and returned its sections B and C responses as untimely.

AICO did not file its sections B and C responses in a timely matter despite having been granted multiple extensions of time. Therefore, AICO failed to provide information requested by the established deadlines. See section 776(a)(2)(B) of the Act. Also, AICO did not respond at all to section D of our questionnaire, thereby withholding, among other things, cost-of-production information that is necessary for reaching the applicable determination. See section 776(a)(2)(A) of the Act. In granting extensions, we informed AICO repeatedly that, if we did not receive submissions by the stated deadline, we may reject the submission and use facts available in the preliminary determination.

By not providing its submissions by the applicable deadlines, AICO did not provide information we need to calculate an antidumping margin for the preliminary determination. Thus, in reaching our preliminary determination, pursuant to sections 776(a)(2)(A) and (B) of the Act, we have based the dumping margin on facts otherwise available for AICO.

B. Application of Adverse Inferences for Facts Available

In applying the facts otherwise available, section 776(b) of the Act provides that, if the administering authority finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the administering authority, in reaching the applicable determination under this title, the administering authority may use an inference adverse to the interests of that party in selecting from among the facts otherwise available.

Adverse inferences are appropriate ''to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.'' See Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103–316, vol. 1 (1994) at 870 (*SAA*). Further, ''affirmative evidence of bad faith on the part of a respondent is not required before the Department may make an adverse inference.'' See *Antidumping Duties; Countervailing Duties,* 62 FR 27296, 27340 (May 19, 1997). Pursuant to section 782(d) of the Act, the Department provided Salvi and AICO with notice informing them of the consequences of their failure to respond adequately to the Department's request for information. Nevertheless, Salvi did not respond to the Q&V questionnaire and AICO did not respond adequately, completely, or in a timely manner to the standard questionnaire. This constitutes a failure on the part of Salvi and AICO to cooperate to the best of their ability to comply with requests for information by the Department within the meaning of section 776(b) of the Act. Because Salvi and AICO did not provide information we requested, section 782(e) of the Act is not applicable. Based on the above, the Department has preliminarily determined that Salvi and AICO failed to cooperate to the best of their ability and, therefore, in selecting from among the facts otherwise available, an adverse inference is warranted. See, *e.g., Notice of Final Determination of Sales at Less than Fair Value: Circular Seamless Stainless Steel Hollow Products from Japan,* 65 FR 42985 (July 12, 2000).

C. Selection and Corroboration of Information Used as Facts Available

Where the Department applies adverse facts available because a respondent failed to cooperate by not acting to the best of its ability to comply with a request for information, section 776(b) of the Act authorizes the Department to rely on information derived from the petition, a final determination, a previous administrative review, or other information placed on the record. See also 19 CFR 351.308(c) and the *SAA* at 870. In this case, because we are unable to calculate a margin for Salvi and AICO and because an adverse inference is warranted, we have assigned to Salvi and AICO a margin of 121.62 percent, the highest margin alleged in the petition. See *Petition for the Imposition of Antidumping Duties on Imports of Glycine from India, Japan, and the Republic of Korea* dated March 30, 2007 (*Petition*), and the supplements to the *Petition* filed on behalf of Geo Specialty Chemicals, Inc. (the petitioner), and dated April 3, 12, 13, 17, and 18, 2007, as recalculated in the April 19, 2007, ''Office of AD/CVD Operations Initiation Checklist for the Antidumping Duty Petition on Glycine from the India ''(*Initiation Checklist*) on file in Import Administration's Central Records Unit, Room 1870, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230.

When using facts otherwise available, section 776(c) of the Act provides that, when the Department relies on secondary information (such as information contained in the petition) rather than on information obtained in the course of an investigation, it must corroborate, to the extent practicable, information from independent sources that are reasonably available at its disposal.

The *SAA* clarifies that ''corroborate'' means the Department will satisfy itself that the secondary information to be used has probative value. See *SAA* at 870. As stated in *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, from Japan; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews,* 61 FR 57391, 57392 (November 6, 1996) (unchanged in *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan; Final Results of Antidumping Duty Administrative Reviews and Termination in Part,* 62 FR 11825 (March 13, 1997)), to corroborate secondary information, the Department will examine, to the extent practicable, the reliability and relevance of the information used. The Department's regulations state that independent sources used to corroborate such evidence may include, for example, published price lists, official import statistics and customs data, and information obtained from interested parties during the particular investigation. See 19 CFR 351.308(d) and the *SAA* at 870.

For the purposes of this investigation, to the extent appropriate information was available, we reviewed the adequacy and accuracy of the information in the *Petition* during our pre-initiation analysis and for purposes of this preliminary determination. See *Initiation Checklist.* We examined evidence supporting the calculations in the *Petition* to determine the probative value of the margins alleged in the *Petition* for use as adverse facts available for purposes of this preliminary determination. During our pre-initiation analysis, we examined the key elements of the export-price and

normal-value calculations used in the *Petition* to derive margins. Also, during our pre-initiation analysis, we examined information from various independent sources provided either in the *Petition* or, based on our requests, in supplements to the *Petition*, that corroborates key elements of the export-price and normal-value calculations used in the *Petition* to derive estimated margins.

The petitioner calculated export prices using lost sales reports from sales staff. See the *Petition* at 27–29. The Petitioner adjusted U.S. prices for foreign inland freight, international freight, U.S. inland freight, distributor mark-up, and credit charges using publicly available data. See *Petition* at Exhibits 1–4 and 6. The petitioner arrived at adjusted, per pound, U.S. dollar figures per pound for technical grade glycine, food grade glycine, and pharmaceutical grade glycine, the same unit and currency on which normal value was calculated. See Volume I of the *Petition* at pages 27–29, Volume II of the *Petition* at DOC Exhibits 1–7, the April 12, 2007, supplement to the *Petition*, at Exhibit A, and the April 13, 2007, supplement to the *Petition*, at Exhibit L.

Based on our review of the information contained in the *Petition*, we recalculated net export prices (based on price quotes) by excluding an adjustment to export price for U.S. credit expenses. Because the petitioner did not provide supporting documentation for its home-market interest rate, we did not make an adjustment to normal value for home-market credit expenses. We also recalculated the net export prices based on price quotes by revising the reported value associated with a distributor's mark-up. See Volume II of the *Petition*, at Exhibits DOC–1, DOC–27 through DOC–29, and the April 13, 2007, supplement to the *Petition*, at Exhibits L, M, and N. In addition, we recalculated the distributor's mark-up value using a reseller's average mark-up percentage based on the industry practice of glycine sales in the United States. See *Initiation Checklist*, Attachment VI. Based on our examination of the aforementioned information, we consider the petitioner's calculation of net U.S. prices corroborated.

With respect to normal value, the petitioner stated that, because it does not sell glycine in the Indian market, it does not have specific knowledge of how glycine is sold, marketed, or packaged in the Indian market. Therefore, the petitioner determined the price of glycine sold in the Indian market and the cost of production (COP) based on market research of Indian manufactures of glycine. The petitioner was able to determine domestic Indian prices based on price quotes, obtained by a market researcher, from two Indian manufacturers of glycine. See the Memorandum to the File entitled ''Telephone Call to Market Research Firm Regarding the Antidumping Petition on Glycine from India,'' dated April 19, 2007. These price quotations identified specific terms of sale and payment terms. See Volume II of the *Petition*, at Exhibits DOC–17, DOC–18, DOC–22, and DOC–23. These per pound price quotes were for technical grade glycine, USP grade glycine (food grade), and pharmaceutical grade glycine.

Based on our review of the information contained in the *Petition*, we recalculated normal value for Indian glycine (when based on price quotations) by excluding the adjustment for home-market and U.S. credit expenses. See *Initiation Checklist*.

Based on the petitioner's initial cost model, all of the domestic Indian prices of glycine were found to be above cost, and, therefore, there was no allegation of sales at prices below COP. See, *e.g.*, Volume I of the *Petition*, at page 33, Volume II of the *Petition*, at Exhibits DOC–17—DOC–20, and the April 13, 2007, supplement to the *Petition*, at pages 2–3 and Exhibits B, F, and I, and the discussion of export price above. In its April 13, 2007, supplement to the *Petition*, in response to questions by the Department regarding cost methodology, however, the petitioner revised its cost-calculation methodology and calculated Indian COP based on publicly available cost information. Based on the new cost methodology, the petitioner re-calculated the cost of USP grade glycine and this resulted in the Indian market prices of USP grade glycine being significantly below the COP for that specific product. The petitioner alleged that these sales in the Indian market did not form an adequate basis for comparison to the U.S. prices and that normal value in those instances should be based on the constructed value of the merchandise. See the April 13, 2007, supplement to the *Petition*, at 5 and Exhibit I, and Volume II of the *Petition*, at Exhibits DOC–17 and DOC–18.

Further, because this methodology provided information demonstrating reasonable grounds to believe or suspect that sales of glycine in India were made at prices below the fully absorbed COP within the meaning of section 773(b) of the Act, the petitioner requested that the Department conduct a cost investigation for respondents in India. See the April 13, 2007, supplement to the *Petition*, at 5, Exhibit I, and Volume II of the *Petition* at Exhibits DOC–17 and DOC–18.

Further, section 773(b)(1) of the Act requires that the Department have ''reasonable grounds to believe or suspect'' that below-cost sales have occurred before initiating such an investigation. Reasonable grounds exist when an interested party provides specific factual information on costs and prices, observed or constructed, indicating that sales in the foreign market in question are at below-cost prices. See section 773(b)(2)(A) of the Act.

Pursuant to section 773(b)(3) of the Act, COP consists of the cost of manufacturing (COM), selling, general, and administrative (SG&A) expenses, and packing expenses. To calculate the COM, the petitioner multiplied the usage quantity of each input needed to produce one metric ton (MT) of glycine by the value of that input. The petitioner obtained all of the quantity and value data it used to calculate the COM from public sources. The petitioner obtained the input-usage factors from the public record of the 1997–1998 administrative review of glycine from the People's Republic of China (PRC). See *Initiation Notice*, 72 FR 20819. The petitioner asserted that the producer in the PRC 1997–1998 review produced glycine by the same production method that producers in India use. The petitioner obtained the values for the inputs from various public sources. The petitioner calculated factory overhead, SG&A, and the financial-expense ratios based on the Indian surrogate ratios that the Department used in the preliminary results of the 2005–2006 administrative review of the antidumping duty order on glycine from the PRC. Where the Department used constructed value to determine normal value in that review, the petitioner added an amount for profit from the same financial statements the Department used.

We adjusted petitioner's calculation of SG&A expenses to apply the SG&A rate to COM inclusive of factory overhead. We did not include a separate financial-expense amount as the petitioner did because the SG&A ratio already included financial expense. See the *Initiation Checklist* for a full description of the petitioner's methodology and the adjustments the Department made to the petitioner's calculations.

Because it alleged sales below cost, pursuant to sections 773(a)(4), (b) and (e) of the Act, the petitioner also based normal value for Indian sales of a certain grade glycine on constructed

value. The petitioner calculated constructed value using the same COM, SG&A, and financial-expense figures it used to compute the COP. Consistent with section 773(e)(2) of the Act, the petitioner included an amount for profit in constructed value. See the April 13, 2007, supplement to the *Petition*, pages 1–5, Exhibit I.

The petitioner obtained the values for the inputs from various public sources. Specifically, the petitioner valued raw materials using import statistics in the World Trade Atlas for the year 2006, exclusive of imports from non-market and heavily subsidized economies, which is the latest Indian import data available. See *Initiation Checklist* at 9. The petitioner valued labor costs using the average per-hour wages for India for 2004 using the International Labour Organization's Yearbook of Labour Statistics and per-capita gross national income obtained from the World Bank. The petitioner did not adjust the labor data for wage inflation. See *Initiation Checklist* at 10. The petitioner valued electricity and water consumption using data from page 43 of the Key World Energy Statistics 2003, published by the International Energy Agency, which were attached to the 2005–2006 *Preliminary Results of Antidumping Duty Administrative Review and Preliminary Rescission of Glycine from the People's Republic of China, Surrogate Value Memo,* at Exhibit 6, dated April 2, 2007. The petitioner did not adjust the electricity data for inflation. See *Initiation Checklist* at 10.

Because the petitioner demonstrated, and we confirmed, the validity of the input-usage quantities it used in its COP/constructed-value build-up, used public sources of information, such as official import statistics, that we confirmed were accurate to value inputs of production, and used documents that were used in the Department's prior decisions and that we consider to be accurate to compute factory overhead, SG&A, financial expense, and profit, we consider the petitioner's calculation of normal value corroborated. Further, we consider the petitioner's calculation of normal value corroborated because the bulk of the calculations relied on publicly available information or import statistics which do not require further corroboration. Therefore, because we confirmed the accuracy and validity of the information underlying the derivation of margins in the *Petition* by examining source documents as well as publically available information, we preliminarily determine that the margins in the *Petition* are reliable for the purposes of this investigation.

In making a determination as to the relevance aspect of corroboration, the Department will consider information reasonably at its disposal as to whether there are circumstances that would render a margin not relevant. Where circumstances indicate that the selected margin is not appropriate as adverse facts available, the Department will disregard the margin and determine an appropriate margin. For example, in *Fresh Cut Flowers from Mexico: Final Results of Antidumping Duty Administrative Review,* 61 FR 6812 (February 22, 1996), the Department disregarded the highest margin as ''best information available'' (the predecessor to ''facts available'') because the margin was based on another company's uncharacteristic business expense that resulted in an unusually high dumping margin.

In *Am. Silicon Techs.* v. *United States,* 273 F. Supp. 2d 1342, 1346 (CIT 2003), the court found that the adverse facts-available rate bore a ''rational relationship'' to the respondent's ''commercial practices'' and was, therefore, relevant. In the pre-initiation stage of this investigation, we confirmed that the calculation of margins in the *Petition* reflects commercial practices of the particular industry during the period of investigation. Further, no information has been presented in the investigation that calls into question the relevance of this information. As such, we preliminarily determine that the highest margin in the *Petition*, which we determined during our pre-initiation analysis was based on adequate and accurate information and which we have corroborated for purposes of this preliminary determination, is relevant as the adverse facts-available rate for Salvi and AICO in this investigation.

Similar to our position in *Polyethylene Retail Carrier Bags from Thailand: Preliminary Results of Antidumping Duty Administrative Review,* 71 FR 53405 (September 11, 2006) (unchanged in *Polyethylene Retail Carrier Bags from Thailand: Final Results of Antidumping Duty Administrative Review,* 72 FR 1982 (January 17, 2007)), because this is the first proceeding involving Salvi and AICO, there are no probative alternatives. Accordingly, by using information that was corroborated in the pre-initiation stage of this investigation and preliminarily determined to be relevant to Salvi and AICO in this investigation, we have corroborated the adverse facts-available rate ''to the extent practicable.'' See section 776(c) of the Act, 19 CFR 351.308(d), and *NSK Ltd.* v. *United States,* 346 F. Supp. 2d 1312, 1336 (CIT 2004), which states, ''pursuant to the 'to the extent practicable' language * * * the corroboration requirement itself is not mandatory when not feasible.'' Therefore, we find that the estimated margin of 121.62 percent in the *Initiation Notice* has probative value. Consequently, in selecting a rate to apply as adverse facts available, with respect to Salvi and AICO, we have applied the margin rate of 121.62 percent, the highest estimated dumping margin set forth in the notice of initiation. See *Initiation Notice*, 72 FR 20820.

Fair-Value Comparision

Paras was the sole selected respondent which provided timely responses to all sections of our questionnaire and supplemental questionnaires. We have calculated a margin for Paras using the information and methodology we describe below.

Comparison-Market Sales

In order to determine whether there was a sufficient volume of sales of glycine in the comparison market to serve as a viable basis for calculating the normal value, we compared the volume of Paras's home-market sales of the foreign like product to its volume of the U.S. sales of the subject merchandise in accordance with section 773(a)(1) of the Act. Paras's quantity of sales in the home market was greater than five percent of its sales to the U.S. market. Based on this comparison of the aggregate quantities of the sales in comparison market (India) and the United States and absent any information that a particular market situation in the exporting country did not permit a proper comparison, we determined that the quantity of the foreign like product sold by the respondent in the exporting country was sufficient to permit a proper comparison with the sales of the subject merchandise to the United States, pursuant to section 773(a)(1) of the Act. Thus, we determined that Paras's home market was viable during the period of investigation. Therefore, in accordance with section 773(a)(1)(B)(i) of the Act, we based normal value for the respondent on the prices at which the foreign like product was first sold for consumption in the exporting country in the usual commercial quantities and in the ordinary course of trade and, to the extent practicable, at the same level of trade as the U.S. sales.

Export Price

We calculated export price in accordance with section 772(a) of the Act because Paras sold the merchandise

to unaffiliated purchasers in the United States prior to importation. We based export price on the packed, delivered, duty-unpaid price to the unaffiliated purchasers in the United States. We made deductions from the starting price for movement expenses in accordance with section 772(c)(2)(A) of the Act. We added duty drawback to the gross unit price. See section 772(c)(1)(B) of the Act.

Product Comparisons

In accordance with section 771(16) of the Act, we considered all products covered by the scope of the order which were produced and sold by Paras in the home market during the period of investigation to be foreign like products for the purpose of determining appropriate product comparisons to glycine sold in the United States. We compared U.S. sales to sales made in the comparison market during the period of investigation.

We found there were sales of identical merchandise in the comparison market made in the ordinary course of trade to compare to Paras's U.S. sales. In making product comparisons, we defined identical foreign like products based on the physical characteristics reported by Paras in the following order of importance: type, grade, specification, and nominal grade. For more information, see ''Analysis Memorandum of Paras Intermediates, Pvt. Ltd., for the Preliminary Determination of the Less-Than-Fair-Value Investigation on Glycine from India'' dated October 26, 2007 (*Prelim Memo*).

Cost of Production

Based on allegations contained in the petition and in accordance with section 773(b)(2)(A)(i) of the Act, we found reasonable grounds to believe or suspect that glycine sales were made in India at prices below the COP. See *Initiation Notice,* 72 FR at 20818. As a result, the Department has conducted an investigation to determine whether Paras made home-market sales at prices below its COP during the period of investigation within the meaning of section 773(b) of the Act. For Paras, we conducted the COP analysis as described below. We were unable to conduct a cost investigation of Salve and AICO because of their failure to respond to our questionnaire in a timely manner.

In accordance with section 773(b)(3) of the Act, we calculated the COP based on the sum of the costs of materials and labor employed in producing the foreign like product, the SG&A expenses, and all costs and expenses incidental to packing the merchandise. In our COP analysis, we used the home-market sales and COP information Paras provided in its questionnaire responses, including its home-market and COP databases. The Department issued a detailed supplemental section D questionnaire on October 9, 2007, to Paras to address various questions and fundamental issues, including transactions with affiliated parties and further processing of imported materials, after reviewing the original section D response dated August 27, 2007. The due date for the response to the supplemental questionnaire is October 30, 2007, which is later than the statutory deadline for this preliminary determination. Upon receipt of a response from Paras, we will analyze these issues, provide a memorandum discussing the results of our analysis to the respondents and the petitioner, and allow the parties to comment prior to the final determination.

After calculating the COP and in accordance with section 773(b)(1) of the Act, we tested home-market sales of the foreign like product to determine whether they were made at prices below the COP within an extended period of time in substantial quantities and whether such prices permitted the recovery of all costs within a reasonable period of time. The home-market prices were exclusive of any applicable movement charges, billing adjustments, discounts, and indirect selling expenses. Pursuant to section 773(b)(2)(C) of the Act, where less than 20 percent of Paras's sales of a given product were at prices less than the COP, we did not disregard any below-cost sales of that product because the below-cost sales were not made in substantial quantities within an extended period of time. Where 20 percent or more of Paras's sales of a given product were at prices less than the COP, we disregarded the below-cost sales of that product because we determined that the below-cost sales were made in substantial quantities within an extended period of time, pursuant to sections 773(b)(2)(B) and (C) of the Act and because, based on comparisons of prices to weighted-average COPs for the period of investigation, we determined that these below-cost sales were made at prices which would not permit recovery of all costs within a reasonable period of time in accordance with section 773(b)(2)(D) of the Act. See *Prelim Memo.* Consequently, we disregarded Paras's below-cost sales of products where 20 percent or more of the product were at prices less than the COP and used the remaining sales as the basis for determining normal value, in accordance with section 773(b)(1) of the Act.

Normal Value

We based normal value for Paras on the prices of the foreign like products sold to its comparison-market customers. When applicable, we made adjustments for differences in packing and for movement expenses in accordance with sections 773(a)(6)(A) and (B) of the Act. In addition, we made adjustments for differences in circumstances of sale in accordance with section 773(a)(6)(C)(iii) of the Act and 19 CFR 351.410. For comparisons to export price, we made circumstance-of-sale adjustments by deducting home-market direct selling expenses incurred on home-market sales from, and adding U.S. direct selling expenses to, normal value.

Level of Trade

In accordance with section 773(a)(1)(B)(i) of the Act, to the extent practicable, we determined normal value based on sales in the home market at the same level of trade as the export-price sales. Pursuant to 19 CFR 351.412(c)(1), the normal-value level of trade is based on the starting price of the sales in the home market or, when normal value is based on constructed value, the starting price of the sales from which we derive SG&A expenses and profit. For export-price sales, the U.S. level of trade is based on the starting price of the sales to the U.S. market.

To determine whether normal-value sales are at a different level of trade than the export-price sales, the Department examines stages in the marketing process and selling functions along the chain of distribution between the producer and the customer. If the comparison-market sales are at a different level of trade than the export-price sales and the difference affects price comparability, as manifested by a pattern of consistent price differences between comparison-market sales at the normal-value level of trade and comparison-market sales at the level of trade of the export transaction, the Department makes a level-of-trade adjustment under section 773(a)(7)(A) of the Act. See *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate from South Africa,* 62 FR 61731, 61732 (November 19, 1997).

In determining whether Paras made sales at different levels of trade, we obtained information from Paras regarding the marketing stages for the reported U.S. and home-market sales,

including a description of the selling activities it performed for each channel of distribution. Generally, if the reported levels of trade are the same, the selling functions and activities of the seller at each level of distribution should be similar. Conversely, if a party reports that levels of trade are different for different groups of sales, the selling functions and activities of the seller for each distribution group should be dissimilar.

Export-Price Sales

Sales Process and Marketing Support

Paras reported export-price sales to the United States through two channels of distribution, end-users and traders. We examined the chain of distribution and the selling activities associated with sales reported by Paras to these two channels of distribution in the United States. Based on Paras's response, we determined that it provided relatively equal levels of support for most sales-process and marketing-support functions. These functions include, among other functions, sales forecasting, advertising, and sales promotion. It provided less training for end-users than it did for traders and slightly less inventory maintenance for end-users.

Paras did not report any billing adjustments, early-payment discounts, quantity discounts, or rebates for its sales to the United States. Based on the limited information we received from Paras, we determine that the degree of sales process and marketing support provided is medium.

Freight and Delivery

Paras provided less freight and delivery for end-users. For traders, Paras may ship, at the trader's request, the order directly to the trader's customers. We determine that the degree of freight and delivery services provided is higher for traders than for end-users.

Warehousing

Paras reported that none of the subject merchandise sold in United States during the period of investigation was shipped to a warehouse or other intermediate location to either channel of distribution.

We found that both distribution channels for sales to the U.S. market were similar with respect to sales process and marketing support but different with respect to freight services. Consequently we find that these channels constituted two distinct levels of trade.

Home-Market Sales

Sales Process and Marketing Support

Paras reported home-market sales during the period of investigation through two channels of distribution, end-users and traders. We examined the chain of distribution and the selling activities associated with sales reported by Paras to these two channels of distribution in the home market. Based on Paras's response, we determine that it provided relatively equal levels of support for most sales-process and marketing-support functions. These functions include, among other functions, sales forecasting, advertising, and sales promotion. It provided less training for end-users than it did for traders, however, as well as less technical assistance and market research for end-users than traders. With respect to inventory maintenance, Paras provided slightly less inventory maintenance for end-users.

Based on the limited information we received from Paras, we determine that the degree of sales process and marketing support provided is medium although it is slightly higher for traders.

Freight and Delivery

Paras provided less freight and delivery for end-users. For traders, Paras may ship, at the trader's request, the order directly to the trader's customers. We determine that the degree of freight and delivery services provided is higher for traders than for end-users.

Warehousing

Paras reported that none of the subject merchandise sold in the home market during the period of investigation was shipped to a warehouse or other intermediate location.

We found that both distribution channels in the home market were similar with respect to sales process and warehousing services but different with respect to freight services. Therefore, we find that these two channels constitute two distinct levels of trade.

Paras reported export-price sales through two channels of distribution. To the extent practicable, we compare normal value at the same level of trade as the U.S. price. The export-price level of trade for end-users is similar to the home-market level of trade for end-users with respect to sales process, freight services, and warehousing services. The export-price level of trade for traders differed from end-users with respect to freight and delivery and warehousing but was similar to the level of trade for home-market traders. We were able to match all export-price sales to identical sales in the home-market but not always at the same level of trade. For those comparison-market sales for which we matched export-price sales at a different level of trade, we found that there was a pattern of price difference and we made a level-of-trade adjustment.

All-Others Rate

Section 735(c)(5)(B) of the Act provides that, where the estimated weighted-averaged dumping margins established for all exporters and producers individually investigated are zero or *de minimis* or are determined entirely under section 776 of the Act, the Department may use any reasonable method to establish the estimated all-others rate for exporters and producers not individually investigated. In this case, the only individually investigated companies have margins which are zero or determined entirely under section 776. Under these circumstances, we have assigned, as the all-others rate, the simple average of the margins in the *Petition.* See *Notice of Final Determinations of Sales at Less Than Fair Value: Certain Cold-Rolled Flat-Rolled Carbon-Quality Steel Products From Argentina, Japan and Thailand,* 65 FR 5520, 5527–28 (February 4, 2000); see also *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Plate in Coil from Canada,* 64 FR 15457 (March 31, 1999). Consistent with our practice, we calculated a simple average of the rates in the *Petition,* as recalculated in the *Initiation Checklist* at Attachment VI and ranged in the *Initiation Notice,* and assigned this rate to all other manufacturers/exporters. See *Initiation Notice,* 72 FR at 20820. For details of these calculations, see the memorandum from George Callen to the File entitled ''Antidumping Duty Investigation on Glycine from India—Analysis Memo for All-Others Rate,'' dated October 26, 2007.

Currency Conversion

Pursuant to section 773A(a) of the Act, we converted amounts expressed in foreign currencies into U.S. dollar amounts based on the exchange rates in effect on the date of the U.S. sale, as reported by the Federal Reserve Bank.

Preliminary Determination

We preliminarily determine that the following weighted-average dumping margins exist for the period January 1, 2006, through December 31, 2006:

Manufacturer/Exporter	Weighted-average margin (percent)
Paras Intermediates Ltd	0.00
Nutracare International/Salvi Chemical Industries	121.62
Advanced Exports/Aico Laboratories	121.62
All Others	45.82

Suspension of Liquidation

In accordance with section 733(d) of the Act, we will instruct CBP to suspend liquidation of all entries of glycine from India that are entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**. We will instruct CBP to require a cash deposit or the posting of a bond equal to the weighted-average margin, as indicated in the chart above, as follows: (1) The rates for the mandatory respondents except Paras (see below) will be the rates we have determined in this preliminary determination; (2) if the exporter is not a firm identified in this investigation but the producer is, the rate will be the rate established for the producer of the subject merchandise; (3) the rate for all other producers or exporters will be 45.82 percent. These suspension-of-liquidation instructions will remain in effect until further notice.

In accordance with 19 CFR 351.204(e)(2), because the weighted-average margin for Paras is zero, we will not instruct CBP to suspend liquidation of merchandise produced and exported by Paras.

International Trade Commission Notification

In accordance with section 733(f) of the Act, we have notified the ITC of our preliminary determination of sales at less than fair value. If our final antidumping determination is affirmative, the ITC will determine whether the imports covered by that determination are materially injuring, or threatening material injury to, the U.S. industry. The deadline for the ITC's determination would be the later of 120 days after the date of this preliminary determination or 45 days after the date of our final determination.

Public Comment

Interested parties are invited to comment on the preliminary determination. Interested parties may submit case briefs to the Department no later than seven days after the date of the issuance of the final verification report in this proceeding. Rebuttal briefs, the content of which is limited to the issues raised in the case briefs, must be filed within five days from the deadline for the submission of case briefs. Executive summaries should be limited to five pages total, including footnotes. Further, we request that parties submitting briefs and rebuttal briefs provide us with a copy of the public version of such briefs on diskette. Section 774 of the Act provides that the Department will hold a hearing to afford interested parties an opportunity to comment on arguments raised in case or rebuttal briefs, provided that such a hearing is requested by an interested party. If a request for a hearing is made in this investigation, the hearing normally will be held two days after the deadline for submission of the rebuttal briefs at the U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230. Parties should confirm by telephone the time, date, and place of the hearing 48 hours before the scheduled time. Interested parties who wish to request a hearing, or to participate if one is requested, must submit a written request within 30 days of the publication of this notice. Requests should specify the number of participants and provide a list of the issues to be discussed. Oral presentations will be limited to issues raised in the briefs. We will make our final determination within 75 days after the date of this preliminary determination.

This determination is issued and published pursuant to sections 733(f) and 777(i)(1) of the Act.

Dated: October 26, 2007.

David M. Spooner,

Assistant Secretary for Import Administration.

[FR Doc. E7–21873 Filed 11–6–07; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–890]

Second Amended Final Results of Antidumping Duty Administrative Review: Wooden Bedroom Furniture From the People's Republic of China

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

SUMMARY: On August 22, 2007, the Department of Commerce (''Department'') published in the **Federal Register** the amended final results of the first administrative review and concurrent new shipper reviews of the antidumping duty order on wooden bedroom furniture from the People's Republic of China (''PRC''). *See Amended Final Results of the Antidumping Duty Administrative Review and New Shipper Reviews: Wooden Bedroom Furniture from the People's Republic of China*, 72 FR 46957 (August 22, 2007) (''*Final Results*'') [1] and accompanying Issues and Decision Memorandum (August 8, 2007) (''Issues and Decision Memo''). The period of review (''POR'') covered June 24, 2004, through December 31, 2005. We are amending our *Final Results* to correct ministerial errors made in the calculation of the antidumping duty margin for Fujian Lianfu Forestry Co./Fujian Wonder Pacific Inc./Fuzhou Huan Mei Furniture Co., Ltd./Jiangsu Dare Furniture Co., Ltd. (collectively, ''Dare Group''), Shanghai Aosen Furniture Co., Ltd. (''Shanghai Aosen''), and Kunwa Enterprise Company (''Kunwa''), pursuant to section 751(h) of the Tariff Act of 1930, as amended (''Act'').

EFFECTIVE DATE: November 7, 2007.

FOR FURTHER INFORMATION CONTACT: Lilit Astvatsatrian, AD/CVD Operations, Office 8, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–6412.

SUPPLEMENTARY INFORMATION:

Background

On August 21, 2007, Petitioners,[2] Dare Group, Shanghai Aosen, and Kunwa filed timely ministerial error allegations with respect to the

[1] As a result of an inadvertent error by the Department in the final results, an incorrect appendix was attached to the notice released on August 8, 2007. The amended final results correct this error and were published in place if the original version released on August, 2007. The original notice was never published in the **Federal Register**.

[2] American Furniture Manufacturers Committee for Legal Trade and Vaughan-Bassett Furniture Company.

Department's antidumping duty margin calculation in the *Final Results*. On August 27, 2007, Petitioners and Dare Group filed timely rebuttal comments.

Scope of Order

The product covered by the order is wooden bedroom furniture. Wooden bedroom furniture is generally, but not exclusively, designed, manufactured, and offered for sale in coordinated groups, or bedrooms, in which all of the individual pieces are of approximately the same style and approximately the same material and/or finish. The subject merchandise is made substantially of wood products, including both solid wood and also engineered wood products made from wood particles, fibers, or other wooden materials such as plywood, oriented strand board, particle board, and fiberboard, with or without wood veneers, wood overlays, or laminates, with or without non-wood components or trim such as metal, marble, leather, glass, plastic, or other resins, and whether or not assembled, completed, or finished.

The subject merchandise includes the following items: (1) Wooden beds such as loft beds, bunk beds, and other beds; (2) wooden headboards for beds (whether stand-alone or attached to side rails), wooden footboards for beds, wooden side rails for beds, and wooden canopies for beds; (3) night tables, night stands, dressers, commodes, bureaus, mule chests, gentlemen's chests, bachelor's chests, lingerie chests, wardrobes, vanities, chessers, chifforobes, and wardrobe-type cabinets; (4) dressers with framed glass mirrors that are attached to, incorporated in, sit on, or hang over the dresser; (5) chests-on-chests,[3] highboys,[4] lowboys,[5] chests of drawers,[6] chests,[7] door chests,[8] chiffoniers,[9] hutches,[10] and armoires; [11] (6) desks, computer stands, filing cabinets, book cases, or writing tables that are attached to or incorporated in the subject merchandise; and (7) other bedroom furniture consistent with the above list.

The scope of the order excludes the following items: (1) Seats, chairs, benches, couches, sofas, sofa beds, stools, and other seating furniture; (2) mattresses, mattress supports (including box springs), infant cribs, water beds, and futon frames; (3) office furniture, such as desks, stand-up desks, computer cabinets, filing cabinets, credenzas, and bookcases; (4) dining room or kitchen furniture such as dining tables, chairs, servers, sideboards, buffets, corner cabinets, china cabinets, and china hutches; (5) other non-bedroom furniture, such as television cabinets, cocktail tables, end tables, occasional tables, wall systems, book cases, and entertainment systems; (6) bedroom furniture made primarily of wicker, cane, osier, bamboo or rattan; (7) side rails for beds made of metal if sold separately from the headboard and footboard; (8) bedroom furniture in which bentwood parts predominate; [12] (9) jewelry armoires; [13] (10) cheval mirrors; [14] (11) certain metal parts; [15] (12) mirrors that do not attach to, incorporate in, sit on, or hang over a dresser if they are not designed and marketed to be sold in conjunction with a dresser as part of a dresser-mirror set; and (13) upholstered beds.[16]

Imports of subject merchandise are classified under subheading 9403.50.9040 of the HTSUS as ''wooden * * * beds'' and under subheading 9403.50.9080 of the HTSUS as ''other * * * wooden furniture of a kind used in the bedroom.'' In addition, wooden headboards for beds, wooden footboards for beds, wooden side rails for beds, and wooden canopies for beds may also be entered under subheading 9403.50.9040 of the HTSUS as ''parts of wood'' and framed glass mirrors may also be entered under subheading 7009.92.5000 of the HTSUS as ''glass mirrors * * * framed.'' This order covers all wooden bedroom furniture meeting the above description, regardless of tariff classification. Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of this proceeding is dispositive.

[3] A chest-on-chest is typically a tall chest-of-drawers in two or more sections (or appearing to be in two or more sections), with one or two sections mounted (or appearing to be mounted) on a slightly larger chest; also known as a tallboy.

[4] A highboy is typically a tall chest of drawers usually composed of a base and a top section with drawers, and supported on four legs or a small chest (often 15 inches or more in height).

[5] A lowboy is typically a short chest of drawers, not more than four feet high, normally set on short legs.

[6] A chest of drawers is typically a case containing drawers for storing clothing.

[7] A chest is typically a case piece taller than it is wide featuring a series of drawers and with or without one or more doors for storing clothing. The piece can either include drawers or be designed as a large box incorporating a lid.

[8] A door chest is typically a chest with hinged doors to store clothing, whether or not containing drawers. The piece may also include shelves for televisions and other entertainment electronics.

[9] A chiffonier is typically a tall and narrow chest of drawers normally used for storing undergarments and lingerie, often with mirror(s) attached.

[10] A hutch is typically an open case of furniture with shelves that typically sits on another piece of furniture and provides storage for clothes.

[11] An armoire is typically a tall cabinet or wardrobe (typically 50 inches or taller), with doors, and with one or more drawers (either exterior below or above the doors or interior behind the doors), shelves, and/or garment rods or other apparatus for storing clothes. Bedroom armoires may also be used to hold television receivers and/or other audio-visual entertainment systems.

[12] As used herein, bentwood means solid wood made pliable. Bentwood is wood that is brought to a curved shape by bending it while made pliable with moist heat or other agency and then set by cooling or drying. See Customs' Headquarters' Ruling Letter 043859, dated May 17, 1976.

[13] Any armoire, cabinet or other accent item for the purpose of storing jewelry, not to exceed 24'' in width, 18'' in depth, and 49'' in height, including a minimum of 5 lined drawers lined with felt or felt-like material, at least one side door (whether or not the door is lined with felt or felt-like material), with necklace hangers, and a flip-top lid with inset mirror. See Issues and Decision Memorandum from Laurel LaCivita to Laurie Parkhill, Office Director, Concerning Jewelry Armoires and Cheval Mirrors in the Antidumping Duty Investigation of Wooden Bedroom Furniture From the People's Republic of China, dated August 31, 2004. *See also Wooden Bedroom Furniture From the People's Republic of China: Notice of Final Results of Changed Circumstances Review and Revocation in Part,* 71 FR 38621 (July 7, 2006).

[14] Cheval mirrors are, i.e., any framed, tiltable mirror with a height in excess of 50'' that is mounted on a floor-standing, hinged base. Additionally, the scope of the order excludes combination cheval mirror/jewelry cabinets. The excluded merchandise is an integrated piece consisting of a cheval mirror, i.e., a framed tiltable mirror with a height in excess of 50 inches, mounted on a floor-standing, hinged base, the cheval mirror serving as a door to a cabinet back that is integral to the structure of the mirror and which constitutes a jewelry cabinet lined with fabric, having necklace and bracelet hooks, mountings for rings and shelves, with or without a working lock and key to secure the contents of the jewelry cabinet back to the cheval mirror, and no drawers anywhere on the integrated piece. The fully assembled piece must be atleast 50 inches in height, 14.5 inches in width, and 3 inches in depth. *See Wooden Bedroom Furniture From the People's Republic of China: Final Results of Changed Circumstances Review and Determination To Revoke Order in Part,* 72 FR 948 (January 9, 2007).

[15] Metal furniture parts and unfinished furniture parts made of wood products (as defined above) that are not otherwise specifically named in this scope (i.e., wooden headboards for beds, wooden footboards for beds, wooden side rails for beds, and wooden canopies for beds) and that do not possess the essential character of wooden bedroom furniture in an unassembled, incomplete, or unfinished form. Such parts are usually classified under the Harmonized Tariff Schedule of the United States (''HTSUS'') subheading 9403.90.7000.

[16] Upholstered beds that are completely upholstered, i.e., containing filling material and completely covered in sewn genuine leather, synthetic leather, or natural or synthetic decorative fabric. To be excluded, the entire bed (headboards, footboards, and side rails) must be upholstered except for bed feet, which may be of wood, metal, or any other material and which are no more than nine inches in height from the floor. *See Wooden Bedroom Furniture From the People's Republic of China: Final Results of Changed Circumstances Review and Determination To Revoke Order in Part,* 72 FR 7013 (February 14, 2007).

Ministerial Errors

A ministerial error is defined in section 751(h) of the Act and further clarified in 19 CFR 351.224(f) as ''an error in addition, subtraction, or other arithmetic function, clerical error resulting from inaccurate copying, duplication, or the like, and any other similar type of unintentional error which the Secretary considers ministerial.''

After analyzing all interested parties' comments, we have determined, in accordance with 19 CFR 351.224(e), that ministerial errors existed in certain calculations for Dare Group and Shanghai Aosen in the *Final Results*. Correction of these errors results in a change to Dare Group's and Shanghai Aosen's final antidumping duty margins. Additionally, the rate change for Dare Group and Shanghai Aosen also affects the cash deposit rates for the companies subject to the administrative review that receive a separate rate. The rate for the PRC-wide entity remains unchanged. Further, we determined that a certain ministerial error existed with respect to our determination not to grant Kunwa a separate rate and, for these amended final results, we have determined that Kunwa has demonstrated its eligibility for a separate rate. For a detailed discussion of these ministerial errors, as well as the Department's analysis, see The Memorandum: Wooden Bedroom Furniture from the People's Republic of China: Analysis of Ministerial Error Allegations, dated November 5, 2007 (''Ministerial Error Allegation Memorandum''). The Ministerial Error Allegation Memorandum is on file in the Central Records Unit, room B–099 in the main Department building.

Therefore, in accordance with section 751(h) of the Act and 19 CFR 351.224(e), we are amending the *Final Results* of the administrative review of wooden bedroom furniture from the PRC. The revised weighted-average dumping margins are detailed below. For company-specific calculations, see ''Analysis Memorandum for the Amended Final Results for Dare Group,'' dated November 5, 2007 and ''Analysis Memorandum for the Amended Final Results for Shanghai Aosen,'' dated November 5, 2007. The revised final weighted-average dumping margins are as follows:

WOODEN BEDROOM FURNITURE FROM THE PRC

Exporter	Weighted-average margin (percent)
Fujian Lianfu Forestry Co. Ltd. /Fujian Wonder Pacific Inc. (Dare Group)	49.60
Fuzhou Huan Mei Furniture Co., Ltd. (Dare Group)	49.60
Jiangsu Dare Furniture Co., Ltd. (Dare Group)	49.60
Fine Furniture (Shanghai) Limited	1.97
Foshan Guanqiu Furniture Co., Ltd.	11.72
Shanghai Aosen Furniture Co., Ltd.	.40
Starcorp Funiture Co., Ltd, Starcorp Furniture (Shanghai) Co., Ltd., Orin Furniture (Shanghai) Co., Ltd., Shanghai Star Furniture Co., Ltd., and Shanghai Xing Ding Furniture Industrial Co., Ltd.	216.01
Ace Furniture & Crafts Ltd. (a.k.a. Deqing Ace Furniture and Crafts Limited)	35.78
Baigou Crafts Factory of Fengkai	35.78
Best King International Ltd.	35.78
Dalian Pretty Home Furniture	35.78
Decca Furniture Limited	35.78
Der Cheng Wooden Works of Factory	35.78
Dongguan Dihao Furniture Co., Ltd.	35.78
Dongguan Hua Ban Furniture Co., Ltd.	35.78
Dongguan Mingsheng Furniture Co., Ltd.	35.78
Dongguan New Technology Import & Export Co., Ltd.	35.78
Dongguan Sunpower Enterprise Co., Ltd	35.78
Dongguan Yihaiwei Furniture Limited	35.78
Kalanter (Hong Kong) Furniture Company Limited	35.78
Furnmart Ltd.	35.78
Guangdong New Four Seas Furniture Manufacturing Ltd.	35.78
Guangzhou Lucky Furniture Co. Ltd.	35.78
Hong Yu Furniture (Shenzhen) Co. Ltd.	35.78
Hung Fai Wood Products Factory, Ltd.	35.78
Hwang Ho International Holdings Limited	35.78
King Kei Furniture Factory	35.78
King Wood Furniture Co., Ltd.	35.78
Kunwa Enterprise Company	35.78
Nantong Yangzi Furniture Co., Ltd.	35.78
Po Ying Industrial Co.	35.78
Profit Force Ltd.	35.78
Qingdao Beiyuan-Shengli Furniture Co., Ltd.	35.78
Qingdao Shenchang Wooden Co., Ltd.	35.78
Red Apple Trading Co. Ltd.	35.78
Shenyang Kunyu Wood Industry Co., Ltd.	35.78
Shenzhen Dafuhao Industrial Development Co., Ltd.	35.78
Shenzhen Shen Long Hang Industry Co., Ltd.	35.78
Sino Concord International Corporation	35.78
Tianjin First Wood Co., Ltd.	216.01
T.J. Maxx International Co., Ltd.	35.78
Top Art Furniture Factory/Sanxiang Top Art Funiture/Ngai Kun Trading	35.78
Top Goal Development Co.	35.78
Transworld (Zhangzhou) Furniture Co. Ltd.	35.78

WOODEN BEDROOM FURNITURE FROM THE PRC—Continued

Exporter	Weighted-average margin (percent)
Wan Bao Chen Group Hong Kong Co. Ltd.	35.78
Winmost Enterprises Limited	35.78
Xilinmen Group Co. Ltd.	35.78
Yongxin Industrial (Holdings) Limited	35.78
Zhongshan Gainwell Furniture Co. Ltd.	35.78
PRC-Wide Rate	216.01

Assessment Rates

The Department has determined, and U.S. Customs and Border Protection (''CBP'') shall assess, antidumping duties on all appropriate entries. For customers/importers of respondents that did not report entered value, we calculated customer/importer-specific antidumping duty assessment amounts based on the ratio of the total amount of antidumping duties calculated for the examined sales of subject merchandise to the total quantity of subject merchandise sold in those transactions. For customers/importers of respondents that reported entered value, we calculated customer-specific antidumping duty assessment amounts based on customer/importer-specific ad valorem rates in accordance with 19 CFR 351.212(b)(1). For the companies receiving a separate rate that were not selected for individual review (i.e., separate rate companies) we will calculate an assessment rate based on the weighted average of the cash deposit rates calculated for the companies selected for individual review excluding any that are zero, de minimis, or based entirely on AFA pursuant to section 735(c)(5)(B) of the Act. The Department intends to issue appropriate assessment instructions directly to CBP 15 days after the date of publication of the second amended final results of these new shipper and administrative reviews.

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of these second amended final results of this administrative review and new shippers for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided for by section 751(a)(2)(C) of the Act: (1) For the exporters listed above, the cash deposit rate will be the rates shown for those companies (except if the rate is de minimis, i.e., less than 0.5 percent, a zero cash deposit will be required for that company); (2) for previously investigated or reviewed PRC and non-PRC exporters not listed above that have separate rates, the cash deposit rate will continue to be the exporter-specific rate published for the most recent period; (3) for all PRC exporters of subject merchandise which have not been found to be entitled to a separate rate, the cash deposit rate will be the PRC-wide rate of 216.01 percent; and (4) for all non-PRC exporters of subject merchandise which have not received their own rate, the cash deposit rate will be the rate applicable to the PRC exporters that supplied that non-PRC exporter. These deposit requirements shall remain in effect until further notice.

These second amended final results are published in accordance with sections 751(h) and 777(i)(1) of the Act.

Dated: November 5, 2007.

Stephen J. Claeys,

Acting Assistant Secretary for Import Administration.

[FR Doc. E7–21955 Filed 11–6–07; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–489–502]

Certain Welded Carbon Steel Standard Pipe From Turkey: Preliminary Results of Countervailing Duty Administrative Review

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

SUMMARY: The Department of Commerce (''the Department'') is conducting an administrative review of the countervailing duty (''CVD'') order on certain welded carbon steel standard pipe from Turkey for the period January 1, 2006, through December 31, 2006. We preliminarily find that the net subsidy rate for the company under review is *de minimis*. *See* the ''Preliminary Results of Review'' section of this notice, *infra*. Interested parties are invited to comment on these preliminary results. (*See* the ''Public Comment'' section, *infra*.)

DATES: *Effective Date:* November 7, 2007.

FOR FURTHER INFORMATION CONTACT: Kristen Johnson, AD/CVD Operations, Office 3, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–4793.

SUPPLEMENTARY INFORMATION:

Background

On March 7, 1986, the Department published in the **Federal Register** the CVD order on certain welded carbon steel pipe and tube products from Turkey. *See Countervailing Duty Order: Certain Welded Carbon Steel Pipe and Tube Products from Turkey,* 51 FR 7984 (March 7, 1986). On March 2, 2007, the Department published a notice of opportunity to request an administrative review of this CVD order. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review,* 72 FR 9505 (March 2, 2007). On March 16, 2007, we received a timely request for review from Borusan Mannesmann Boru Sanayi ve Ticaret A.S. (''BMB''), Borusan Istikbal Ticaret T.A.S. (''Istikbal'') and their affiliates (collectively, the Borusan Group (''Borusan'')), a Turkish producer and exporter of the subject merchandise. On April 27, 2007, the Department initiated an administrative review of the CVD order on certain welded carbon steel standard pipe from Turkey, covering the period January 1, 2006, through December 31, 2006. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 72 FR 20986 (April 27, 2007).

On May 1, 2007, the Department issued a questionnaire to Borusan and the Government of the Republic of Turkey (''the GOT''); we received

Borusan's and the GOT's questionnaire responses on July 5, 2007.

In accordance with 19 CFR 351.213(b), this review covers only those producers or exporters of the subject merchandise for which a review was specifically requested. The only company subject to this review is Borusan. This review covers 11 programs.

Scope of the Order

The products covered by this order are certain welded carbon steel pipe and tube with an outside diameter of 0.375 inch or more, but not over 16 inches, of any wall thickness (pipe and tube) from Turkey. These products are currently provided for under the Harmonized Tariff Schedule of the United States (''HTSUS'') as item numbers 7306.30.10, 7306.30.50, and 7306.90.10. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise is dispositive.

Period of Review

The period for which we are measuring subsidies is January 1, 2006, through December 31, 2006.

Company History

BMB was the only company in the Borusan Group that produced the subject merchandise during the period of review (''POR'').[1] During 2006, all subject merchandise sold to the United States was either sold directly to the U.S. customer by BMB, or first sold by BMB to Istikbal, the affiliated export sales company, and then resold to an unaffiliated U.S. customer.

BMB's shares are majority held by Borusan Mannesmann Boru Yatirim Holding A.S., a holding company owned by Borusan Holding A.S.[2] and by Mannesmannrohren-Werke A.G., a publicly traded company in Germany. Istikbal is majority-owned by Borusan Holding A.S.

Subsidies Valuation Information

Benchmark Interest Rates

To determine whether government-provided loans under review conferred a benefit, the Department uses, where possible, company-specific interest rates for comparable commercial loans. *See* 19 CFR 351.505(a). Where no company-specific benchmark interest rates are available, as is the case in this review, the Department's regulations direct us to use a national average interest rate as the benchmark. *See* 19 CFR 351.505(a)(3)(ii). According to the GOT, however, there is no official national average short-term interest rate available.[3] Therefore, we have calculated the benchmark interest rate for short-term New Turkish Lira (''YTL'') denominated loans based on short-term interest rate data for 2006, as reported by *The Economist.*[4]

To calculate the benchmark, we sourced the short-term interest rate reported in the last weekly publication of *The Economist* for each quarter of 2006, *i.e.,* the March 23, 2006, June 22, 2006, September 28, 2006, and December 19, 2006, editions. We then simple averaged those rates to calculate an annual short-term interest rate for Turkey.[5] We then compared the nominal average interest rate with the interest rates that the company paid against the YTL-denominated Foreign Trade Companies Short-Term Export Credits and Pre-Export Credits. *See* Memorandum to the File concerning the Calculations for the Preliminary Results of the 2006 Review of the Countervailing Duty Order on Certain Welded Carbon Steel Standard Pipe from Turkey, at 2 (November 1, 2007). This methodology is consistent with the Department's practice. *See Final Results of Countervailing Duty Administrative Review: Certain Welded Carbon Steel Standard Pipe from Turkey,* 72 FR 13479 (March 22, 2007) (''*2005 Pipe Final*'') (affirming methodology from the preliminary results, 71 FR 68550, 68551 (November 27, 2006)); *see also,* 2004 Pipe Memorandum at ''Benchmark Interest Rates'' and ''Comment 1: Benchmark Interest Rate for Turkish lira Loans.''

Analysis of Programs

I. Programs Preliminarily Determined To Be Countervailable

A. Deduction From Taxable Income for Export Revenue

Addendum 4108 of Article 40 of the Income Tax Law, dated June 2, 1995, allows companies that operate internationally to claim, directly on their corporate income tax returns, a tax deduction equal to 0.5 percent of the foreign exchange revenue earned from exports and other international activities.[6] The income tax deduction for export earnings may either be taken as a lump sum or be used to cover certain undocumented expenses, which were incurred through international activities, that would otherwise be non-deductible for tax purposes (*e.g.,* expenses paid in cash, such as for lodging, gasoline, and food).

Consistent with prior determinations, we preliminarily find that this tax deduction is a countervailable subsidy. *See 2005 Pipe Final,* 72 FR 13429 (affirming preliminary results, 71 FR at 68552) and 2004 Pipe Memorandum, at ''Deduction from Taxable Income for Export Revenue.'' The deduction provides a financial contribution within the meaning of section 771(5)(D)(ii) of the Tariff Act of 1930, as amended (''the Act''), because it represents revenue forgone by the GOT. The deduction provides a benefit in the amount of the tax savings to the company pursuant to section 771(5)(E) of the Act. It is also specific under section 771(5A)(B) of the Act because its receipt is contingent upon export earnings. In this review, no new information or evidence of changed circumstances has been submitted to warrant reconsideration of the Department's prior findings.

During 2006, the review period, BMB and Istikbal filed separate corporate income tax returns for tax year 2005. Each company utilized the deduction for export earnings with respect to its 2005 income taxes.

The Department typically treats a tax deduction as a recurring benefit in accordance with 19 CFR 351.524(c)(1). To calculate the countervailable subsidy rate for this program, we calculated the tax savings realized by BMB and Istikbal in 2006, as a result of the deduction for export earnings. We then divided that benefit by Borusan's total export sales for 2006. On this basis, we preliminarily determine the net countervailable subsidy for this program to be 0.12 percent *ad valorem.*

[1] BMB was previously named Borusan Birlesik Boru Fabrikalari San ve Tic. (''BBBF''). The company's name was changed to BMB on December 13, 2004. *See Final Results of Countervailing Duty Administrative Review: Certain Welded Carbon Steel Standard Pipe from Turkey,* 71 FR 43111 (July 31, 2006) (''*2004 Pipe Final*''), and accompanying Issues and Decision Memorandum at ''Company Information'' (''2004 Pipe Memorandum'').

[2] Borusan Holding A.S. is owned by the family of Asim Kocabiyik, the company's founder.

[3] *See* GOT's Questionnaire Response, at 19 (July 5, 2007).

[4] In each issue, *The Economist* reports short-term interest data on a percentage per annum basis for select countries.

[5] The short-term YTL interest rates sourced from *The Economist* do not include commissions or fees paid to commercial banks, *i.e.,* they are nominal rates. *See Carbon and Certain Alloy Steel Wire Rod from Turkey; Final Negative Countervailing Duty Determination,* 67 FR 55815 (August 30, 2002) (''*Wire Rod*''), and accompanying Issues and Decision Memorandum, at ''Benchmark Interest Rates'' (''Wire Rod Memorandum'').

[6] These actions include construction, repair, installation, and transportation activities that occur abroad.

B. Foreign Trade Companies Short-Term Export Credits

The Foreign Trade Company (''FTC'') loan program was established by the Export Credit Bank of Turkey (''Export Bank'') to meet the working capital needs of exporters, manufacturer-exporters, and manufacturers supplying exporters. This program is specifically designed to benefit Foreign Trade Corporate Companies (''FTCC'') and Sectoral Foreign Trade Companies (''SFTC'').[7] An FTCC is a company whose export performance was at least US$100 million in the previous year and whose paid in capital is at least YTL 2 million.

To eligible applicants, the Export Bank provides short-term export loans directly to companies in Turkish lira or foreign currency, based on their prior export performance, up to 100 percent of the FOB export commitment. The loan interest rates are set by the Export Bank and the maturity of the loans is usually 180 days for YTL-denominated loans and 360 days for foreign currency-denominated loans. To qualify for an FTC loan, along with the necessary application documents, a company must provide a bank letter of guarantee, equivalent to the loan's principal and interest amount, because the financing is a direct credit from the Export Bank. Istikbal, which has FTC status, was the only Borusan company to receive FTC credits during the POR.

Consistent with previous determinations, we preliminarily find that these loans confer a countervailable subsidy within the meaning of section 771(5) of the Act. *See, e.g., 2005 Pipe Final,* 72 FR 13429 (affirming preliminary results, 71 FR at 68552); and 2004 Pipe Memorandum at ''Foreign Trade Companies Short-Term Export Credits.'' The loans constitute a financial contribution in the form of a direct transfer of funds from the GOT, under section 771(5)(D)(i) of the Act. A benefit exists under section 771(5)(E)(ii) of the Act in the amount of the difference between the payments of interest that Istikbal made on its loans during the POR and the payments the company would have made on comparable commercial loans. The program is also specific in accordance with section 771(5A)(B) of the Act because receipt of the loans is contingent upon export performance. Further, the FTC loans are not tied to a particular export destination. Therefore, we have treated this program as an untied export loan program, which renders it countervailable regardless of whether the loans were used for exports to the United States. *See id.*

Pursuant to 19 CFR 351.505(a)(1), we have calculated the benefit as the difference between the payments of interest that Istikbal made on its FTC loans during the POR and the payments the company would have made on comparable commercial loans.[8] In accordance with section 771(6)(A) of the Act, we subtracted from the benefit amount the fees that Istikbal paid to commercial banks for the required letters of guarantee. We then divided the resulting benefit by Borusan's total export sales for 2006. On this basis, we preliminarily find that the net countervailable subsidy for this program is 0.06 percent *ad valorem.*

C. Pre-Export Credits

This program is similar to the FTC credit program described above; however, companies classified as either FTC or SFTC are not eligible for pre-export loans. Under the pre-export credit program, a company's past export performance is considered in evaluating its eligibility for loans and establishing the credit limit. Specifically, to be eligible for a loan, a company must have exported more than $200,000 of goods in the prior 12-month period. Like FTC loans, the Export Bank directly extends to companies' pre-export loans, which are contingent upon export commitment. The loans, whose interest rates are set by the Export Bank, are denominated in either Turkish lira or foreign currency and have a maximum maturity of 360 and 540 days, respectively. To quality for a pre-export loan, along with necessary application documents, a company must provide a bank letter of guarantee, equivalent to the loan's principal and interest amount. During the POR, BMB paid interest against pre-export loans.

Consistent with previous determinations, we preliminarily find that these loans confer a countervailable subsidy within the meaning of section 771(5) of the Act. *See, e.g., 2005 Pipe Final,* 72 FR 13429 (affirming preliminary results, 71 FR at 68552); and 2004 Pipe Memorandum at ''Pre-Export Credits.'' The loans constitute a financial contribution in the form of a direct transfer of funds from the GOT, under section 771(5)(D)(i) of the Act. A benefit exists under section 771(5)(E)(ii) of the Act in the amount of the difference between the payments of interest that BMB made on the loans during the POR and the payments the company would have made on comparable commercial loans. The program is also specific in accordance with section 771(5A)(B) of the Act because receipt of the loans is contingent upon export performance.

Further, like the FTC loans, these loans are not tied to a particular export destination. Therefore, we have treated this program as an untied export loan program rendering it countervailable regardless of whether the loans were used for exports to the United States. *See id.*

Pursuant to 19 CFR 351.505(a)(1), we have calculated the benefit as the difference between the payments of interest that BMB made on its pre-export loans during the POR and the payments the company would have made on comparable commercial loans.[9] In accordance with section 771(6)(A) of the Act, we subtracted from the benefit amount the fees which BMB paid to commercial banks for the required letters of guarantee. We then divided the resulting benefit by Borusan's total export value for 2006. On this basis, we preliminarily find that the net countervailable subsidy for this program is 0.05 percent *ad valorem.*

II. Program Preliminarily Determined To Not Confer Countervailable Benefits

A. Inward Processing Certificate Exemption

Under the Inward Processing Certificate (''IPC'') [10] program, companies are exempt from paying customs duties and value added taxes (''VAT'') on raw materials and intermediate unfinished goods imported to be used in the production of exported goods. Companies may choose whether to be exempted from the applicable duties and taxes upon importation (*i.e.*, the Suspension System) or have the duties and taxes reimbursed after exportation of the finished goods (*i.e.*, the Drawback System). Under the Suspension System, companies provide a letter of guarantee that is returned to the companies upon fulfillment of the export commitment.

To participate in this program, a company must hold an IPC, which lists the amount of raw materials/ intermediate unfinished goods to be

[7] To promote exports and diversity in products exported, the GOT encouraged small and medium scale enterprises to form SFTC, which comprise five to ten companies that operate together in a similar sector.

[8] *See* ''Benchmark Interest Rates,'' *supra* (discussing the benchmark rates used in these preliminary results).

[9] *See* ''Benchmark Interest Rates,''*supra* (discussing the benchmark rates used in these preliminary results).

[10] During the POR, the IPC was implemented under Resolution No. 2005/8391. A copy of this resolution was submitted by the GOT in its July 5, 2007, Questionnaire Response as Exhibit 23.

imported and the amount of product to be exported. To obtain an IPC, an exporter must submit an application, which states the amount of imported raw material required to produce the finished products and a ''letter of export commitment,'' which specifies that the importer of materials will use the materials to produce exported goods. There are two types of IPCs: a D–1 certificate and a D–3 certificate.[11] During the POR, Borusan utilized D–1 certificates associated with imports of hot-rolled coil and zinc used in the production of carbon steel pipe and tube. Borusan did not utilize any D–3 certificates during the POR.

An IPC specifies the maximum quantity of inputs that can be imported under the program. Under the IPC program, the value of imported inputs may not exceed the value of the exported products. Input/output usage rates listed on an IPC are set by the GOT working in conjunction with Turkey's Exporter Associations, which are quasi-governmental organizations, which represent different industries. The input/output usage rates vary by product and industry and are determined using data from capacity reports submitted by companies that apply for IPCs. The input/output usage rates are subject to periodic review and verification by the GOT. The GOT uses the input/output usage rates to ensure that a company's expected export quantities are sufficient to cover the quantity of inputs imported duty-free under the program.[12] Each time a company imports raw materials on a duty exempt basis, the company must present the IPC to Turkish customs.

Pursuant to 19 CFR 351.519(a)(1)(ii), a benefit exists to the extent that the exemption extends to inputs that are not consumed in the production of the exported product, making normal allowances for waste, or if the exemption covers charges other than imported charges that are imposed on the input. In regard to the VAT exemption granted under this program, pursuant to 19 CFR 351.517(a), in the case of the exemption upon export of indirect taxes, a benefit exists to the extent that the Department determines that the amount exempted exceeds the amount levied with respect to the production and distribution of like products when sold for domestic consumption.

In prior reviews, the Department found that, in accordance with 19 CFR 351.519(a)(4)(i), the GOT has a system in place to confirm which inputs are consumed in the production of the exported product and in what amounts, and that the system is reasonable for the purposes intended. *See 2005 Pipe Final,* 72 FR 13429 (affirming preliminary results, 71 FR at 68552); and 2004 Pipe Memorandum, at ''Inward Processing Certificate Exemption.'' During the POR, under D–1 certificates, Borusan received duty and VAT exemptions on certain imported inputs used in the production of steel pipes and tubes and not duty or VAT refunds. There is no evidence on the record of this review that indicates the amount of exempted inputs imported under the program were excessive or that Borusan used the imported inputs for any other product besides those exported. Further, there is no evidence on the record of this review to warrant a reconsideration of the Department's finding that the GOT's IPC monitoring system is reasonable.

Therefore, consistent with the *2005 Pipe Final* and *2004 Pipe Final,* we preliminarily determine that the tax and duty exemptions, which Borusan received on imported inputs under D–1 certificates of the IPC program, did not confer countervailable benefits as Borusan consumed the imported inputs in the production of the exported product, making normal allowance for waste. We further preliminarily find that the VAT exemption did not confer countervailable benefits on Borusan because the exemption does not exceed the amount levied with respect to the production and distribution of like products when sold for domestic consumption. Further, because Borusan did not import any goods under a D–3 certificate during the POR, we preliminarily determine that this aspect of the IPC program was not used.

III. Programs Preliminarily Determined To Not Be Used

We examined the following programs and preliminarily determine that Borusan did not apply for or receive benefits under these programs during the POR:

A. VAT Support Program (Incentive Premium on Domestically Obtained Goods)[13]

B. Pre-Shipment Export Credits

C. Post-Shipment Export Loans

D. Pre-Shipment Rediscount Loans

E. Subsidized Turkish Lira Credit Facilities

F. Subsidized Credit for Proportion of Fixed Expenditures

G. Regional Subsidies.

Preliminary Results of Review

In accordance with 19 CFR 351.221(b)(4)(i), we have calculated a subsidy rate for Borusan for the period January 1, 2006, through December 31, 2006. We preliminarily determine that the total net countervailable subsidy rate is 0.23 percent *ad valorem,* which is *de minimis*, pursuant to 19 CFR 351.106(c).

The Department intends to issue assessment instructions to U.S. Customs and Border Protection (''CBP'') 15 days after the date of publication of the final results of this review. If the final results remain the same as these preliminary results, the Department will instruct CBP to liquidate without regard to countervailing duties all shipments of subject merchandise produced by Borusan entered, or withdrawn from warehouse, for consumption from January 1, 2006, through December 31, 2006. The Department will also instruct CBP not to collect cash deposits of estimated countervailing duties on all shipments of the subject merchandise produced by Borusan, entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this review.

CBP will continue to collect cash deposits for non-reviewed companies at the most recent company-specific or country-wide rate applicable to the company. Accordingly, the cash deposit rates that will be applied to companies covered by this order but not examined in this review, are those established in the most recently completed administrative proceeding for each company. Those rates shall apply to all non-reviewed companies until a review of a company assigned these rates is requested.

These deposit requirements, when imposed, shall remain in effect until further notice.

[11] For more information on D–3 certificates, *see* GOT's Questionnaire Response, at 38–40 (July 5, 2007); 2004 Pipe Memorandum, at ''Inward Processing Certificate Exemption,'' and Memorandum to Melissa Skinner, Director, AD/CVD Operations, Office 3, from Team regarding Verification of the Questionnaire Responses submitted by the Government of the Republic of Turkey, at 9–12 (March 31, 2006) (the public version of the verification report is available on the public file in the Department's Central Records Unit, room B–099).

[12] For more information on how waste/usage rates are set by the GOT, *see* 2004 Pipe Memorandum, at ''Inward Processing Certificate Exemption''; and GOT's Questionnaire Response, at Exhibit 5, pages 10–11 (July 14, 2006).

[13] Although we found this program to be terminated in *Wire Rod,* residual payments for puchases made prior to the program's termination were permitted. *See* Wire Rod Memorandum, at ''VAT Support Program.''

Public Comment

Pursuant to 19 CFR 351.224(b), the Department will disclose to parties to the proceeding any calculations performed in connection with these preliminary results within five days after the date of the public announcement of this notice. Pursuant to 19 CFR 351.309, interested parties may submit written comments in response to these preliminary results. Unless otherwise indicated by the Department, case briefs must be submitted within 30 days after the date of publication of this notice, pursuant to 19 CFR 351.309(c)(1)(ii). Rebuttal briefs, limited to arguments raised in case briefs, must be submitted no later than five days after the time limit for filing case briefs, unless otherwise specified by the Department, pursuant to 19 CFR 351.309(d)(1). Parties who submit argument in this proceeding are requested to submit with the argument: (1) A statement of the issues, and (2) a brief summary of the argument. Parties submitting case and/or rebuttal briefs are requested to provide the Department copies of the public version on disk. Case and rebuttal briefs must be served on interested parties in accordance with 19 CFR 351.303(f). Also, pursuant to 19 CFR 351.310(c), within 30 days of the date of publication of this notice, interested parties may request a public hearing on arguments to be raised in the case and rebuttal briefs. Unless the Secretary specifies otherwise, the hearing, if requested, will be held two days after the date for submission of rebuttal briefs, that is, 37 days after the date of publication of these preliminary results.

Representatives of parties to the proceeding may request disclosure of proprietary information under administrative protective order no later than 10 days after the representative's client or employer becomes a party to the proceeding, but in no event later than the date the case briefs, under 19 CFR 351.309(c)(ii), are due. *See* 19 CFR 351.305(b)(3). The Department will publish the final results of this administrative review, including the results of its analysis of arguments made in any case or rebuttal briefs.

This administrative review is issued and published in accordance with section 751(a)(1), 777(i)(1) of the Act and 19 CFR 351.221(b)(4).

Dated: November 1, 2007.

David M. Spooner,

Assistant Secretary for Import Administration.

[FR Doc. E7–21874 Filed 11–6–07; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF EDUCATION

Submission of Data by State Educational Agencies

AGENCY: National Center for Education Statistics, Institute of Education Sciences, Department of Education.

ACTION: Notice of dates of submission of State revenue and expenditure reports for fiscal year (FY) 2007 and of revisions to those reports.

SUMMARY: The Secretary announces dates for the submission by State educational agencies (SEAs) of expenditure and revenue data and average daily attendance statistics on ED Form 2447 (the National Public Education Financial Survey (NPEFS)) for FY 2007. The Secretary sets these dates to ensure that data are available to serve as the basis for timely distribution of Federal funds. The U.S. Bureau of the Census (Bureau of the Census) is the data collection agent for the National Center for Education Statistics (NCES). The data will be published by NCES and will be used by the Secretary in the calculation of allocations for FY 2009 appropriated funds.

DATES: The date on which submissions will first be accepted is March 17, 2008. The mandatory deadline for the final submission of all data, including any revisions to previously submitted data, is September 2, 2008.

Addresses and Submission Information: SEAs may mail ED Form 2447 to: Bureau of the Census, ATTENTION: Governments Division, Washington, DC 20233–6800.

SEAs may submit data via the World Wide Web using the interactive survey form at *surveys.nces.ed.gov/ccdnpefs.* If the Web form is used, it includes a digital confirmation page where a pin number may be entered. A successful entry of the pin number serves as a signature by the authorizing official. A certification form also may be printed from the Web site, and signed by the authorizing official and mailed to the Governments Division of the Bureau of the Census, at the address listed in the previous paragraph. This signed form must be mailed within five business days of Web form data submission.

Alternatively, SEAs may hand deliver submissions by 4 p.m. (Eastern Time) to: Governments Division, Bureau of the Census, 4600 Silver Hill Road, Suitland, MD 20746.

If an SEA's submission is received by the Bureau of the Census after September 2, 2008, in order for the submission to be accepted, the SEA must show one of the following as proof that the submission was mailed on or before the mandatory deadline date:

1. A legibly dated U.S. Postal Service postmark.

2. A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

3. A dated shipping label, invoice, or receipt from a commercial carrier.

4. Any other proof of mailing acceptable to the Secretary.

If the SEA mails ED Form 2447 through the U.S. Postal Service, the Secretary does not accept either of the following as proof of mailing:

1. A private metered postmark.

2. A mail receipt that is not dated by the U.S. Postal Service.

Note: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, an SEA should check with its local post office.

FOR FURTHER INFORMATION CONTACT: Ms. Terri Kennerly, Chief, Bureau of the Census, ATTENTION: Governments Division, Washington, DC 20233–6800. Telephone: (301) 763–1559. If you use a telecommunications device for the deaf (TDD), you may call the Federal Relay Service (FRS) at 1–800–877–8339.

Individuals with disabilities may obtain this document in an alternative format (e.g., Braille, large print, audiotape, or computer diskette) on request to: Frank Johnson, National Center for Education Statistics, Institute of Education Sciences, U.S. Department of Education, Washington, DC 20208–5651. Telephone: (202) 502–7362.

SUPPLEMENTARY INFORMATION: Under the authority of section 153(a)(1)(I) of the Education Sciences Reform Act of 2002, 20 U.S.C. 9543, which authorizes NCES to gather data on the financing of education, NCES collects data annually from SEAs through ED Form 2447. The report from SEAs includes attendance, revenue, and expenditure data from which NCES determines the average State per-pupil expenditure (SPPE) for elementary and secondary education, as defined in the Elementary and Secondary Education Act of 1965, as amended (ESEA) (20 U.S.C. 7801(2)).

In addition to utilizing the SPPE data as general information on the financing of elementary and secondary education, the Secretary uses these data directly in calculating allocations for certain formula grant programs, including Title I, Part A of the ESEA, Impact Aid, and Indian Education programs. Other programs, such as the Educational Technology State Grants program (Title II, Part D of the ESEA), the Education for Homeless Children and Youth Program under Title VII of the McKinney-Vento Homeless Assistance Act, the Teacher

Quality State Grants program (Title II, Part A of the ESEA), and the Safe and Drug-Free Schools and Communities program (Title IV, Part A of the ESEA), make use of SPPE data indirectly because their formulas are based, in whole or in part, on State Title I, Part A allocations.

In January 2008, the Bureau of the Census, acting as the data collection agent for NCES, will e-mail to SEAs ED Form 2447 with instructions and request that SEAs submit data to the Bureau of the Census on March 17, 2008, or as soon as possible thereafter. SEAs are urged to submit accurate and complete data on March 17, or as soon as possible thereafter, to facilitate timely processing. Submissions by SEAs to the Bureau of the Census will be checked for accuracy and returned to each SEA for verification. All data, including any revisions, must be submitted to the Bureau of the Census by an SEA not later than September 2, 2008.

Having accurate and consistent information on time is critical to an efficient and fair allocation process and to the NCES statistical process. To ensure timely distribution of Federal education funds based on the best, most accurate data available, NCES establishes, for allocation purposes, September 2, 2008, as the final date by which the NPEFS Web form or ED Form 2447 must be submitted. If an SEA submits revised data after the final deadline that results in a lower SPPE figure, its allocations may be adjusted downward or the Department may request the SEA to return funds. SEAs should be aware that all of these data are subject to audit and that, if any inaccuracies are discovered in the audit process, the Department may seek recovery of overpayments for the applicable programs. If an SEA submits revised data after September 2, 2008, the data also may be too late to be included in the final NCES published dataset.

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.*

Authority: 20 U.S.C. 9543.

Dated: November 2, 2007.

Grover J. Whitehurst,

Director, Institute of Education Sciences.

[FR Doc. E7–21899 Filed 11–6–07; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings # 1

October 31, 2007.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER07–815–002.

Applicants: Midwest Independent Transmission System.

Description: Midwest Independent Transmission System Operator, Inc submits an Amended and Restated Facilities Construction Agreement.

Filed Date: 10/29/2007.

Accession Number: 20071031–0202.

Comment Date: 5 p.m. Eastern Time on Monday, November 19, 2007.

Docket Numbers: ER07–1237–002.

Applicants: L'Anse Warden Electric Co., Up Power Marketing, LLC and L'Anse Warde.

Description: UP Power Marketing LLC submits a revised version of FERC Electric Tariff, Original Volume 1.

Filed Date: 10/26/2007.

Accession Number: 20071031–0155.

Comment Date: 5 p.m. Eastern Time on Friday, November 16, 2007.

Docket Numbers: ER08–92–000.

Applicants: Virginia Electric and Power Company.

Description: Virginia Electric & Power Company dba Dominion Virginia Power submits revised tariff sheets to the open-access transmission tariff implementing a transmission cost of service formula rate.

Filed Date: 10/25/2007.

Accession Number: 20071029–0078.

Comment Date: 5 p.m. Eastern Time on Thursday, November 15, 2007.

Docket Numbers: ER08–93–000.

Applicants: PJM Interconnection, L.L.C.

Description: PJM Interconnection LLC requests waiver of FERC's notice requirements to permit an effective date of 11/21/07.

Filed Date: 10/26/2007.

Accession Number: 20071030–0102.

Comment Date: 5 p.m. Eastern Time on Friday, November 16, 2007.

Docket Numbers: ER08–94–000.

Applicants: Mid-Continent Area Power Pool.

Description: Mid-Continent Area Power Pool submits Third Revised Sheet 107 *et al.* to MAPP Schedule F for filing to FERC.

Filed Date: 10/26/2007.

Accession Number: 20071030–0101.

Comment Date: 5 p.m. Eastern Time on Friday, November 16, 2007.

Docket Numbers: ER08–101–000.

Applicants: PJM Interconnection, L.L.C.

Description: PJM Interconnection, LLC submits an executed Interconnection Service Agreement with Industrial Power Generating Co, LLC *et al.*

Filed Date: 10/29/2007.

Accession Number: 20071031–0205.

Comment Date: 5 p.m. Eastern Time on Tuesday, November 13, 2007.

Docket Numbers: ER08–102–000.

Applicants: Midwest Independent Transmission System.

Description: Midwest Independent Transmission System Operator, Inc submits an Amended Interconnection Agreement with Southern Indiana Gas and Electric Co *et al.*

Filed Date: 10/30/2007.

Accession Number: 20071031–0204.

Comment Date: 5 p.m. Eastern Time on Tuesday, November 20, 2007.

Docket Numbers: ER08–103–000.

Applicants: Wisconsin Public Service Corporation.

Description: Wisconsin Public Service Corp submits Fifth Revised Sheet 227 to Second Revised Rate Schedule FERC 51, effective 1/1/08.

Filed Date: 10/30/2007.

Accession Number: 20071031–0206.

Comment Date: 5 p.m. Eastern Time on Tuesday, November 20, 2007.

Docket Numbers: ER08–104–000.

Applicants: Wisconsin Public Service Corporation.

Description: Wisconsin Public Service Corp submits two revised service agreements with Manitowoc Public Utilities et al under ER08–104.

Filed Date: 10/30/2007.

Accession Number: 20071031–0203.

Comment Date: 5 p.m. Eastern Time on Tuesday, November 20, 2007.

Docket Numbers: ER08–115–000.

Applicants: New York Independent System Operator, Inc.

Description: New York Independent System Operator Inc. *et al.* submits executed amended and restated Standard Large Generator Interconnection Agreement with Airtricity Munnsville Wind Farm, LLC.

Filed Date: 10/29/2007.

Accession Number: 20071031–0201.

Comment Date: 5 p.m. Eastern Time on Monday, November 19, 2007.

Take notice that the Commission received the following electric securities filings:

Docket Numbers: ES07–62–001.

Applicants: AEP Generating Company.

Description: Amended Application Under Section 204 of the FPA for Authorization to Issue Securities of AEP Generating Company *et al.*

Filed Date: 10/30/2007.

Accession Number: 20071030–5025.

Comment Date: 5 p.m. Eastern Time on Wednesday, November 7, 2007.

Docket Numbers: ES07–66–001.

Applicants: Allegheny Generating Company.

Description: Supplemental Submission of Allegheny Generating Company.

Filed Date: 10/26/2007.

Accession Number: 20071026–5037.

Comment Date: 5 p.m. Eastern Time on Wednesday, November 7, 2007.

Docket Numbers: ES07–67–002.

Applicants: National Grid USA.

Description: Second Amendment to Application for Authorization to Issue Securities under Section 204 of the Federal Power Act of National Grid USA.

Filed Date: 10/23/2007.

Accession Number: 20071023–5048.

Comment Date: 5 p.m. Eastern Time on Wednesday, November 7, 2007.

Take notice that the Commission received the following electric reliability filings:

Docket Numbers: RR06–1–012; RR07–1–002; RR07–2–002; RR07–3–002; RR07–4–002; RR07–5–002; RR07–6–002; RR07–7–002; RR07–8–002.

Applicants: North American Electric Reliability Corporation.

Description: Compliance Filing of the North American Electric Reliability Corporation in Response to April 19 2007 Order including Attachments 1 through 10.

Filed Date: 10/30/2007.

Accession Number: 20071030–5030.

Comment Date: 5 p.m. Eastern Time on Tuesday, November 30, 2007.

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.,

Acting Deputy Secretary.

[FR Doc. E7–21835 Filed 11–6–07; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2007–0409; FRL–8156–1]

The Association of American Pesticide Control Officials (AAPCO)/State FIFRA Issues Research and Evaluation Group (SFIREG); Notice of Public Meeting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Association of American Pesticide Control Officials (AAPCO)/State FIFRA Issues Research and Evaluation Group (SFIREG) will hold a 2–day meeting, beginning on December 3, 2007 and ending December 4, 2007. This notice announces the location and times for the meeting and sets forth the tentative agenda topics.

DATES: The meeting will be held on December 3, 2007 from 8:30 a.m. to 5 p.m. and 8:30 a.m. to 12 noon on December 4, 2007.

To request accommodation of a disability, please contact the person listed under **FOR FURTHER INFORMATON CONTACT**, preferably at least 10 days prior to the meeting, to give EPA as much time as possible to process your request.

ADDRESSES: The meeting will be held at U.S. EPA, 2777 Crystal Dr., (One Potomac Yard South), 4th Floor South Conference Center, Arlington, VA 22202.

FOR FURTHER INFORMATION CONTACT: Georgia McDuffie, Field and External Affairs Division (7506P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 605–0195; fax number: (703) 308–1850; e-mail address: *mcduffie.georgia@epa.gov* or Grier Stayton, Executive Secretary, P.O. Box 466, Milford, DE 19963; telephone number: (302) 422–8152; fax: number (302) 422–2435; e-mail address: ''*grier.stayton*'' <*aapco-sfireg@comcast.net*>.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are interested in SFIREG information exchange relationship with EPA regarding important issues related to human health, environmental exposure to pesticides, and insight into EPA's decision-making process are invited and encouraged to attend the meetings and participate as appropriate. Potentially affected entities may include, but are not limited to: Those persons who are or may be required to conduct testing of chemical substances under the Federal Food, Drug and Cosmetic Act (FFDCA), or the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).

B. How Can I Get Copies of this Document and Other Related Information?

1. *Docket.* EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2007–0409. Publicly available docket materials are available either in the electronic docket at *http://*

www.regulations.gov, or, if only available in hard copy, at the Office of Pesticide Programs (OPP) Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

2. *Electronic access*. You may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr*.

II. Tentative Agenda

1. Report on Unacceptable Label Language
2. Iodomethane Registration Decision
3. Soil Fumigant Update
4. Label Accountability Workgroup
5. Report of E-Labeling Subcommittee
6. Cause Marketing PR Notice
7. Rodenticide Cluster Review and Strychnine Issue
8. Tribal Pesticide Program Council Update
9. OPP and OECA Program Updates
10. Interaction with ASIWPCA and WQ Benchmark Setting
11. Regional Reports
12. Working Committee Reports

List of Subjects

Environmental protection.

Dated: October 29, 2007.

William R. Diamond,

Director, Field External Affairs Division, Office of Pesticide Programs.

[FR Doc. E7–21724 Filed 11–6–07; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[FRL–8492–8]

Meeting of the Mid-Atlantic/Northeast Visibility Union (MANE–VU) Stakeholder Briefing

AGENCY: Environmental Protection Agency.

ACTION: Notice of meeting.

SUMMARY: The United States Environmental Protection Agency (EPA) is announcing the Stakeholder Briefing of the Mid-Atlantic/Northeast Visibility Union (MANE–VU). This meeting will deal with matters relative to Regional Haze and visibility improvement in Federal Class I areas within MANE–VU.

DATES: The meeting will be held on November 15, 2007 starting at 8:30 a.m. (EST).

Location: Hyatt Regency Crystal City, 2799 Jefferson Davis Highway, Arlington, Virginia 22202.

FOR FURTHER INFORMATION CONTACT: For questions regarding Meeting Specifics, Documents and Press Inquiries Contact: Kromeklia Bryant, Ozone Transport Commission, 444 North Capitol Street, NW., Suite 638, Washington, DC 20001; (202) 508–3840; e-mail: *ozone@otcair.org*; Web site: *http://www.manevu.org*.

SUPPLEMENTARY INFORMATION: The Mid-Atlantic/Northeast Visibility Union (MANE–VU) was formed at in 2001, in response to EPA's issuance of the Regional Haze rule. MANE–VU's members include: Connecticut, Delaware, the District of Columbia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, the Penobscot Indian Nation, the St. Regis Mohawk Tribe along with EPA and Federal Land Managers.

Type of Meeting: This meeting will be open to the public.

Agenda: Copies of the final agenda are available from the OTC office (202) 508–3840; by e-mail: *ozone@otcair.org* or via the MANE–VU Web site at *http://www.manevu.org*.

Dated: October 26, 2007.

Donald S. Welsh,

Regional Administrator, Region III.

[FR Doc. E7–21851 Filed 11–6–07; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–8493–1]

National Environmental Justice Advisory Council; Notification of Public Meeting and Public Comment

AGENCY: Environmental Protection Agency.

ACTION: Notice.

SUMMARY: Pursuant to the Federal Advisory Committee Act (FACA), Public Law 92–463, the U.S. Environmental Protection Agency (EPA) hereby provides notice that the National Environmental Justice Advisory Council (NEJAC) will convene a meeting on the date and time described below. All meetings are open to the public. Members of the public are encouraged to provide comments relevant to the specific issues being considered by the NEJAC. For additional information about registering for public comment, please see **SUPPLEMENTARY INFORMATION**.

DATES: The NEJAC will convene an open meeting via teleconference call on Tuesday, November 20, 2007, from 2 p.m. to 4 p.m. (all times noted are Eastern Time). Due to limited telephone lines, all members of the public who wish to attend the teleconference meeting or to provide public comment must register in advance, no later than Friday, November 16, 2007.

ADDRESSES: Because this meeting will be held via teleconference call, there is no physical location where members of the public can listen in. To attend, you must register in advance. See **FOR FURTHER INFORMATION CONTACT** section below.

FOR FURTHER INFORMATION CONTACT: Pre-registration for all attendees is required. Because this meeting is conducted via teleconference call, online registrations will not be accepted. Rather, requests should be sent to Ms. Julianne Pardi of ICF International at: 9300 Lee Highway, Fairfax, Virginia 22031; Telephone: (703) 934–3873; E-mail: *jpardi@icfi.com,* or FAX: (703) 934–3270. Please provide name, organization, and telephone number for follow-up as necessary.

Correspondence concerning the meeting should be sent to Ms. Victoria Robinson, NEJAC Program Manager, U.S. Environmental Protection Agency, at 1200 Pennsylvania Avenue, NW., (MC2201A), Washington, DC 20460; via e-mail at *environmental-justice-epa@epa.gov;* by telephone at (202) 564–6349; or by FAX at (202) 564–1624. Additional information about the meeting is available at the Internet Web site: *http://www.epa.gov/compliance/environmentaljustice/nejac/meetings.html.*

SUPPLEMENTARY INFORMATION: The Charter of the NEJAC states that the advisory committee shall provide independent advice to the Administrator on areas that may include, among other things, ''advice about EPA's progress, quality and adequacy in planning, developing and implementing environmental justice strategies, projects and programs'' relating to environment justice. The purpose of the teleconference meeting is to review the NEJAC initial comments regarding EPA's Environmental Justice Strategic Enforcement Assessment Tool (EJSEAT).

Public Comment: Individuals or groups making oral presentations during the public comment period will be limited to a total time of five minutes. Only one representative of a community, an organization, or a group will be allowed to speak. Any number of written comments can be submitted for the record. The suggested format for individuals making public comment should be as follows: Name of Speaker,

Name of Organization/Community, Address/Telephone/E-mail, Description of Concern and its Relationship to the policy issue(s), and Recommendations or desired outcome. Written comments received by November 12, 2007 will be included in the materials distributed to the members of the NEJAC. Written comments received after that date will be provided to the NEJAC as logistics allow. All information should be sent to the address, e-mail, or fax number listed in the **FOR FURTHER INFORMATION CONTACT** section above.

Information about Services for the Handicapped: Individuals requiring accommodations for a disability should contact the Ms. Julianne Pardi at least five business days prior to the meeting so that appropriate arrangements can be made to facilitate their participation. For information about services for the disabled or to request special assistance at the meeting, contact Ms. Pardi as soon as possible. All requests should be sent to the address, e-mail, or fax number listed in the **FOR FURTHER INFORMATION CONTACT** section above.

Dated: November 1, 2007.

Charles Lee,

Designated Federal Officer, National Environmental Justice Advisory Council.

[FR Doc. E7–21856 Filed 11–6–07; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2007–1078; FRL–8156–2]

Prometon Risk Assessments; Notice of Availability, and Risk Reduction Options

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the availability of EPA's risk assessments and related documents for the pesticide prometon, and opens a public comment period on these documents. The public is encouraged to suggest risk management ideas or proposals to address the risks identified. EPA is developing a Reregistration Eligibility Decision (RED) for prometon through a modified, 4-Phase public participation process that the Agency uses to involve the public in developing pesticide reregistration decisions. This is Phase 3 of the 4-Phase Process. Through this program, EPA is ensuring that all pesticides meet current health and safety standards.

DATES: Comments must be received on or before January 7, 2008.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2007–1078, by one of the following methods:

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

Instructions: Direct your comments to docket ID number EPA–HQ–OPP–2007–1078. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov website is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the docket index available in regulations.gov. To access the electronic docket, go to *http://www.regulations.gov*, select ''Advanced Search,'' then ''Docket Search.'' Insert the docket ID number where indicated and select the ''Submit'' button. Follow the instructions on the regulations.gov website to view the docket index or access available documents. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Rosanna Louie, Special Review and Reregistration Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–0037; fax number: (703) 308–8005; e-mail address: *louie.rosanna@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general, and may be of interest to a wide range of stakeholders including environmental, human health, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI*. Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is

claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

II. Background

A. What Action is the Agency Taking?

EPA is releasing for public comment its human health and environmental fate and effects risk assessments and related documents for prometon, a triazine pesticide, and soliciting public comment on risk management ideas or proposals. Prometon is a nonselective ''bare-ground'' herbicide used to manage annual and perennial grasses and broadleaf weeds. EPA developed the risk assessments and risk characterization for prometon through a modified version of its public process for making pesticide reregistration eligibility decisions. Through these programs, EPA is ensuring that pesticides meet current standards under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and the Federal Food, Drug, and Cosmetic Act (FFDCA), as amended by the Food Quality Protection Act of 1996 (FQPA).

Prometon is a nonselective ''bare-ground'' herbicide labeled for pre- and post-emergence applications to manage annual and perennial grasses and broadleaf weeds. Products containing prometon are formulated as emulsifiable concentrates, Ready-to-Use, water-based flowable concentrates, and pelleted granules. Prometon is registered for weed control around buildings, storage areas, fences, pumps, machinery, fuel tanks, recreational areas, roadways, guard rails, airports, military installations, highway medians, pipelines, railroads, lumberyards, rights-of-way, and industrial sites (such as cross connects, pedestals, transformers, vaults, buried cable closures, telephone booths, fire plugs).

EPA is providing an opportunity, through this notice, for interested parties to provide comments and input on the Agency's risk assessments for prometon. Such comments and input could address, for example, the availability of additional data to further refine the risk assessments, such as typical sizes of treatment areas, any use sites that prometon is no longer used on, and alternative pesticides or weed management methods that would be utilized in place of applying prometon, or could address the Agency's risk assessment methodologies and assumptions as applied to this specific pesticide.

Through this notice, EPA also is providing an opportunity for interested parties to provide risk management proposals or otherwise comment on risk management for prometon. Risks of concern associated with the use of prometon are various ecological risks and some human health exposure scenarios in residential settings. In targeting these risks of concern, the Agency solicits information on effective and practical risk reduction measures.

EPA seeks to achieve environmental justice, the fair treatment and meaningful involvement of all people, regardless of race, color, national origin, or income, in the development, implementation, and enforcement of environmental laws, regulations, and policies. To help address potential environmental justice issues, the Agency seeks information on any groups or segments of the population who, as a result of their location, cultural practices, or other factors, may have atypical, unusually high exposure to prometon, compared to the general population.

EPA is applying the principles of public participation to all pesticides undergoing reregistration and tolerance reassessment. The Agency's Pesticide Tolerance Reassessment and Reregistration; Public Participation Process, published in the **Federal Register** on May 14, 2004 (69 FR 26819) (FRL–7357–9), explains that in conducting these programs, the Agency is tailoring its public participation process to be commensurate with the level of risk, extent of use, complexity of the issues, and degree of public concern associated with each pesticide. For prometon, a modified, 4–Phase process with 1 comment period and ample opportunity for public consultation seems appropriate in view of its limited use, few complex issues, and other factors. However, if as a result of comments received during this comment period EPA finds that additional issues warranting further discussion are raised, the Agency may lengthen the process and include a second comment period, as needed. Although prometon is part of the triazine group of pesticides, it did not meet the criterion for inclusion into the triazine cumulative risk assessment (71 FR 35664), based on its toxicity profile. It was therefore excluded from the triazine cumulative risk assessment.

All comments should be submitted using the methods in **ADDRESSES**, and must be received by EPA on or before the closing date. Comments will become part of the Agency Docket for prometon. Comments received after the close of the comment period will be marked ''late.'' EPA is not required to consider these late comments.

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

Section 4(g)(2) of FIFRA, as amended, directs that, after submission of all data concerning a pesticide active ingredient, ''the Administrator shall determine whether pesticides containing such active ingredient are eligible for reregistration'' before calling in product-specific data on individual end-use products and either reregistering products or taking other ''appropriate regulatory action.''

List of Subjects

Environmental protection, Pesticides and pests.

Dated: October 31, 2007.

Peter Caulkins,

Acting Director, Special Review and Reregistration Division, Office of Pesticide Programs.

[FR Doc. E7–21854 Filed 11–6–07; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2004–0369; FRL–8154–7]

Chloroneb; Termination of Certain Uses

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces EPA's cancellation order for the termination of certain uses, voluntarily requested by the registrant and accepted by the Agency, of products containing the pesticide chloroneb, pursuant to section 6(f)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended. This cancellation order follows a May 25, 2007 **Federal Register** Notice of Receipt of Request from the chloroneb registrant to voluntarily terminate certain uses of their chloroneb product registrations. The request would terminate chloroneb's use as a seed treatment. These are not the last chloroneb products registered for use in the United States. In the May 25, 2007 notice, EPA indicated that it would issue an order implementing the cancellation to terminate certain uses, unless the Agency received substantive comments within the 30 day comment period that would merit its further review of these requests, or unless the registrant withdrew their request within this period. The Agency did not receive any comments on the notice. Further, the registrant did not withdraw their request. Accordingly, EPA hereby issues in this notice a cancellation order granting the requested termination of use as a seed treatment. Any distribution, sale, or use of the chloroneb products subject to this cancellation order is permitted only in accordance with the terms of this order, including any existing stocks provisions.

DATES: The cancellations are effective November 7, 2007.

FOR FURTHER INFORMATION CONTACT: Wilhelmena Livingston, Special Review and Reregistration Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–8025; fax number: (703) 308–8005; e-mail address: *livingston.wilhelmena@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general, and may be of interest to a wide range of stakeholders including environmental, human health, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT.**

B. How Can I Get Copies of this Document and Other Related Information?

1. *Docket.* EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2004–0369. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the Office of Pesticide Programs (OPP) Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

2. *Electronic access.* You may access this **Federal Register** document electronically through the EPA Internet under the **Federal Register** listings at *http://www.epa.gov/fedrgstr*.

II. What Action is the Agency Taking?

This notice announces the cancellation order to terminate use as a seed treatment, as requested by the registrant, of chloroneb products registered under section 3 of FIFRA. Chloroneb is a fungicide currently registered for use as a pre-plant seed treatment for cotton, sugarbeets, soy beans, and beans. It is also registered on commercial turf and ornamentals. These registrations are listed in sequence by registration number in Table 1 of this unit.

TABLE 1.— CHLORONEB PRODUCT REGISTRATIONS WITH TERMINATION OF CERTAIN USES

EPA Registration Number	Product Name
73782-1	Chloroneb Fungicide Technical
73782-2	Demosan 65W
73782-3	Terrameb SP Turf Fungicide
73782-4	K. E. Chloroneb Systemic Flowable Fungicide

Table 2 of this unit includes the name and address of record for all registrants of the products in Table 1 of this unit, in sequence by EPA company number.

TABLE 2.—REGISTRANT OF CHLORONEB PRODUCTS WITH TERMINATION OF CERTAIN USES

EPA Registration Number	Product Name
73782	Kincaid Inc., P.O. Box 490 Athens, TN 37371

III. Summary of Public Comments Received and Agency Response to Comments

During the public comment period provided, EPA received no comments in response to the May 25, 2007 **Federal Register** notice announcing the Agency's receipt of the request for voluntary cancellation to terminate certain uses of chloroneb.

IV. Cancellation Order

Pursuant to FIFRA section 6(f), EPA hereby approves the requested cancellation to terminate certain uses of chloroneb registrations identified in Table 1 of Unit II. Any distribution, sale, or use of existing stocks of the products identified in Table 1 of Unit II. in a manner inconsistent with any of the Provisions for Disposition of Existing Stocks set forth in Unit VI. will be considered a violation of FIFRA.

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

Section 6(f)(1) of FIFRA provides that a registrant of a pesticide product may at any time request that any of its pesticide registrations be canceled or amended to terminate one or more uses. FIFRA further provides that, before acting on the request, EPA must publish a notice of receipt of any such request in the **Federal Register**. Thereafter, following the public comment period,

the Administrator may approve such a request.

VI. Provisions for Disposition of Existing Stocks

Existing stocks are those stocks of registered pesticide products which are currently in the United States and which were packaged, labeled, and released for shipment prior to the effective date of the cancellation action. The cancellation order issued in this notice includes the following existing stocks provisions.

Registrant may sell and distribute existing stocks for one year from the date of the use termination request and allow persons other than the registrant to continue to sell and/or use existing stocks of cancelled products until such stocks are exhausted, provided that such use is consistent with the terms of the previously approved labeling on, or that accompanied, the cancelled product. The order will specifically prohibit any use of existing stocks that is not consistent with such previously approved labeling.

List of Subjects

Environmental protection, Pesticides and pests.

Dated: October 31, 2007.

Steven Bradbury,

Director, Special Review and Reregistration Division, Office of Pesticide Programs.

[FR Doc. E7–21789 Filed 11–6–07; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2007–1011; FRL–8155–7]

Denatonium Benzoate; Notice of Receipt of Request to Voluntarily Cancel a Pesticide Registration

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In accordance with section 6(f)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended, EPA is issuing a notice of receipt of a request by the registrant to voluntarily cancel its registration of a product containing the pesticide denatonium benzoate. The request would terminate denatonium benzoate use in or on conifers and deciduous, non-bearing trees, shrubs, flowers, and other ornamental plants. The request would terminate the last pesticide product registered for use in the United States containing denatonium benzoate as an active ingredient. EPA intends to grant this request at the close of the comment period for this announcement unless the Agency receives substantive comments within the comment period that would merit its further review of the request, or unless the registrant withdraws their request within this period. Upon acceptance of this request, any sale, distribution, or use of the product listed in this notice will be permitted only if such sale, distribution, or use is consistent with the terms as described in the final order.

DATES: Comments must be received on or before December 7, 2007.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2007–1011, by one of the following methods:

• *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.

• *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

• *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

Instructions: Direct your comments to docket ID number EPA–HQ–OPP–2007–1011. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov website is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the docket index available in regulations.gov. To access the electronic docket, go to *http://www.regulations.gov*, select ''Advanced Search,'' then ''Docket Search.'' Insert the docket ID number where indicated and select the ''Submit'' button. Follow the instructions on the regulations.gov website to view the docket index or access available documents. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Andrea Carone, Special Review and Reregistration Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308-0122; fax number: (703) 308-8005; e-mail address: *carone.andrea@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general, and may be of interest to a wide range of stakeholders including environmental, human health, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions

regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

II. Background on the Receipt of Request to Cancel

This notice announces receipt by EPA of a request from the registrant Becker Underwood to cancel one denatonium benzoate product registration. Becker Underwood's product, Tree Guard, is used to repel deer from feeding on conifers and deciduous, non-bearing trees, shrubs, flowers and other ornamental plants. In a letter dated October 16, 2007, Becker Underwood requested EPA to cancel the registration for its product Tree Guard, EPA Reg. No. 66676–1. The terms of the cancellation include the following:

1. Beginning with the 2007 calendar year, Becker Underwood shall limit the total amount of Tree Guard that it distributes or sells in the United States in any given calendar year to 300 pounds of the active ingredient denatonium benzoate;

2. The voluntary cancellation of all uses of Tree Guard will be effective December 1, 2009. The registrant's request will terminate the last pesticide product registered in the United States containing denatonium benzoate as an active ingredient.

III. What Action is the Agency Taking?

This notice announces receipt by EPA of a request from Becker Underwood to cancel their denatonium benzoate product registration. The affected product and the registrant making the request are identified in Tables 1 and 2 of this unit.

Under section 6(f)(1)(A) of FIFRA, registrants may request, at any time, that their pesticide registrations be canceled or amended to terminate one or more pesticide uses. Section 6(f)(1)(B) of FIFRA requires that before acting on a request for voluntary cancellation, EPA must provide a 30–day public comment period on the request for voluntary cancellation or use termination. In addition, section 6(f)(1)(C) of FIFRA requires that EPA provide a 180–day comment period on a request for voluntary cancellation or termination of any minor agricultural use before granting the request, unless:

1. The registrants request a waiver of the comment period, or

2. The Administrator determines that continued use of the pesticide would pose an unreasonable adverse effect on the environment.

The denatonium benzoate registrant has requested that EPA waive the 180–day comment period. EPA will provide a 30–day comment period on the proposed requests.

Unless a request is withdrawn by the registrant within 30 days of publication of this notice, or if the Agency determines that there are substantive comments that warrant further review of this request, an order will be issued canceling the affected registrations.

TABLE 1.—DENATONIUM BENZOATE PRODUCT REGISTRATION WITH A PENDING REQUEST FOR CANCELLATION

Registration Number	Product Name	Company
66676-1	Tree Guard	Becker Underwood

Table 2 of this unit includes the name and address of record for the registrant of the product listed in Table 1 of this unit.

TABLE 2.—REGISTRANT REQUESTING VOLUNTARY CANCELLATION

EPA Company Number	Company Name and Address
66676	Becker Underwood, Inc. 801 Dayton Avenue Ames, IA 50010

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

Section 6(f)(1) of FIFRA provides that a registrant of a pesticide product may at any time request that any of its pesticide registrations be canceled or amended to terminate one or more uses. FIFRA further provides that, before acting on the request, EPA must publish a notice of receipt of any such request in the **Federal Register**. Thereafter, following the public comment period, the Administrator may approve such a request.

V. Procedures for Withdrawal of Request and Considerations for Reregistration of denatonium benzoate

A registrant who chooses to withdraw a request for cancellation must submit such withdrawal in writing to the person listed under **FOR FURTHER INFORMATION CONTACT**, postmarked before December 7, 2007. This written withdrawal of the request for cancellation will apply only to the applicable FIFRA section 6(f)(1) request listed in this notice. If the product has been subject to a previous cancellation action, the effective date of cancellation and all other provisions of any earlier cancellation action are controlling.

VI. Provisions for Disposition of Existing Stocks

Existing stocks are those stocks of once-registered pesticide products which are currently in the United States and which were packaged, labeled, and released for shipment prior to the effective date of the cancellation action.

In any order issued in response to this request for amendment to terminate

products, the Agency proposes to include the following provisions for the treatment of any existing stocks of the products identified or referenced in Table 1 in Unit III. For EPA Registration No. 66676–1, sale by the registrant of existing stocks will be allowed for a period of 24 months, starting from the effective voluntary cancellation date, December 1, 2009.

If the request for voluntary cancellation is granted as discussed in this unit, the Agency intends to issue a cancellation order that will allow persons other than the registrant to continue to sell and/or use existing stocks of cancelled products until such stocks are exhausted, provided that such use is consistent with the terms of the previously approved labeling on, or that accompanied, the cancelled product. The order will specifically prohibit any use of existing stocks that is not consistent with such previously approved labeling. If, as the Agency currently intends, the final cancellation order contains the existing stocks provision just described, the order will be sent only to the affected registrants of the cancelled products. If the Agency determines that the final cancellation order should contain existing stocks provisions different than the ones just described, the Agency will publish the cancellation order in the **Federal Register**.

List of Subjects

Environmental protection, Pesticides and pests.

Dated: October 31, 2007.

Steven Bradbury,

Director, Special Review and Reregistration Division, Office of Pesticide Programs.

[FR Doc. 07–5527 Filed 11–6–07; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2003–0237; FRL–8155–9]

Methyl Parathion; Notice of Receipt of Requests to Voluntarily Cancel and/or Amend to Terminate Uses of Certain Methyl Parathion Pesticide Registrations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In accordance with section 6(f)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended, EPA is issuing a notice of receipt of requests by the registrants to voluntarily cancel some registrations and amend other registrations to terminate uses of certain end-use products containing the pesticide methyl parathion. The requests would terminate methyl parathion use in or on cabbage, dried beans, dried peas, hops, lentils, pecans, and sugar beets. The requests would not terminate the last methyl parathion products registered for use in the U.S. EPA intends to grant these requests at the close of the comment period for this announcement unless the Agency receives substantive comments within the comment period that would merit its further review of the requests, or unless the registrants withdraw their requests within this period. Upon acceptance of these requests, any sale, distribution, or use of products listed in this notice will be permitted only if such sale, distribution, or use is consistent with the terms as described in the final order.

DATES: Comments must be received on or before December 7, 2007.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2003–0237, by one of the following methods:

• *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.

• *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

• *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

Instructions: Direct your comments to docket ID number EPA–HQ–OPP–2003–0237. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The Federal regulations.gov website is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the docket index available in regulations.gov. To access the electronic docket, go to *http://www.regulations.gov*, select ''Advanced Search,'' then ''Docket Search.'' Insert the docket ID number where indicated and select the ''Submit'' button. Follow the instructions on the regulations.gov web site to view the docket index or access available documents. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: John W. Pates, Jr., Special Review and Reregistration Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–8195; fax number: (703) 308–8005; e-mail address: *pates.john@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general, and may be of interest to a

wide range of stakeholders including environmental, human health, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

II. Background on the Receipt of Requests to Cancel and/or Amend Registrations to Delete Uses

This notice announces receipt by EPA of requests from registrants Helena Chemical Company (Company #5905), Drexel Chemical Company (Company #19713), and Cheminova A/S to cancel product registrations 5905–533, 5905–534, 19713–511, 19713–512, and Special Local Need (SLN) WA000019, respectively. In addition, this notice announces receipt by EPA of requests from registrants Cheminova A/S (Company #4787), Cheminova, Inc. (Company #67760), and Cerexagri, Inc. (Company #4581) to amend to terminate uses from Cheminova Declare (EPA Reg. No. 4787–48), Cheminova Methyl Parathion 4EC (EPA Reg. No. 67760–43), and Penncap-M (EPA Reg. No. 4581–393) methyl parathion product registrations. Methyl parathion is an insecticide/miticide for use on various terrestrial food and feed crops to control many types of pests, including mites, thrips, weevils, aphids, and leafhoppers. In letters dated August 30, 2007 (Helena Chemical Company), June 12, 2006 (Drexel Chemical Company), and October 14, 2005 (Cheminova A/S) each registrant requested EPA to cancel affected product registrations. Also, in letters dated May 3, 2007 (Cerexagri, Inc.) and June 5, 2007 (Cheminova A/S and Cheminova, Inc.) registrants requested EPA to amend to terminate uses of pesticide product registrations identified in this notice (Tables 1 and 2). Specifically, Helena Chemical Company, Drexel Chemical Company, and Cheminova A/S have agreed to voluntarily cancel all methyl parathion product registrations which include: 4lb Methyl Parathion (EPA Reg. No. 5905–533), Malathion-Methyl Parathion Emulsifiable Liquid (EPA Reg. No. 5905-534), Drexel Methyl Parathion 4 (EPA Reg. No. 19713-511), Drexel Methyl Parathion 4E (EPA Reg. No. 19713-512), Cheminova Declare (EPA Reg. No. 4787-48), and SLN #WA-0000194 (Parent EPA No. 4787–48).

In addition, Cerexagri, Inc., Cheminova A/S, and Cheminova, Inc. have requested voluntary cancellation of the following uses from their methyl parathion end product registrations: Cabbage, dried beans, dried peas, hops, lentils, pecans, and sugar beets. The registrants' requests will not terminate the last methyl parathion products registered in the United States; however, it does terminate pesticide products registered in the United States for these uses.

III. What Action is the Agency Taking?

This notice announces receipt by EPA of requests from registrants to cancel and/or amend to terminate uses of methyl parathion product registrations. The affected products and the registrants making the requests are identified in Tables 1-3 of this unit.

Under section 6(f)(1)(A) of FIFRA, registrants may request, at any time, that their pesticide registrations be canceled or amended to terminate one or more pesticide uses. Section 6(f)(1)(B) of FIFRA requires that before acting on a request for voluntary cancellation, EPA must provide a 30–day public comment period on the request for voluntary cancellation or use termination. In addition, section 6(f)(1)(C) of FIFRA requires that EPA provide a 180–day comment period on a request for voluntary cancellation or termination of any minor agricultural use before granting the request, unless:

1. The registrants request a waiver of the comment period, or

2. The Administrator determines that continued use of the pesticide would pose an unreasonable adverse effect on the environment.

The methyl parathion registrants have requested that EPA waive the 180–day comment period. EPA will provide a 30–day comment period on the proposed requests.

Unless a request is withdrawn by the registrant within 30 days of publication of this notice, or if the Agency determines that there are substantive comments that warrant further review of this request, an order will be issued canceling and amending the affected registrations.

TABLE 1.—METHYL PARATHION PRODUCT REGISTRATIONS WITH PENDING REQUESTS FOR CANCELLATION

Registration No.	Product name	Company
5905–533	4 lb Methyl Parathion	Helena Chemical Company
5905–534	Malathion-Methyl Parathion Emulsifiable Liquid	Helena Chemical Company

TABLE 1.—METHYL PARATHION PRODUCT REGISTRATIONS WITH PENDING REQUESTS FOR CANCELLATION—Continued

Registration No.	Product name	Company
19713–511	Methyl Parathion 4	Drexel Chemical Company
19713–512	Drexel Methyl Parathion 4E	Drexel Chemical Company
SLN WA000019	4787–48 (Declare)	Cheminova A/S

TABLE 2.—METHYL PARATHION PRODUCT REGISTRATIONS WITH PENDING REQUESTS FOR AMENDMENT TO DELETE USES

Registration No.	Product name	Company
4787–48	Declare	Cheminova A/S
67760–43	Methyl Parathion 4EC	Cheminova, Inc.
4581–393	Penncap-M	Cerexagri, Inc.

Table 3 of this unit includes the names and addresses of record for the registrants of the products listed in Table 1 and Table 2 of this unit.

TABLE 3.—REGISTRANTS REQUESTING VOLUNTARY CANCELLATION AND/OR AMENDMENTS

EPA Company No.	Company name and address
4581	Cerexagri, Inc. 630 Freedom Business Center Suite 402 King of Prussia, PA 19406
4787	Cheminova A/S Washington Office 1600 Wilson Boulevard Suite 700 Arlington, VA 22209
5905	Helena Chemical Company 225 Schilling Boulevard Suite 300 Collierville, TN 38017
67760	Cheminova, Inc. Washington Office 1600 Wilson Boulevard Suite 700 Arlington, VA 22209
19713	Drexel Chemical Company 1700 Channel Avenue P.O. Box 13327 Memphis, TN 38113–0327

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

Section 6(f)(1) of FIFRA provides that a registrant of a pesticide product may at any time request that any of its pesticide registrations be canceled or amended to terminate one or more uses. FIFRA further provides that, before acting on the request, EPA must publish a notice of receipt of any such request in the **Federal Register**. Thereafter, following the public comment period, the Administrator may approve such a request.

V. Procedures for Withdrawal of Request and Considerations for Reregistration of Methyl Parathion

Registrants who choose to withdraw a request for cancellation must submit such withdrawal in writing to the person listed under **FOR FURTHER INFORMATION CONTACT**, postmarked before December 7, 2007. This written withdrawal of the request for cancellation will apply only to the applicable FIFRA section 6(f)(1) request listed in this notice. If the products have been subject to a previous cancellation action, the effective date of cancellation and all other provisions of any earlier cancellation action are controlling.

VI. Provisions for Disposition of Existing Stocks

Existing stocks are those stocks of registered pesticide products which are currently in the United States and which were packaged, labeled, and released for shipment prior to the effective date of the cancellation action.

If the request for voluntary cancellation and/or use termination is granted as discussed above, the Agency intends to issue a cancellation order that will allow persons other than the registrant to continue to sell and/or use existing stocks of cancelled products until such stocks are exhausted, provided that such use is consistent with the terms of the previously approved labeling on, or that accompanied, the cancelled product. The order will specifically prohibit any use of existing stocks that is not consistent with such previously approved labeling. If, as the Agency currently intends, the final cancellation order contains the existing stocks provision just described, the order will be sent only to the affected registrants of the cancelled products. If the Agency determines that the final cancellation order should contain existing stocks provisions different than the ones just described, the Agency will publish the cancellation order in the **Federal Register**.

List of Subjects

Environmental protection, Pesticides and pests.

Dated: October 31, 2007.

Peter Caulkins,

Acting Director, Special Review and Reregistration Division, Office of Pesticide Programs.

[FR Doc. E7–21787 Filed 11–6–07; 8:45 am]

BILLING CODE 6560–507–S

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2007–0946; FRL–8154–9]

Pesticides; Guidance for Pesticide Registrants on Labeling Revisions Required by the Final Rule ''Pesticide Management and Disposal; Standards for Pesticide Containers and Containment''; Pesticide Registration Notice 2007-4

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of Availability.

SUMMARY: The Agency is announcing the availability of a Pesticide Registration Notice titled ''Labeling Revisions Required by the Final Rule 'Pesticide Management and Disposal; Standards for Pesticide Containers and Containment.' '' PR Notices are issued by the Office of Pesticide Programs (OPP) to inform pesticide registrants and other interested persons about important policies, procedures, and registration related decisions and serve to provide guidance to pesticide registrants and OPP personnel. This particular PR Notice provides guidance to registrants on how to change their labels to comply with the new labeling requirements established by the container and containment rule. By August 17, 2009, all pesticide products distributed or sold by a registrant must

bear labels that comply with the new requirements.

FOR FURTHER INFORMATION CONTACT: Kimberly Nesci, Field and External Affairs Division (FEAD), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–8059; fax number: (703) 308–2962; e-mail address: *nesci.kimberly@epa.gov* or Nancy Fitz, FEAD, Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–7385; fax number: (703) 308–2962; e-mail address: *fitz.nancy@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general. You may be affected by this action if you are a pesticide registrant. This action may be of particular interest to those persons who are required to register pesticides. Since other entities may also be interested, the Agency has not attempted to describe all the specific entities that may be interested in this action.

If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Get Copies of this Document and Other Related Information?

1. *Docket*. EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2007–0946. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the Office of Pesticide Programs (OPP) Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

2. *Electronic access*. You may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr*.

II. What Guidance Does this PR Notice Provide?

On August 16, 2006, the Agency published a Final Rule titled ''Pesticide Management and Disposal; Standards for Pesticide Containers and Containment'' (71 FR 47330) (FRL 8076-2) that established standards for pesticide containers and containment structures. Among other things, the final rule established requirements for label language to include the following: A statement identifying the container as refillable or nonrefillable; instructions to facilitate the removal of pesticides from containers prior to disposal or recycling; and, for nonrefillable containers, instructions for managing the container. This notice provides instructions to pesticide registrants on revising their product labels in order to implement the new requirements. Most registrants may be able to make the necessary label amendments by notification; however, in some cases an application for amendment and EPA approval may be required. By August 17, 2009, all pesticide products distributed or sold by a registrant must have labels that comply with the new requirements (40 CFR 156.159).The Agency is releasing this PR Notice as a final document and not for comment because it implements final regulations currently in place. The container and containment rule was released for public comment before the final rule was published.

III. Do PR Notices Contain Binding Requirements?

The PR Notice discussed in this document is intended to provide guidance to EPA personnel and decision makers and to pesticide registrants. While the requirements in the statutes and Agency regulations are binding on EPA and the applicants, this PR Notice is not binding on pesticide registrants.

List of Subjects

Environmental protection, Pesticides and pests, Pesticide labels, Pesticide labeling, Pesticide containers, Pesticide containment.

Dated: October 29, 2007.

Debra Edwards,

Director, Office of Pesticide Programs.

[FR Doc. E7–21860 Filed 11–6–07; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[FRL–8492–9]

Proposed Administrative Cost Recovery Settlement Under Section 122(h) of the Comprehensive Environmental Response Compensation and Liability Act, as Amended, 42 U.S.C. 9622(h), Part of PCB Treatment Inc. Superfund Site

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice; request for public comment.

SUMMARY: In accordance with Section 122(i) of the Comprehensive Environmental Response Compensation and Liability Act, as amended (CERCLA), 42 U.S.C. 9622(i), notice is hereby given of a proposed administrative settlement with Anthony Prunsky for recovery of past response costs concerning part of the PCB Treatment Inc. Superfund Site located at 45 Ewing Street, Wyandotte County, Kansas City, Kansas, also known as the Unified Government of Wyandotte County/Kansas City, Kansas. The settlement requires Mr. Prunsky to pay to the Hazardous Substance Superfund the Net Sale Proceeds it receives through the sale of the 45 Ewing Street Property ($62,000) less the closing costs, taxes owed to Unified Government of Wyandotte County/Kansas City, Kansas and attorneys fees. The settlement requires Mr. Prunsky to pay $5000.00 to the Hazardous Substance Superfund. The settlement includes a covenant not to sue the settling parties pursuant to Section 107(a) of CERCLA, 42 U.S.C. 9607(a). For thirty (30) days following the date of publication of this notice, the Agency will receive written comments relating to the settlement. The Agency will consider all comments and may modify or withdraw its consent to the settlement if comments received disclose facts or considerations which indicate that the settlement is inappropriate, improper, or inadequate. The Agency's response to any comments received will be available for public inspection at the EPA Region VII office located at 901 N. 5th Street, Kansas City, Kansas.

DATES: Comments must be submitted on or before December 7, 2007.

ADDRESSES: The proposed settlement is available for public inspection at the EPA Region VII office, 901 N. 5th Street, Kansas City, Kansas, Monday through Friday, between the hours of 7 a.m. through 5 p.m. A copy of the proposed settlement may be obtained from the

Regional Hearing Clerk, 901 N. 5th Street, Kansas City, Kansas, (913) 551–7567. Comments should reference the PCB Treatment, Inc. Superfund Site, EPA Docket No.07–2007–0009 and should be addressed to Audrey Asher, Senior Assistant Regional Counsel, 901 N. 5th Street, Kansas City, Kansas 66101.

FOR FURTHER INFORMATION CONTACT: Audrey Asher at telephone: (913) 551–7255; fax number: (913) 551–7925; E-mail address: *asher.audrey@epa.gov.*

Dated: October 23, 2007.

Cecilia Tapia,

Director, Superfund Division, Region VII.

[FR Doc. E7–21894 Filed 11–6–07; 8:45 am]

BILLING CODE 6560–50–P

COUNCIL ON ENVIRONMENTAL QUALITY

The National Environmental Policy Act and Collaboration

AGENCY: Council On Environmental Quality.

ACTION: Notice of Availability, Collaboration in NEPA—A Handbook for NEPA Practitioners.

SUMMARY: The Council on Environmental Quality (CEQ) has published ''Collaboration in NEPA—A Handbook for NEPA Practitioners.'' Designed to assist Federal agencies in more effective use of collaboration throughout the National Environmental Policy Act (NEPA) process, the handbook is a product of an interagency work group. Public comments were solicited and the handbook was finalized after considering the comments received. ''Collaboration in NEPA'' is available from CEQ and can be accessed at *http://www.NEPA.gov* under the heading ''Current Developments.''

ADDRESSES: Electronic or facsimile requests are preferred because Federal agencies often experience mail delays as a result of security screening. Requests can be submitted via electronic mail to *hgreczmiel@ceq.eop.gov* with the subject line ''NEPA Modernization (Collaboration-NEPA).'' Fax requests to ''NEPA Modernization (Collaboration-NEPA)'' at (202) 456–0753. Requests can also be mailed to NEPA Modernization (Collaboration-NEPA), Attn: Associate Director for NEPA Oversight, 722 Jackson Place, NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Horst Greczmiel at (202) 395–5750.

SUPPLEMENTARY INFORMATION: The Council on Environmental Quality (CEQ) established a National Environmental Policy Act (NEPA) Task Force and is implementing recommendations to modernize the implementation of NEPA and make the NEPA process more effective and efficient. More information about the task force is posted on the task force Web site at *http://ceq.eh.doe.gov/ntf.* CEQ requested public comments on the proposed handbook on March 26, 2007, 72 FR 14103. Comments received are posted at *http://ceq.eh.doe.gov/ntf/implementation.html.*

The handbook suggests ways in which Federal agencies can use collaboration and environmental conflict resolution strategies when preparing NEPA analyses and documentation. Collaboration is encouraged during the NEPA process as a whole and toward that end the handbook emphasizes engaging a balanced set of affected and interested parties in seeking agreement at one or more stages of the NEPA process by cultivating shared vision, trust, and communication. Acknowledging that collaboration during the NEPA process can vary considerably depending on the phase of the process and the roles by the lead agency assigns to each party, the handbook notes that providing opportunities for participation on the part of stakeholders, supplemented with outreach efforts, may be appropriate.

The phases for collaboration outlined in the handbook begin with the assessment and planning phase, often referred to as ''conflict'' or ''situation'' assessments, when agencies clarify the issues and assess the opportunity for collaboration. This is followed by the convening and initiation phase when the lead agency brings parties together to inform them about the process and to develop a plan for how they can work together. Sharing interests, exchanging information, and identifying gaps in knowledge is then followed by the phase where participants seek agreement through deliberation and negotiation. That is often considered the heart of the collaborative process. The fifth and final phase is the decision-making and implementation phase.

''Collaboration in NEPA'' links those phases for collaboration to the stages of the NEPA process, including developing the proposed action, establishing the purpose and need, conducting scoping, developing alternatives, and analyzing impacts. The handbook concludes with a discussion of the challenges facing collaboration and providing tools for practitioners such as strategies for preventing conflicts, attitudes and behaviors to enhance collaboration, case studies, a compendium of resources, and examples of memoranda of agreement.

In response to comments on the draft handbook the final handbook was improved in several ways. The discussion of collaboration at the various stages of the NEPA process was consolidated and the guide that provides examples and identifies options and tools for collaboration was augmented. Appendices were reorganized, references and case studies updated, roles of the lead agencies and applicants clarified, and the compendium of resources expanded.

November 1, 2007.

James L. Connaughton,

Chairman, Council on Environmental Quality.

[FR Doc. E7–21881 Filed 11–6–07; 8:45 am]

BILLING CODE 3125–W8–P

FEDERAL MARITIME COMMISSION

Notice of Agreements Filed

The Commission hereby gives notice of the filing of the following agreements under the Shipping Act of 1984. Interested parties may submit comments on agreements to the Secretary, Federal Maritime Commission, Washington, DC 20573, within ten days of the date this notice appears in the **Federal Register**. Copies of agreements are available through the Commission's Office of Agreements (202–523–5793 or *tradeanalysis@fmc.gov*).

Agreement No.: 012015–000.

Title: BBC Chartering and Logistic—Dockwise Yacht Transport Agreement.

Parties: BBC Chartering & Logistic GmbH & Co. KG, and Dockwise Yacht Transport LLC.

Filing Party: Matthew Thomas; Troutman Sanders LLP; 401 9th Street, NW.; Suite 1000; Washington, DC 20004.

Synopsis: The agreement authorizes BBC Chartering & Logistic GmbH & Co. KG to charter space to Dockwise Yacht Transport LLC for transport of yachts worldwide.

Agreement No.: 012016–000.

Title: Maersk Line / Wan Hai Space Charter Agreement.

Parties: A.P. Moller-Maersk A/S trading under the name of Maersk Line and Wan Hai Lines Ltd.

Filing Party: Wayne R. Rohde; Sher & Blackwell; 1850 M Street, NW., Ste 900; Washington, DC 20036.

Synopsis: Agreement authorizes Maersk Line to charter space to Wan Hai in trade between ports of California and

ports of South Korea and People's Republic of China.

Agreement No.: 012017–000.

Title: COSCON/SINOLINES Vessel Sharing Agreement.

Parties: COSCO Container Lines Company Ltd. and Sinotrans Container Lines Co. Ltd.

Filing Party: Robert B. Yoshitomi; Nixon Peabody, LLP; 555 West Fifth Street, 46th Floor; Los Angeles, CA 90013.

Synopsis: Agreement authorizes COSCO Container Lines Company Ltd. and Sinotrans Container Lines Co., Ltd. to charter slots to each other and coordinate sailings between U.S. West Coast ports and ports in China, Korea and Japan.

Agreement No.: 012018–000.

Title: Matson/MELL Space Charter Agreement.

Parties: Matson Navigation Company, Inc. and Marianas Express Lines Ltd.

Filing Party: Sloan White; Assistant General Counsel; Matson Navigation Company; 555 12th Street; Oakland, CA 94607.

Synopsis: The agreement authorizes Marianas Express to charter space to Matson between ports in Guam and ports in Palau and Yap.

By order of the Federal Maritime Commission.

Dated: November 2, 2007.

Bryant L. VanBrakle,

Secretary.

[FR Doc. E7–21897 Filed 11–6–07; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License Applicants

Notice is hereby given that the following applicants have filed with the Federal Maritime Commission an application for license as a Non-Vessel Operating Common Carrier and Ocean Freight Forwarder—Ocean Transportation Intermediary pursuant to section 19 of the Shipping Act of 1984 as amended (46 U.S.C. Chapter 409 and 46 CFR part 515).

Persons knowing of any reason why the following applicants should not receive a license are requested to contact the Office of Transportation Intermediaries, Federal Maritime Commission, Washington, DC 20573.

Non-Vessel Operating Common Carrier Ocean Transportation Intermediary Applicants:

Atlantic Shipping Company, Inc., 56 Water Street, Fall River, MA 02721. Officers: Victor L. Depina, President (Qualifying Individual), Francisco P. Fernandes, Vice President.

Speedfreight Transport, LLC, Speedfreight Cargo Transport, 1012 Grand Chanpion Drive, Rockville, MD 20850. Officers: Charity De Asis, V.P. of Marketing/Opera. (Qualifying Individual), Rimando D. Roxas, COO.

Non-Vessel Operating Common Carrier and Ocean Freight Forwarder Transportation Intermediary Applicants:

TBS Logistics Incorporated dba Magnum Lines, 11731 Jones Road, Suite 200, Houston, TX 77070, Officer: Kurt Miller, Vice President (Qualifying Individual).

Livingston International, Inc. dba Livingston Customs Brokerage, 670 Young Street, Tonawanda, NY 14150. Officers: Henry Gayheart, Managing Director (Qualifying Individual), Maureen Anne Celmer, Senior Director.

Chaucer Freight LLC, 909 Ace Drive, Wood Dale, IL 60191. Officers: Richard Tilford, Operations Director (Qualifying Individual), Mandy June Dunn, Manager (Qualifying Individual).

Blue Ocean International Inc. dba Blue Ocean, Transport dba Blue Ocean Forwarding, 8424 Dundee Terrace, Miami Lakes, FL 33016. Officers: Juan Estelles, President (Qualifying Individual).

Lazo Cargo/Envios Corp, 529 NW 12 Avenue, Miami, FL 33136. Officers: Jairo J. Lazo, President (Qualifying Individual), Cynthia E. Lovo, Vice President.

Sifax Shipping Company, LLC, 2512 McAllister Road, Houston, TX 77092. Officers: Alfred Odetola, Operations Manager (Qualifying Individual). Clement O. Kembi, Director.

Trans-System Logistics, LLC., 701 North Poast Oak, Suite 301, Houston, TX 77024. Officers: Angelica Garcia-Dunn, Asst. Vice President (Qualifying Individual), Eddie Lawson, President.

Frami Freight IMP & EXP Inc., 8346 NW 68 Street, Miami, FL 33166. Officer: Franklin B. Cruz, President (Qualifying Individual).

Ocean Freight Forwarder—Ocean Transportation Intermediary Applicants:

Aprile USA, Inc., 1370 Broadway, Suite 1006, New York, NY 10018. Officers: Anna Cilento, Asst. Secretary (Qualifying Individual), Carlo Pozzi, President.

Dated: November 2, 2007.

Bryant L. VanBrakle,

Secretary.

[FR Doc. E7–21898 Filed 11–6–07; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License Revocations

The Federal Maritime Commission hereby gives notice that the following Ocean Transportation Intermediary licenses have been revoked pursuant to section 19 of the Shipping Act of 1984 (46 U.S.C. Chapter 409) and the regulations of the Commission pertaining to the licensing of Ocean Transportation Intermediaries, 46 CFR part 515, effective on the corresponding date shown below:

License Number: 013324N.
Name: Competent Services, Inc. dba CSC Lines
Address: 271 Route 46 West, Ste. C–205, Fairfield, NJ 07004.
Date Revoked: October 9, 2007.
Reason: Surrendered license voluntarily.

License Number: 000132F.
Name: I.L. Cohen Co., Inc.
Address: 150–30 132nd Ave., Ste. 208, Jamaica, NY 11434.
Date Revoked: October 21, 2007.
Reason: Failed to maintain a valid bond.

License Number: 003963F.
Name: Natural Freight Ltd. dba Bronco Container Lines.
Address: Transportation Bldg., 225 Broadway, Ste. 2406, New York, NY 10007.
Date Revoked: October 20, 2007.
Reason: Failed to maintain a valid bond.

License Number: 016960N.
Name: Sesco Group, Inc.
Address: 4453 Durfee Ave., El Monte, CA 91732
Date Revoked: October 25, 2007.
Reason: Surrendered license voluntarily.

License Number: 017151N.
Name: Ultra Air Cargo, Inc.
Address: 555 S. Isis Ave., Inglewood, CA 90301.
Date Revoked: October 26, 2007.
Reason: Failed to maintain a valid bond.

Sandra L. Kusumoto,

Director, Bureau of Certification and Licensing.

[FR Doc. E7–21892 Filed 11–6–07; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License Reissuance

Notice is hereby given that the following Ocean Transportation

Intermediary license has been reissued by the Federal Maritime Commission pursuant to section 19 of the Shipping Act of 1984 (46 U.S.C. Chapter 409) and the regulations of the Commission pertaining to the licensing of Ocean Transportation Intermediaries, 46 CFR part 515.

License No.	Name/address	Date reissued
003963N	Natural Freight Ltd., dba Bronco Container Lines, 225 Broadway, Suite 2406, New York, NY 10007.	October 20, 2007.

Sandra L. Kusumoto,

Director, Bureau of Certification and Licensing.

[FR Doc. E7–21891 Filed 11–6–07; 8:45 am]

BILLING CODE 6730–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Solicitation of Nominations for Membership on the Secretary's Advisory Committee on Human Research Protections

AGENCY: Department of Health and Human Services, Office of the Secretary, Office of Public Health and Science.

ACTION: Notice.

Authority: 42 U.S.C. 217a, section 222 of the Public Health Service Act, as amended. The Committee is governed by the provisions of Public Law 92–463, as amended (5 U.S.C. Appendix 2), which sets forth standards for the formation and use of advisory committees.

SUMMARY: The Office for Human Research Protections (OHRP), a program office in the Office of Public Health and Science, Department of Health and Human Services (HHS), is seeking nominations of qualified candidates to be considered for appointment as members of the Secretary's Advisory Committee on Human Research Protections (SACHRP). SACHRP provides advice and recommendations to the Secretary, HHS, and the Assistant Secretary for Health on matters pertaining to the continuance and improvement of functions within the authority of HHS directed toward protections for human subjects in research. SACHRP was established by the Secretary, HHS, on October 1, 2002. OHRP is seeking nominations of qualified candidates to fill five positions on the Committee membership that will be vacated at scheduled intervals during the 2008 calendar year.

DATES: Nominations for membership on the Committee must be received no later than December 7, 2007.

ADDRESSES: Nominations should be mailed or delivered to: Dr. Ivor Pritchard, Acting Director, Office for Human Research Protections, Department of Health and Human Services, 1101 Wootton Parkway, Suite 200; Rockville, MD 20852. Nominations will not be accepted by e-mail or by facsimile.

FOR FURTHER INFORMATION CONTACT: Dr. Kevin Prohaska, Acting Executive Director, SACHRP, Office for Human Research Protections, 1101 Wootton Parkway, Suite 200, Rockville, MD 20852, telephone: 240–453–8231. A copy of the Committee charter and list of the current members can be obtained by contacting Dr. Prohaska, accessing the SACHRP Web site at *http://www.hhs.gov/ohrp/sachrp*, or requesting via e-mail at *sachrp@osophs.dhhs.gov.*

SUPPLEMENTARY INFORMATION: The Committee provides advice on matters pertaining to the continuance and improvement of functions within the authority of HHS directed toward protections for human subjects in research. Specifically, the Committee provides advice relating to the responsible conduct of research involving human subjects with particular emphasis on special populations such as neonates and children, prisoners, the decisionally impaired, pregnant women, embryos and fetuses, individuals and populations in international studies, investigator conflicts of interest and populations in which there are individually identifiable samples, data, or information.

In addition, the Committee is responsible for reviewing selected ongoing work and planned activities of the OHRP and other offices/agencies within HHS responsible for human subjects protection. These evaluations may include, but are not limited to, a review of assurance systems, the application of minimal research risk standards, the granting of waivers, education programs sponsored by OHRP, and the ongoing monitoring and oversight of institutional review boards and the institutions that sponsor research.

Nominations: The Office for Human Research Protections is requesting nominations to fill five positions for voting members of SACHRP. The five positions will become vacant at scheduled intervals during the 2008 calendar year. Nominations of potential candidates for consideration are being sought from a wide array of fields, including, but not limited to: Public health and medicine, behavioral and social sciences, health administration, and biomedical ethics. To qualify for consideration of appointment to the Committee, an individual must possess demonstrated experience and expertise in any of the several disciplines and fields pertinent to human subjects protection and/or clinical research.

The individuals selected for appointment to the Committee can be invited to serve a term of up to four years. Committee members receive a stipend and reimbursement for per diem and any travel expenses incurred for attending Committee meetings and/or conducting other business in the interest of the Committee.

Nominations should be typewritten. The following information should be included in the package of material submitted for each individual being nominated for consideration: (1) A letter of nomination that clearly states the name and affiliation of the nominee, the basis for the nomination (i.e., specific attributes which qualify the nominee for service in this capacity), and a statement that the nominee is willing to serve as a member of the Committee; (2) the nominator's name, address and daytime telephone number, and the home and/or work address, telephone number, and email address of the individual being nominated; and (3) a current copy of the nominee's curriculum vitae. Federal employees should not be nominated for consideration of appointment to this Committee.

The Department makes every effort to ensure that the membership of HHS Federal advisory committees is fairly balanced in terms of points of view represented and the committee's function. Every effort is made to ensure that individuals from a broad representation of geographic areas, women and men, ethnic and minority groups, and the disabled are given consideration for membership on HHS Federal advisory committees. Appointment to this Committee shall be made without discrimination on the basis of age, race, ethnicity, gender, sexual orientation, disability, and

cultural, religious, or socioeconomic status.

Documentation must be included in the nomination to indicate that the nominated individual is willing to serve as a member of SACHRP. Individuals who are selected to be considered for appointment will be required to provide detailed information regarding their financial holdings, consultancies, and research grants or contracts. Disclosure of this information is necessary in order to determine if the selected candidate is involved in any activity that may pose a potential conflict with the official duties to be performed as a member of SACHRP.

Dated: October 31, 2007.

Ivor A. Pritchard,

Acting Director, Office for Human Research Protections, Acting Executive Secretary, Secretary's Advisory Committee on Human Research Protections.

[FR Doc. E7–21824 Filed 11–6–07; 8:45 am]

BILLING CODE 4150–36–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Meeting of the Advisory Committee on Minority Health

AGENCY: Department of Health and Human Services, Office of the Secretary, Office of Public Health and Science, Office of Minority Health.

ACTION: Notice.

SUMMARY: As stipulated by the Federal Advisory Committee Act, the Department of Health and Human Services (DHHS) is hereby giving notice that the Advisory Committee on Minority Health (ACMH) will hold a meeting. This meeting is open to the public. Preregistration is required for both public attendance and comment. Any individual who wishes to attend the meeting and/or participate in the public comment session should e-mail *acmh@osophs.dhhs.gov.*

DATES: The meeting will be held on November 27, 2007, from 9 a.m. to 4 p.m.

ADDRESSES: The meeting will be held at the DoubleTree Hotel, Terrace Ballroom, 1515 Rhode Island Ave., NW., Washington, DC 20005. The meeting is accessible from the Dupont Circle and McPherson Square Metro Stations. From the Dupont Circle Metro Station meeting participants may walk 2 blocks south on Connecticut Avenue, turn left on Rhode Island Avenue for approximately 5 blocks. The DoubleTree is on the left after Logan Circle. From the McPherson Square Metro Station meeting participants may walk 5 blocks north on 14th Street, turn right on to Rhode Island Avenue for approximately 2 blocks. The DoubleTree will be on the left after Logan Circle.

FOR FURTHER INFORMATION AND REGISTRATION CONTACT: Ms. Monica A. Baltimore, Tower Building, 1101 Wootton Parkway, Suite 600, Rockville, Maryland 20852; phone: (240) 453–2882; fax: (240) 453–2883.

SUPPLEMENTARY INFORMATION:

In accordance with Public Law 105–392, the ACMH was established to provide advice to the Deputy Assistant Secretary for Minority Health in improving the health of each racial and ethnic minority group and on the development of goals and specific program activities of the Office of Minority Health.

Topics to be discussed during this meeting will include Integrating Racially and Ethnically Diverse Communities into Emergency Preparedness and other strategies to improve the health of racial and ethnic minority populations through the development of health policies and programs that will help eliminate health disparities, as well as other related issues.

Public attendance at the meeting is limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the designated contact person at least fourteen business days prior to the meeting. Members of the public will have an opportunity to provide comments at the meeting. Public comments will be limited to five minutes per speaker. Individuals who would like to submit written statements should mail or fax their comments to the Office of Minority Health at least five business days prior to the meeting. Any members of the public who wish to have printed material distributed to ACMH committee members should submit their materials to Garth N. Graham, M.D., M.P.H., Executive Secretary, ACMH, Tower Building, 1101 Wootton Parkway, Suite 600, Rockville, Maryland 20852, prior to close of business November 23, 2007.

Dated: October 30, 2007.

Garth N. Graham,

Deputy Assistant Secretary for Minority Health.

[FR Doc. E7–21822 Filed 11–6–07; 8:45 am]

BILLING CODE 4150–29–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60 Day–07–07BS]

Proposed Data Collections Submitted for Public Comment and Recommendations; Notice

This 60 Day **Federal Register** Notice published on September 27, 2007 (72 FR 54915–54916) has been inadvertently republished. This is a duplicate document of the previous FRN that was published on October 27, 2006. Therefore, we would like to retract it.

Maryam I. Daneshvar,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. E7–21864 Filed 11–6–07; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP): State Based Occupational Safety and Health Surveillance Review, Program Announcement (PA) PAR04–106

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC) announces the aforementioned meeting.

Time and Date: 8 a.m.–5 p.m., November 30, 2007 (Closed).

Place: Renaissance Hotel, 6th Avenue, Pittsburgh, PA 15222.

Status: The meeting will be closed to the public in accordance with provisions set forth in section 552b(c)(4) and (6), Title 5 U.S.C., and the Determination of the Director, Management Analysis and Services Office, CDC, pursuant to Public Law 92–463.

Matters To Be Discussed: The meeting will include the review, discussion, and evaluation of ''State Based Occupational Safety and Health Surveillance Review, PA PAR04–106.

For Further Information Contact: Stephen Olenchock, Ph.D., Scientific Review Administrator, Office of Extramural Coordination and Special Projects, National Institute for Occupational Safety and Health, CDC, 1095 Willowdale Road, Morgantown, WV 26505, Telephone (304) 285–6271.

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both CDC and the Agency for Toxic Substances and Disease Registry.

Dated: October 29, 2007.

Elaine L. Baker,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. E7–21842 Filed 11–6–07; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2007N–0427]

Lederle Laboratories et al.; Withdrawal of Approval of 73 New Drug Applications and 62 Abbreviated New Drug Applications

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is withdrawing approval of 73 new drug applications (NDAs) and 62 abbreviated new drug applications (ANDAs) from multiple applicants. The holders of the applications notified the agency in writing that the drug products were no longer marketed and requested that the approval of the applications be withdrawn.

EFFECTIVE DATE: December 7, 2007.

FOR FURTHER INFORMATION CONTACT: Florine P. Purdie, Center for Drug Evaluation and Research (HFD–7), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–594–2041.

SUPPLEMENTARY INFORMATION: The holders of the applications listed in the table in this document have informed FDA that these drug products are no longer marketed and have requested that FDA withdraw approval of the applications. The applicants have also, by their requests, waived their opportunity for a hearing.

Application No.	Drug	Applicant
NDA 6–459	Hetrazan (diethylcarbamaxine citrate) Tablets and Syrup	Lederle Laboratories, c/o Wyeth Pharmaceuticals, Inc., P.O. Box 8299, Philadelphia, PA 19101–8299
NDA 6–799	Rubramin and Rubramin PC (cyanocobalamin injection USP)	Bristol-Myers Squibb Co., P.O. Box 4000, Princeton, NJ 08543–4000
NDA 7–517	Tapazole (methimazole tablets USP), 5 milligrams (mg) and 10 mg	King Pharmaceuticals, Inc., 501 Fifth St., Bristol, TN 37620
NDA 7–942	Sus-Phrine (epinephrine) Injection	Forest Laboratories, Inc., Harborside Financial Center, Plaza Three, suite 602, Jersey City, NJ 07311
NDA 9–319	Ambenyl Expectorant and Ambenyl Cough Syrup	Do.
NDA l0–533	PBZ SR (tripelennamine HCl USP) Extended-Release Tablets	Novartis Pharmaceuticals Corp., One Health Plaza, East Hanover, NJ 07936–1080
NDA 10–744	Darbid (isopropamide iodide) Tablets	SmithKline Beecham Corp., d/b/a/ GlaxoSmith Kline, P.O. Box 13398, Five Moore Dr., Research Triangle Park, NC 27709
NDA 10–909	Miradon (anisindione) Tablets	Schering Corp., 2000 Galloping Hill Rd., Kenilworth, NJ 07033
NDA 11–213	Trilafon (perphenazine) Injection, 5 mg/milliliter (mL)	Do.
NDA 11–283	Kenacort (tramcinolone) Tablets	Bristol-Myers Squibb Co.
NDA 11–808	Mellaril (thioridazine HCl) Tablets	Novartis Pharmaceuticals Corp.
NDA 12–145	Prolixin (fluphenazine HCl) Elixir, 0.5 mg/mL	Apothecon, c/o Bristol-Myers Squibb Co., P.O. Box 4500, Princeton, NJ 08543–4500
NDA 12–313	BIO-CLEAR (dibenzothiophene) Cream	Helena Rubinstein, 202 Rodney Bldg., 3411 Silverside Rd., Wilmington, DE 19810
NDA 12–665	Velban (vinblastine sulfate) for Injection	Eli Lilly and Co., Lilly Corporate Center, Indianapolis, IN 46285
NDA 12–678	Tolbutamide Tablets	Sandoz Inc., 227–15 North Conduit Ave., Laurelton, NY 11413
NDA 12–796	Quinidex Extentabs (quinidine sulfate extended-release tablets USP)	Wyeth Pharmaceuticals, Inc.
NDA 14–103	Oncovin (vincristine sulfate) Injection	Eli Lilly and Co.
NDA 14–242	Dexacort (dexamethasone sodium phosphate) Turbinaire	UCB, 755 Jefferson Rd., Rochester, NY 14623

Application No.	Drug	Applicant
NDA 14–262	Solbar (dioxybenzone and oxybenzone) Cream	Person & Covey, Inc., 616 Allen Ave., Glendale, CA 91201
NDA 16–363	Lasix (furosemide) 10–mg/mL Injection	Sanofi-Aventis, 300 Somerset Corporate Blvd., Bridgewater, NJ 08807–0977
NDA 16–408	WILDROOT (pyrithione zinc) Hair Groom and Grenadier Hair Groom	Colgate-Palmolive Co., 909 River Rd., Piscataway, NJ 08854–5596
NDA 16–729	Ferrous Citrate Fe 59 Injection	Mallinckrodt Inc., 675 McDowell Blvd., P.O. Box 5840, St. Louis, MO 63134
NDA 16–820	Emete-Con (benzquinamide HCl) Injection	Pfizer, Inc., 235 East 42nd St., New York, NY 10017
NDA 16–847	Isopaque 440 (metrizoate sodium, meglumine metrizoate, calcium metrizoate, and metrizoate magnesium) Injection	GE Healthcare, 101 Carnegie Center, Princeton, NJ 08540
NDA 17–430	Neggram (nalidixic acid USP) Suspension	Sanofi-Aventis
NDA 17–466	Bricanyl (terbutaline sulfate) Injection	Sanofi-Aventis
NDA 17–506	Isopaque 280 (metrizoic acid, meglumine, and calcium) Injection	GE Healthcare
NDA 17–613	Lotrimin (clotrimazole) Topical Solution, 1%	Schering Corp.
NDA 17–618	Bricanyl (terbutaline sulfate) Tablets	Sanofi-Aventis
NDA 17–619	Lotrimin (clotrimazole) Cream, 1%	Schering Corp.
NDA 17–668	Tenuate (diethylpropion HCl) Tablets, 25 mg	Sanofi-Aventis
NDA 17–669	Tenuate (diethylpropion HCl) Extended-Release Tablets, 75 mg	Sanofi-Aventis
NDA 17–688	Lasix (furosemide) Oral Solution, 10 mg/mL	Sanofi-Aventis
NDA 17–719	Dimeray (iocarmate meglumine) Injection	Mallinckrodt Inc.
NDA 17–725	Sodium Pertechnetate Tc–99m (technectium Tc–99m sodium pertechnetate)	Mallinckrodt Inc.
NDA 17–730	Isopaque 370 (metrizoic acid and meglume) Injection	GE Healthcare
NDA 17–769	Calcimar (calcitonin salmon) Injection	Sanofi-Aventis
NDA 17–838	Lungaggregate Reagent	GE Healthcare
NDA 17–848	Tc–99m Lungaggregate	Do.
NDA 17–907	Glucoscan Kit for the Preparation of Technetium Tc–99m Gluceptate	Bristol-Myers Squibb Pharma Co., Chestnut Run Plaza, 974 Centre Rd., Wilmington, DE 19805
NDA 17–923	Mellaril-S (thioridazine HCl) Oral Suspension	Novartis Pharmaceuticals Corp.
NDA 17–956	Tepanil (diethylpropion HCl) Ten-Tabs	3M Pharmaceuticals, 3M Center, Bldg 0275–05–W–12, St. Paul, MN 55144–1000
NDA 18–000	Bricanyl (terbutaline sulfate) Inhaler	Sanofi-Aventis
NDA 18–067	Cinobac (cinoxacin) Capsules, 250 mg and 500 mg	Eli Lilly and Co.
NDA 18–088	Krypton Kr–81m Gas Generator	GE Healthcare
NDA 18–148	Nasalide (flunisolide) Nasal Spray	IVAX Research, Inc., 4400 Biscayne Blvd., Miami, FL 33137
NDA 18–489	Technescan HIDA (kit for the preparation of technetium Tc–99m lidofenin injection)	Draximage, 16751 Autoroute TransCanada Highway, Kirkland, Quebec, H9H 4J4, Canada
NDA 18–519	Irrigation Solution G (citric acid and sodium carbonate)	Baxter Healthcare Corp., 1620 Waukegan Rd., MPGR-AL, McGaw Park, IL 60085
NDA 18–554	Eulexin (flutamide) Capsules	Schering Corp.

Application No.	Drug	Applicant
NDA 18–700	Inocor (inamrinone lactate) Injection, 5 mg base/mL	Sanofi-Synthelabo Inc., c/o Sanofi-Aventis, 300 Somerset Corporate Blvd., P.O. Box 6977, Bridgewater, NJ 08807–0977
NDA 18–770	Tornalate (bitolterol mesylate) Metered-Dose Inhaler	Sanofi-Aventis
NDA 18–813	Lotrimin (clotrimazole) Lotion, 1%	Schering Corp.
ANDA 18–862	Betatrex (betamethasone valerate cream USP, 0.1%)	Savage Laboratories, 60 Baylis Rd., Melville, NY 11747
ANDA 18–863	Betatrex (betamethasone valerate ointment USP, 0.1%)	Do.
ANDA 18–867	Betatrex (betamethasone valerate lotion USP, 0.1%)	Do.
NDA 19–084	Nizoral (ketoconazole) Cream, 2%	Johnson & Johnson Pharmaceutical Research & Development, LLC, c/o Janssen Pharmaceutical Products, LP, 1125 Trenton-Harbourton Rd., P.O. Box 200, Titusville, NJ 08560
NDA 19–284	Oral Colonic Lavage (OCL) (sodium chloride, sodium bicarbonate, sodium sulfate, potassium chloride, and polyethelene glycol 3350)	Hospira, Inc., 275 North Field Dr., Bldg. 2–J45–2, Lake Forest, Il 60045–5046
NDA 19–408	Diprolene (betamethasone dipropionate)	Schering Corp.
NDA 19–459	Photoplex (7% padimate O and 3% avobenzone) Lotion	Allergan, 2525 Dupont Dr., P.O. Box 19534, Irvine, CA 92623–9534
NDA 19–520	Travasol (amino acid) in Dextrose Injection	Baxter Healthcare Corp.
NDA 19–545	Didronel (etidronate disodium) Injection	MGI Pharma, Inc., 5775 West Old Shakopee Rd., suite 100, Bloomington, MN 55437–3174
NDA 19–548	Tornalate (bitolterol mesylate) Inhalatioon Solution, 0.2%	Sanofi-Aventis
NDA 19–576	Nizoral (ketoconazole) Cream, 2%	Johnson & Johnson Pharmaceutical & Development, LLC
NDA 19–648	Nizoral (ketoconazole) Cream, 2%	Do.
NDA 20–091	Imagent (perflubron)	Alliance Pharmaceuticals Corp., 4660 La Jolla Dr., suite 740, San Diego, CA 92122
NDA 20–147	Travasol (amino acid) with Electrolytes in Dextrose Injection	Baxter Healthcare Corp.
NDA 20–228	Atrovent (ipratropium bromide) Inhalation Solution	Boehringer Ingelheim Pharmaceuticals, Inc., 900 Ridgebury Rd., P.O. Box 368, Ridgefield, CT 06877–0368
NDA 20–303	Prempro/Premphase (conjugated estrogens and medroxyprogesterone acetate) Tablets	Wyeth Pharmaceuticals, Inc.
NDA 20–315	Orlaam (levomethadyl acetate HCl) Oral Solution	Roxane Laboratories, P.O. Box 16532, Columbus, OH 43216–6532
NDA 20–486	Vanceril (beclomethasone dipropionate) Double Strength Aerosol	Schering Corp.
NDA 20–887	AcuTect Kit for the Preparation of Technetium Tc–99m Apticide Injection	CIS-US, Inc., 10 De Angelo Dr., Bedford, MA 01730
NDA 21–012	Neo-Tect Kit for the Preparation of Technetium Tc–99m Depreotide Injection	Do.
NDA 21–075	Nutropin Depot (somatropin recombinant)	Genentech Inc., 1 DNA Way MS1242, South San Francisco, CA 94080–4990
ANDA 40–098	Acetaminophen and Codeine Phosphate Oral Solution USP	Clonmel Healthcare, Ltd., c/o STADA Pharmaceuticals Inc., U.S. Agent, 5 Cedar Brook Dr., Cranbury, NJ 08512
NDA 50–477	Nebcin (tobramycin sulfate) for Injection	Eli Lilly and Co.
NDA 50–519	Nebcin (tobramycin sulfate) for Injection	Do.

Application No.	Drug	Applicant
NDA 50–678	Dynabac (dirithromycin delayed-release tablets USP)	Lilly Research Laboratories, Lilly Corporate Center, Indianapolis, IN 46285
ANDA 60–212	Grisactin (griseofulvin microcrystalline) Tablets, 500 mg	Wyeth Ayerst Laboratories, c/o Wyeth Pharmaceuticals, P.O. Box 8299, Philadelphia, PA 19101
ANDA 60–570	Fungizone (amphotericin B lotion USP), 3%	Apothecon, c/o Bristol-Myers Squibb Co.
ANDA 60–751	NEO-CORTEF (neomycin sulfate and hydrocortisone acetate) Ointment	Pharmacia & Upjohn Co., c/o Pfizer, Inc., 235 East 42nd St., New York, NY 10017
ANDA 61–007	Terramycin (oxytetracycline HCl, polymyxin B sulfate) Topical Ointment with Polymyxin B Sulfate	Pfizer, Inc.
ANDA 61–131	Nystatin Powder USP	Clonmel Healthcare, Ltd., c/o STADA Pharmaceuticals Inc.
ANDA 61–411	Veetids (penicillin V potassium tablets USP), 250 mg and 500 mg	Apothecon, c/o Bristol-Myers Squibb Co.
ANDA 61–737	ZIBA-Rx (bacitracin zinc USP)	X-GEN Pharmaceuticals, Inc., P.O. Box 1148, Elmira, NY 14902
ANDA 61–859	Anspor (cephradine) Capsules, 250 mg and 500 mg	GlaxoSmithKline, One Franklin Plaza, P.O. Box 7929, Philadelphia, PA 19101–7929
ANDA 61–866	Anspor (cephradine) for Oral Suspension	Do.
ANDA 61–876	Cerubidine Injection (daunorubice HCl for injection USP)	Sanofi-Aventis
ANDA 62–519	Nystex (nystatin) Oral Suspension USP, 100,000 units/mL	Savage Laboratories
ANDA 62–560	Mandol (cefamadole nafate for injection USP)	Eli Lilly and Co.
ANDA 62–739	Tazidime (ceftazidime)	Do.
ANDA 62–745	Cephalexin Tablets USP	Do.
ANDA 62–888	Principen (ampicillin capsules USP), 250 mg and 500 mg	Apothecon, c/o Bristol-Myers Squibb Co.
ANDA 62–926	Rubex (doxorubicin HCl for injection USP)	Bristol-Myers Squibb Co.
ANDA 63–021	Kanamycin Sulfate Injection USP, 75 mg/2 mL	Loch Pharmaceuticals, c/o Bedford Laboratories, A Division of Ben Venue Laboratories, Inc., 300 Northfield Rd., Bedford, OH 44146
ANDA 63–022	Kanamycin Sulfate Injection USP, 500 mg/2 mL	Do.
ANDA 63–025	Kanamycin Sulfate Injection USP, 1 gram (g)/3 mL	Do.
ANDA 63–099	Trimox (amoxicillin capsules USP), 250 mg and 500 mg	Apothecon, c/o Bristol-Myers Squibb Co.
ANDA 70–867	Vincrex (vincristine sulfate for injection USP), 5 mg/vial	Bristol-Myers Squibb Co.
ANDA 71–742	Clorazepate Dipotassium Capsules, 3.75 mg	Clonmel Healthcare, Ltd., c/o STADA Pharmaceuticals Inc.
ANDA 71–743	Clorazepate Dipotassium Capsules, 7.5 mg	Do.
ANDA 71–744	Clorazepate Dipotassium Capsules, 15 mg	Do.
ANDA 72–326	Fenoprofen Calcium Tablets USP, 600 mg	Do.
ANDA 72–507	Methyldopa and Hydrochlorothiazide Tablets USP, 250 mg/15 mg	Do.
ANDA 72–508	Methyldopa and Hydrochlorothiazide Tablets USP, 250 mg/25 mg	Do.
ANDA 72–509	Methyldopa and Hydrochlorothiazide Tables USP, 500 mg/30 mg	Do.
ANDA 72–510	Methyldopa and Hydrochlorothiazide Tablets USP, 500 mg/50 mg	Do.

Application No.	Drug	Applicant
ANDA 72–705	Prazosin HCl Capsules USP, 1 mg	Do.
ANDA 72–706	Prazosin HCl Capsules USP, 2 mg	Do.
ANDA 72–707	Prazosin HCL Capsules USP, 5 mg	Do.
ANDA 74–258	Metoprolol Tartrate Tablets USP, 50 mg and 100 mg	Apothecon, c/o Bristol-Myers Squibb Co.
ANDA 74–423	Captopril Tablets USP, 12.5 mg, 25 mg, 50 mg, and 100 mg	Clonmel Healthcare, Ltd., c/o of STADA Pharmaceuticals Inc.
ANDA 74–472	Captopril Tablets USP, 12.5 mg, 25 mg, 50 mg, and 100 mg	Apothecon, c/o Bristol-Myers Squibb Co.
ANDA 75–407	Morphine Sulfate Extended-Release Tablets USP, 15 mg	Clonmel Healthcare, Ltd., c/o STADA Pharmaceuticals Inc.
ANDA 80–745	Aristocort (triamcinolone acetonide) Ointment, 0.5%	Astellas Pharma US, Inc., Three Parkway North, Deerfield, IL 60015–2537
ANDA 80–750	Aristocort (triamcinolone acetonide) Ointment, 0.1%	Do.
ANDA 83–015	Aristocort (triamcinolone acetonide) Cream, 0.5%	Do.
ANDA 83–016	Aristocort (triamcinolone acetonide) Cream, 0.1%	Do.
ANDA 83–017	Aristocort (triamcinolone acetonide) Cream, 0.025%	Do.
ANDA 83–149	PBZ (tripelennamine HCl) Tablet, 25 mg	Novartis Pharmaceuticals Corp., 59 Route 10, East Hanover, NJ 07936–1080
ANDA 83–317	Propoxyphene HCl Capsules, 65 mg	Impax Laboratories, Inc., 30831 Huntwood Ave., Hayward, CA 94544
ANDA 83–380	Aristogel (triamcinolone acetonide) Gel, 0.1%	Astellas Pharma US, Inc.
ANDA 83–881	Aristocort A (triamcinolone acetonide) Spray	Do.
ANDA 86–212	Chlordiazepoxide HCl Capsules, 25 mg	Impax Laboratories, Inc.
ANDA 86–213	Chlordiazepoxide Capsules, 5 mg	Do.
ANDA 86–358	Mexate (methotrexate sodium for injection)	Bristol-Myers Squibb Co.
ANDA 86–926	Tolbutamide Tablets USP, 500 mg	Clonmel Healthcare, Ltd., c/o STADA Pharmaceuticals Inc.
ANDA 87–011	Quinidine Sulfate Tablets USP, 200 mg	Do.
ANDA 87–677	Hydrocodone Bitartrate and Acetaminophen	B.F. Ascher & Co., Inc., 15501 West 109th St., Lenexa, KS 66219
ANDA 87–887	TRYSUL (triple sulfa vaginal cream USP)	Savage Laboratories
ANDA 88–584	DHC Plus (dihydrocodeine bitartrate, acetaminophen, and caffeine) Capsules	The Purdue Frederick Co., One Stamford Forum, Stamford, CT 06901–3431
ANDA 88–760	Mexate-AQ (methotrexate sodium injection USP), 25 mg	Bristol-Myers Squibb Co.
ANDA 88–780	Aristocort A Ointment (triamcinolone acetonide ointment USP), 0.1%	Astellas Pharma US, Inc.
ANDA 88–781	Aristocort A (triamcinolone acetonide) Ointment, 0.5%	Do.
ANDA 88–944	Sedapap (butalbital and acetaminophen) Tablets, 50 mg/650 mg	Merz Pharmaceuticals, LLC, 4215 Tudor Lane, Greensboro, NC 27410
ANDA 89–887	Mexate-AQ Preserved (methotrexate sodium injection USP), 25 mg/mL	Bristol-Myers Squibb Co.

Therefore, under section 505(e) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(e)) and under authority delegated to the Director, Center for Drug Evaluation and Research, by the Commissioner, approval of the applications listed in the table in this document, and all amendments and

supplements thereto, is hereby withdrawn, effective December 7, 2007.

Dated: October 26, 2007.

Douglas C. Throckmorton,

Deputy Director, Center for Drug Evaluation and Research.

[FR Doc. E7–21886 Filed 11–6–07; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[CIS No. 2427–07; DHS Docket No. USCIS–2007–0054]

RIN No. 1615–ZA62

Announcement of a Stakeholder Meeting on the Evaluation of E-Verify

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

ACTION: Notice of meeting.

SUMMARY: The E-Verify program, formerly Basic Pilot, is an online tool that allows participating employers to confirm the employment eligibility of their newly hired employees, regardless of citizenship, to help maintain a stable, legal workforce. The purpose of this Notice is to announce to interested members of the public a stakeholder meeting on the evaluation of the E-Verify Program to identify program strengths and weaknesses from multiple perspectives and to assist the evaluation staff in prioritizing research topics.

Date and Time: The meeting will be held on Tuesday, November 27, 2007, from 8:30 a.m. to 5 p.m.

ADDRESSES: The meeting will be held at the Washington Court Hotel, 525 New Jersey Avenue, NW., Washington, DC 20001.

FOR FURTHER INFORMATION CONTACT: Sara Speckhard, U.S. Citizenship and Immigration Services (USCIS), Department of Homeland Security, Office of Policy & Strategy, 20 Massachusetts Avenue, NW., Room 4012, Washington, DC 20529. Telephone: (202) 272–1470. *Research contact:* Ms. Marsha Lyons, Westat, 1650 Research Boulevard, Rockville, MD 20850. Telephone: (301) 517–4050, Fax: (301) 294–3992. E-mail: *MarshaLyons@westat.com.*

SUPPLEMENTARY INFORMATION: On September 15, 1997, the legacy Immigration and Naturalization Service (INS) published a notice in the **Federal Register** describing pilot programs that were required by section 403 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). On December 20, 2004, the U.S. Citizenship and Immigration Services (USCIS) announced the extension of one of these programs, the Basic Pilot, to November 30, 2008. Renamed E-Verify, the current program constitutes an online modification of the Basic Pilot and allows participating employers to confirm the employment eligibility of their newly hired employees regardless of citizenship to help maintain a stable, legal workforce. E-Verify is operated jointly by USCIS and the Social Security Administration. An evaluation of the current E-Verify program is being conducted by Westat, Inc. This notice announces a public meeting to seek stakeholder input regarding the E-Verify program.

Summary of Agenda

- Introductions and Purpose.
- Update on E-Verify.
- Overview of the Key Findings of the FY2007 evaluation and the current evaluation goals.
- Break-out group discussions to address topics such as using biometrics for verification, resolving tentative confirmations, timing of employee verifications, and focusing on specific types of employers (i.e., designated agents, employers using designated agents, employment agencies and temporary help agencies, inactive employers).
- Reports from break-out groups.
- Questions and comments.

Public Participation

The meeting is open to the public, but advance notice of attendance is requested to ensure adequate seating. In the event that requests for attendance exceed available space, it may not be possible to honor all requests. Persons planning to attend should notify Ms. Lyons at least 5 days prior to the meeting.

Dated: November 1, 2007.

Jonathan R. Scharfen,

Deputy Director, U.S. Citizenship and Immigration Services.

[FR Doc. E7–21829 Filed 11–6–07; 8:45 am]

BILLING CODE 4410–10–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WO–260–09–1060–00–24 1A]

Notice of Extension for the Call for Nominations for the Wild Horse and Burro Advisory Board

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Extension.

SUMMARY: The purpose of this notice is to extend the submission date to solicit nominations for the Wild Horse and Burro Advisory Board. The **Federal Register** notice for nominations published in the **Federal Register** on September 17, 2007 [72 FR 52906].

DATES: This notice extends the date to December 7, 2007.

ADDRESSES: The nominations should be submitted to the National Wild Horse and Burro Program, Bureau of Land Management, Department of Interior, P.O. Box 12000, Reno, Nevada 89520–0006, *Attn:* Ramona DeLorme: fax (775) 861-6711.

FOR FURTHER INFORMATION CONTACT: Don Glenn, Acting Division Chief, Wild Horse and Burro Group, (202) 452–5082. Individuals who use a telecommunications device for the deaf (TDD) may reach Ms. DeLorme at any time by calling the Federal Information Relay Service at 1 (800) 877–8339.

Dated: October 30, 2007.

Bud Cribley,

Deputy Assistant Director, Renewable Resources and Planning.

[FR Doc. E7–21887 Filed 11–6–07; 8:45 am]

BILLING CODE 4310–84–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–613]

In the Matter of Certain 3G Mobile Handsets and Components Thereof; Notice of Commission Decision Not To Review an Initial Determination Granting Complainants' Motion To Amend the Complaint and Notice of Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined not to review an initial determination (''ID'') (Order No. 3) issued by the presiding administrative law judge (''ALJ'') granting complainants' motion to amend the complaint and notice of investigation.

FOR FURTHER INFORMATION CONTACT: Michelle Walters, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 708–5468. Copies of non-confidential documents filed in connection with this investigation are or will be available for

inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205–2000. General information concerning the Commission may also be obtained by accessing its Internet server at *http://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission instituted Inv. No. 337–TA–613 on September 11, 2007, based on a complaint filed by InterDigital Communications Corporation of King of Prussia, Pennsylvania, and InterDigital Technology Corporation of Wilmington, Delaware (collectively, ''InterDigital''). The complaint alleges violations of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain 3G mobile handsets and components thereof by reason of infringement of various claims in United States Patent Nos. 7,117,004 and 7,190,966. The complaint named Nokia Corporation of Finland and Nokia Inc. of Irving, Texas as respondents.

On September 28, 2007, InterDigital filed a motion to amend the complaint and notice of investigation to add allegations of unfair trade practices in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain 3G mobile handsets and components thereof by reason of infringement of various claims in United States Patent No. 6,973,579 (''the '579 patent''). The Commission investigative attorney supported the motion.

On October 11, 2007, the ALJ granted InterDigital's motion, finding that, pursuant to Commission Rule 210.14(b)(1) (19 CFR 210.14(b)(1)), there was good cause to add the allegations based on the '579 patent. No petitions for review were filed. The Commission has determined not to review the ALJ's ID.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in section 210.42 of the Commission's Rules of Practice and Procedure (19 CFR 210.42).

By order of the Commission.

Issued: November 1, 2007.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. E7–21837 Filed 11–6–07; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Advanced Media Workflow Association, Inc. (Formerly AAF Association, Inc.)

Notice is hereby given that, on September 19, 2007, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Advanced Media Workflow Association, Inc. has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, BPI Improve, Princes Risborough, UNITED KINGDOM; Discovery Communications, Silver Spring, MD; Marquis Broadcast Ltd., Pangbourne, UNITED KINGDOM; National Geographic, Washington, DC; and SAIC, McLean, VA have been added as parties to this venture. Also, Blue Order, Kaiserslautern, GERMANY; Closed Captioning Service, Inc., Burbank, CA; Grizzly Systems, Bellvue, CO; ITSSO, Mapogu, REPUBLIC OF KOREA; and Mediaware International, Arlington, VA have withdrawn as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and Advanced Media Workflow Association, Inc. intends to file additional written notifications disclosing all changes in membership.

On March 28, 2000, advanced Media Workflow Association, Inc. filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on June 29, 2000 (65 FR 40127).

The last notification was filed with the Department on June 22, 2007. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on September 11, 2007 (72 FR 51838).

Patricia A. Brink,

Deputy Director of Operations, Antitrust Division.

[FR Doc. 07–5555 Filed 11–06–07; 8:45 am]

BILLING CODE 4410-11-M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—ASTM International-Standards

Notice is hereby given that, on September 7, 2007, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), ASTM International (''ASTM'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing additions or changes to its standards development activities. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, ASTM has provided an updated list of current, ongoing ASTM standards activities originating between May 2007 to September 2007 designed as Work Items. A complete listing of ASTM Work Items, along with a brief description of each, is available at *http://www.astm.org.*

On September 15, 2004, ASTM filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on November 10, 2004 (69 FR 65226).

The last notification was filed with the Department on May 9, 2007. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on June 8, 2007 (72 FR 31856–01).

Patricia A. Brink,

Deputy Director of Operations, Antitrust Division.

[FR Doc. 07–5558 Filed 11–06–07; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—DVD Copy Control Association

Notice is hereby given that, on September 13, 2007, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), DVD Copy Control Association (''DVD CCA'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, A-Com International Co., Ltd., Hsinchu, Taiwan; ASD Electronics Ltd., Kowloon, Hong Kong-China; AVT International Limited, Kowloon, Hong Kong-China; AWIND Inc., Taipei, Taiwan; Mitsubishi Chemical Corporation, Tokyo, Japan; MOD Systems, Inc., Seattle, WA; New Medium Enterprises, Inc., London, United Kingdom; and TechniSat Digital GmbH, Daun, Germany have been added as parties to this venture.

Also, D-Link Systems, Inc., Fountain Valle, CA; Dyntec Disc Production Co., Ltd., Nakhon, Pathom, Thailand; Hong Kong Konka Ltd., Kway Chung NT, Hong Kong-China; Lenovo (Singapore) Pte. Ltd., Singapore, Singapore; Lynic Technology PLC, Slough, Berkshire, United Kingdom; Maxi World Technology Limited, Kwun Tong, Hong Kong-China; Newcom Technology Corporation, Taipei, Taiwan, OptiDisc Corporation, Anaheim, CA; Raymedia Co., Ltd., Gyeonggi-do, Republic of Korea; Soundmax Electronics Limited, Kowloon, Hong Kong-China; and Taiwan Thick—Film Ind. Corp., Taipei Hsien, Taiwan have withdrawn as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and DVD CCA intends to file additional written notifications disclosing all changes in membership.

On April 11, 2001, DVD CCA filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on August 3, 2001 (66 FR 40727).

The last notification was filed with the Department on June 15, 2007. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on September 11, 2007 (72 FR 51840).

Patricia A. Brink,

Deputy Director of Operations, Antitrust Division.

[FR Doc. 07–5565 Filed 11–6–07; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Industrial Macromolecular Crystallography Association

Notice is hereby given that, on August 21, 2007, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301, *et seq.* (''the Act''), Industrial Macromolecular Crystallography Association (''IMCA'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Johnson & Johnson Pharmaceutical Research & Development, LLC, Raritan, NJ has been added as a party to this venture; 3-Dimensional Pharmaceuticals, Inc., Exton, PA has withdrawn as a party to this venture; and Pfizer Global Research and Development has changed its principal place of business to Groton, CT.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and IMCA intends to file additional written notifications disclosing all changes in membership.

On October 23, 1990, IMCA filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on December 3, 1990 (55 FR 49952).

The last notification was filed with the Department on November 17, 2003. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on December 12, 2003 (68 FR 69422).

Patricia A. Brink,

Deputy Director of Operations, Antitrust Division.

[FR Doc. 07–5561 Filed 11–6–07; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Interchangeable Virtual Instruments Foundation, Inc.

Notice is hereby given that, on October 10, 2007, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Interchangeable Virtual Instruments Foundation, Inc. has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Lockheed Martin, Lakeland, FL has withdrawn as a party to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and Interchangeable Virtual Instruments Foundation, Inc. intends to file additional written notifications disclosing all changes in membership.

On May 29, 2001, Interchangeable Virtual Instruments Foundation, Inc. filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on July 30, 2001 (66 FR 39336).

The last notification was filed with the Department on July 25, 2007. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on August 23, 2007 (72 FR 48307).

Patricia A. Brink,

Deputy Director of Operations, Antitrust Division.

[FR Doc. 07–5569 Filed 11–6–07; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—LiMo Foundation

Notice is hereby given that, on October 3, 2007, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), LiMo Foundation (''LiMo'') filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Innopath Software, Inc., Sunnyvale, CA; Wind River Systems, Alameda, CA; ARM Holdings, PLC, Cambridge, UNITED KINGDOM; MontaVista Software, Inc., Santa Clara, CA; Broadcom Corporation, Sunnyvale, CA; Acrodea, Inc., Tokyo, JAPAN; Ericsson AB, Stockholm, SWEDEN; SoftBank Corp., Tokyo, JAPAN; NX B.V., Eindhoven, THE NETHERLANDS; and KT Freetel Co., Ltd., Seoul, REPUBLIC OF KOREA, have been added as parties to this venture.

No other changes have been made in either the membership or planned activity of this group research project. Membership in this group research project remains open, and LiMo intends to file additional written notifications disclosing all changes in membership.

On March 1, 2007, LiMo filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on April 9, 2007 (72 FR 17583).

The last notification was filed with the Department on June 15, 2007. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on September 11, 2007 (72 FR 51841).

Patricia A. Brink,

Deputy Director of Operations, Antitrust Division.

[FR Doc. 07–5568 Filed 11–06–07; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Network Centric Operations Industry Consortium, Inc.

Notice is hereby given that, on October 12, 2007, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Network Centric Operations Industry Consortium, Inc. has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Telindus, Heverlee, BELGIUM; Advanced Virtual Engine Test Cell, Inc., Springfield, OH; Chandler/May, Inc., Huntsville, AL; and Australian Department of Defence, Canberra, ACT, AUSTRALIA have been added as parties to this venture. Also, Gallium Visual Systems Inc., Ottawa, Ontario CANADA; and EFW Incorporated, Fort Worth, TX have withdrawn as parties to this venture. In addition, MilSOFT Yazilim Teknolojileri A.S. has changed its name to MilSOFT ICT-Iletisim Teknolojileri A.S., Ankara, TURKEY.

No other changes have been made in either the membership on planned activity of the group research project. Membership in this group research project remains open, and Network Centric Operations Industry Consortium, Inc. intends to file additional written notifications disclosing all changes in membership.

On November 19, 2004, Network Centric Operations Industry Consortium, Inc. filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on February 2, 2005 (70 FR 5486).

The last notification was filed with the Department on July 25, 2007. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on August 24, 2007 (72 FR 48680).

Patricia A. Brink,

Deputy Director of Operations, Antitrust Division.

[FR Doc. 07–5553 Filed 11–6–07; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Open DeviceNet Vendor Association, Inc.

Notice is hereby given that, on August 30, 2007, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301, *et seq.* (''the Act''), Open DeviceNet Vendor Association, Inc. (''ODVA'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Yaskawa Eshed Technology, Rosh-Ha'ayin, ISRAEL; Innovasic Semiconductor, Albuquerque, NM; FiberFin Inc., Yorkville, IL; Komatsu Electronics, Inc., Hiratsuka Kanagawa, JAPAN; ENDO KOGYO CO., Ltd., Nilgata, JAPAN; Wolke Inks & Printers GmbH, Hersbruck, GERMANY; The Mercury and Iron and Steel Co. d/b/a MISCO Refractometer, Cleveland, OH; Univer S.p.A., Milan, ITALY; HIPROM TECHNOLOGIES (PTY) LTD, Randburg, SOUTH AFRICA; SEARI Group Co., Ltd., Shanghai, PEOPLE'S REPUBLIC OF CHINA; and Micro Innovation, St. Gallen, SWITZERLAND have been added as parties to this venture. Also, Smart Network Devices GmbH, Juelich, GERMANY; SIEI S.p.A., Gerenzano VA, ITALY; ITT Corporation, Lancaster, PA; and GE Multilin, Markham, Ontario, CANADA have withdrawn as parties to this venture.

In addition, the following members have changed their names: Showa Electric Wire & Cable to SWCC ShowaDevice Technology Co., Ltd., Tokyo, JAPAN; and TURCK (Interlink BT) to TURCK, Inc., Plymouth, MN.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and ODVA intends to file additional written notifications disclosing all changes in membership.

On June 21, 1995, ODVA filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on February 15, 1996 (61 FR 6039).

The last notification was filed with the Department on May 10, 2007. A

notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on July 13, 2007 (72 FR 38618).

Patricia A. Brink,

Deputy Director of Operations, Antitrust Division.

[FR Doc. 07–5562 Filed 11–6–07; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to The National Cooperative Research and Production Act of 1993—Petroleum Environmental Research Forum Project No. 2004–06

Notice is hereby given that, on March 15, 2007, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Petroleum Environmental Research Forum (''PERF'') Project No. 2004–06 has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing (1) the identities of the parties to the venture and (2) the nature and objectives of the venture. The notifications were filed for the purpose of invoking the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances.

Pursuant to Section 6(b) of the Act, the identities of the parties to the venture are: BP Products North America Inc., Naperville, IL; Citgo Petroleum Corporation, Lemont, IL; ConocoPhillips Company, bartlesville, OK; Marathon Petroleum Company LLC, Findlay, OH; YPF S.A., Mendoza, ARGENTINA; and Total France, Paris, FRANCE. The general area of PERF Project 2004–06's planned activity is to reduce desalter environmental impacts.

Patricia A. Brink,

Deputy Director of Operations, Antitrust Division.

[FR Doc. 07–5567 Filed 11–06–07; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Portland Cement Association

Notice is hereby given that, on September 6, 2007, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301, *et seq.* (''the Act''), Portland Cement Association (''PCA'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Praxair, Inc., Danbury, CT, has become an Associate Member.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and PCA intends to file additional written notifications disclosing all changes in membership.

On January 7, 1985, PCA filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on February 5, 1985 (50 FR 5015).

The last notification was filed with the Department on May 14, 2007. A notice as published in the **Federal Register** pursuant to Section 6(b) of the Act on July 13, 2007 (72 FR 38619).

Patricia A. Brink,

Deputy Director of Operations, Antitrust Division.

[FR Doc. 07–5563 Filed 11–6–07; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—PXI Systems Alliance, Inc.

Notice is hereby given that, on August 7, 2007, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301, *et seq.* (''the Act''), PXI Systems Alliance, Inc. has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Invisar, Inc., Chapel Hill, NC; and Triple E Corporation, Lowell, MA have withdrawn as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and PXI Systems Alliance, Inc. intends to file additional written notifications disclosing all changes in membership.

On November 22, 2000, PXI Systems Alliance, Inc. filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on March 8, 2001 (66 FR 13971).

The last notification was filed with the Department on May 30, 2007. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on July 13, 2007 (72 FR 38619).

Patricia A. Brink,

Deputy Director of Operations, Antitrust Division.

[FR Doc. 07–5560 Filed 11–6–07; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—SAE Consortium Ltd.

Notice is hereby given that, on September 27, 2007, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), SAE Consortium Ltd. (''SAEC'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing (1) the identities of the parties to the venture and (2) the nature and objectives of the venture. The notifications were filed for the purpose of invoking the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances.

Pursuant to Section 6(b) of the Act, the identities of the parties to the venture are: Abbott Laboratories, Abbott Park, IL; F. Hoffmann-La Roche, Inc., Basel, SWITZERLAND; Johnson & Johnson Pharmaceutical Research & Development, LLC, Raritan, NJ; Pfizer, Inc., New York, NY; Sanofi-Aventis, Bridgewater, NJ; SmithKline Beecham Corporation d/b/a GlaxoSmithKline, Research Triangle Park, NC; and Wyeth Pharmaceuticals Inc., Collegeville, PA. The SAEC's general area of planned activities is to carry out scientific research in the public interest, including research directed toward the discovery of DNA-variants that are clinically useful in understanding and predicting the risk of drug induced serious adverse events and similar scientific research, the results of which

will then be made freely available to the public on a nondiscriminatory basis. The venture will enable SAEC to identify DNA-variants useful in understanding and predicting the risk of drug induced serious adverse events with shared financial risk and without the duplication of effort that would result from the work of individual members. As the research results are gathered, they will be placed in the public domain for use by the worldwide medical research community in identifying specific genes involved in causing serious adverse events, thereby facilitating downstream research and development of therapeutic diagnostic and pharmaceutical products.

Patricia A. Brink,

Deputy Director of Operations, Antitrust Division.

[FR Doc. 07–5554 Filed 11–06–07; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Semiconductor Test Consortium, Inc.

Notice is hereby given that, on August 22, 2007, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301, *et seq.* (''the Act''), Semiconductor Test Consortium, Inc. has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Tom Jackson (individual member), Merrimack, NH; Wavecrest Corporation, Eden Prairie, MN; Keven Fetterly (individual member), Rollingbay, WA; and Mark Roos (individual member), Santa Clara, CA have been added as parties to this venture. Also, NXP Semiconductors, Inc., San Jose, CA; John Rowe (individual member), Boston, MA; Christopher Alderson (individual member), Yokohama, JAPAN; Apria Technology, Rollingbay, WA; and Roos Instruments, Santa Clara, CA have withdrawn as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and Semiconductor Test Consortium, Inc. intends to file additional written notifications disclosing all changes in membership.

On May 27, 2003, Semiconductor Test Consortium, Inc. filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on June 17, 2003 (68 FR 35913).

The last notification was filed with the Department on June 7, 2007. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on July 13, 2007 (72 FR 38619).

Patricia A. Brink,

Deputy Director of Operations, Antitrust Division.

[FR Doc. 07–5552 Filed 11–6–07; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Cooperative Research Group on High Efficiency Dilute Gasoline Engine (HEDGE)

Notice is hereby given that, on June 1, 2007, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Southwest Research Institute (''SwRI''): Cooperative Research Group on High Efficiency Dilute Gasoline Engine (''HEDGE'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Honda R&D Co., Ltd, Tochigi Prefecture, JAPAN has been added as a party to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and HEDGE intends to file additional written notifications disclosing all changes in membership.

On June 10, 2005, HEDGE filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on July 7, 2005 (70 FR 39339–39340).

The last notification was filed with the Department on April 5, 2007. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on May 7, 2007 (72 FR 25782).

Patricia A. Brink,

Deputy Director of Operations, Antitrust Division.

[FR Doc. 07–5559 Filed 11–6–07; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Cooperative Research Group on Common Rail Fuel Systems

Notice is hereby given that, on August 15, 2007, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Southwest Research Institute (''SwRI''): Cooperative Research Group on Common Rail Fuel Systems filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing (1) the identities of the participants in the cooperative research project and (2) the nature and objectives of the venture. The notifications were filed for the purpose of invoking the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances.

Pursuant to Section 6(b) of the Act, the identities of the current participants in the Cooperative Research Group on Common Rail Fuel Systems are: Baldwin Filters, Kearney, NE; Caterpillar, Inc., Mossville, IL; Champion Laboratories, Inc., Albion, IL; Donaldson, Minneapolis, MN; Komatsu, Oyamo-shi, Japan; Racor, Modesto, Ca.

The purpose and nature of the Cooperative Research Group on Common Rail Fuel Systems is to determine the filtration requirements needed to control significant abrasive wear, and to determine the most sensitive areas in the fuel injection system to identify critical components. To attain such, a filtration assessment system and test protocol for testing future systems will be developed. The test protocol will include conditions, such as vibration, to determine environmental factors that may affect the protocol and the protocol will be verified by different degrees of filtration using various common rail systems. A standardized filter test method to meet industry standards will also be recommended.

Membership in this research group remains open, and the participants

intend to file additional written notification disclosing all changes in membership or planned activities.

Patricia A. Brink,

Deputy Director of Operations, Antitrust Division.

[FR Doc. 07–5564 Filed 11–06–07; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—TeleManagement Forum

Notice is hereby given that, on August 7, 2007, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), TeleManagement Forum (''the Forum'') filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, @Home, Groningen, NETHERLANDS; 3G CLUB (Communication Leaders United Board), Taipei, TAIWAN; Alt-Lan, Moscow, RUSSIA; Averox plc, Uxbridge, Middlesex, UNITED KINGDOM; Avici Systems Inc., North Brillerica, MA; Bakcell Ltd, Baku, AZERBAIJAN; BEE MediaSoft Limited, Hong Kong, HONG KONG–CHINA; BNM Incorporated, Indialantic, FL; Brighthaul, Herzelia, ISRAEL; Bulgarian Telecommunication Company, Sofia, BULGARIA; CACI Ltd, London, UNITED KINGDOM; Casema BV, Den Haag, zh, NETHERLANDS; Cerillion Technologies Limited, London, UNITED KINGDOM; Column Technologies, Downers Grove, IL; CRC-Pinnacle Consulting Co., Ltd, Beijing, PEOPLES REPUBLIC OF CHINA; Cyprus Telecommunications Authority (CYTA), Nicosia, CYPRUS; Dataduct Technologies Ltd, Dun Laoghaire, Dublin, IRELAND; Dublin City University, Dublin, IRELAND; Edelweiss Service Consulting SàRL, Geneva, SWITZERLAND; Elanti Systems, Inc., Murray Hill, NJ; Elitecore Technologies Limited, Ahmedabad, Gujarat, INDIA; Fixed Telefonica Brazil, Sao Paulo, BRAZIL; FLAG Telecom, West Drayton, Middlesex, UNITED KINGDOM; Forthnet S.A., Kallithea, Attica, GREECE; Fusion Business Solutions, Hounslow, Middlesex, UNITED KINGDOM; Gartner, Stamford CT; Grant Thornton Consulting Company Limited, Bangkok, THAILAND; Gridpoint Systems, Ottawa, Ontario, CANADA; Gruppo H2O, Milan, ITALY; GTA Consulting, Outremont, Quebec, CANADA; Hong Kong CSL Limited, Telegraph Bay, Hong Kong, HONG KONG–CHINA; IneoQuest Technologies, Inc., Mansfield, MA; Infotech Enterprises Europe, London, UNITED KINGDOM; Iptivia, New York, NY; isilogica Sàrl, Arzier, Vaud, SWITZERLAND; IST Holdings (Pty) Ltd, Pretoria, Gauteing, SOUTH AFRICA; Jet Infosystems, Moscow, RUSSIA; KDDI R&D Laboratories, Inc., Fujimino, Saitama, JAPAN; Kyak Systems Ltd, London, UNITED KINGDOM; Lifetree Convergence Ltd, New Delhi, Delhi, INDIA; Makedonski Telekomunikacii, Skopje, MACEDONIA; Martin Group, Mitchell, SD; MBR Partners, Stockley Park, Uxbridge, UNITED KINGDOM; Mobinomics, Cape Town, Western Cape, SOUTH AFRICA; Ness Technologies & Systems Group (TSG), Tel Aviv, ISRAEL; NETvisor, Budapest, HUNGARY; NMSWorks Software Pvt. Ltd, Chennai, Tamil nadu, INDIA; Novabit Informationssyteme GmbH, Sauerlach, Bayern, GERMANY; Novell, Waltham, MA; O2UK, Slough, Berkshire, UNITED KINGDOM; OMANTEL, Ruwi, Muscat, OMAN; one2tribe Sp. Z o.o., Michalowice, POLAND; Packet Design Inc., Palo Alto, CA; Raavi Consulting Services, Hyderabad, Andhra Pradesh, INDIA; RiCo, Feodosia, Crimea, UKRAINE; Ronanki Infotech Private Ltd, Bangalore, Karnataka, INDIA; RRD—Reti Radiotelevisive Digitali spa, Milano, ITALY; Sales Technologies, Auckland, NEW ZEALAND; SciSys UK Ltd., Chippenham, UNITED KINGDOM; Tail-f Systems, Stockholm, SWEDEN; Technology Transitions, Inc., Bound Brook, NJ; TelecomAdvisors International S.A., Panama City, PANAMA; Telefonica, Madrid, SPAIN; Telefonica Moviles Colombia S.A., Bogota, Distrito Capital, COLOMBIA; Teleonto Technologies Pvt. Ltd, Hyderabad, AP, INDIA; Teradata, Dayton, OH; University of Jvyäskylaä, FINLAND; University of Otago, Dunedin, Otago, NEW ZEALAND; UPC Broadband Operations b.v., Schiphol Rijk, NETHERLANDS; VISITEK, Jakarta Selatan, Jakarta, INDONESIA; VSS monitoring, Inc., Burlingame, CA; Watch4Net Solutions Inc., Montreal, Quebec, CANADA; Windward Consulting Group, Herndon, VA; WiTech, Cascina, Pisa, ITALY; and Wola Info S.A., Warsaw, Mokotó, POLAND, have been added as parties to this venture.

Also, AOL (UK) Ltd, London, UNITED KINGDOM; AOL Services (UK), London, UNITED KINGDOM; Barret AB, Frösön, SWEDEN; BellSouth, Atlanta, GA; Billing Services Group Europe, Buckden, Cambridgeshire, UNITED KINGDOM; BoldTech Systems, Inc., Denver, CO; Carphone Warehouse, London, UNITED KINGDOM; Casabyte, Inc., Renton, WA; Cingular Wireless LLC, Atlanta, GA; ClickSoftware Inc., Burlington, MA; COLT Telecom Group plc, London, UNITED KINGDOM; Covad Communications, San Jose, CA; Cramer Amdocs OSS Division, Bath, UNITED KINGDOM; DataSynapse, New York, NY; Dimension Data, Midrand, Gauteng, SOUTH AFRICA; Enkata, San Mateo, CA; Enure Networks, Herzeliya, ISRAEL; Evolved Networks, Ipswich, Suffolk, UNITED KINGDOM; Glenayre Technologies, Duluth, GA; GlobalLogic, Newark, NJ; IBB Consulting Group, New Home, PA; Infinera, Sunnyvale, CA; Infozech Software, New Delhi, Delhi, INDIA; Integra Consultores, Caracas, Municipio Metropolitano, VENEZUELA; ipworth, Bellevue, WA; Kamco, Melbourne, Victoria, AUSTRALIA; Kingston Communications (Hull) PLC, Wakefield, West Yorkshire, UNITED KINGDOM; Lawrence Livermore Nat'l Laboratory, Livermore, CA; Lucent Technologies Inc., Monmouth Junction, NJ; MCH-Group, Nieuwegein, NETHERLANDS; MetaSolv Software Inc., Plano, TX; NeoConsult ApS, Friederiksberg, DENMARK; NetProfits Limited, Erlangen, GERMANY; Optima Telekom, Zagreb, CROATIA; Orange Home UK PLC, St Albans, London, UNITED KINGDOM; OT/partners, Glen Echo, MD; Portal Software, Inc., Cupertino, CA; Professional Computing Resources, Inc. (PCR), Kentwood, MI; Ramax International, St. Petersburg, RUSSIA; Revenue Protect Limited, Hatfield, UNITED KINGDOM; Scribax consulting, OSMÖ, Stockholm, SWEDEN; SETA Corporation, McLean, VA; shanghai freesky inc., Shanghai, PEOPLES REPUBLIC OF CHINA; Siebel Systems, Emeryville, CA; Siemens Networks GmbH & Co. KG, Muenchen, Bavaria, GERMANY; Siemens Networks GmbH & Co. KG, Cassina de Pecchi, Milano, ITALY; Simpler Networks Inc., Dorval, Quebec, CANADA; Smart Com, Inc., Ljubljana, SLOVENIA; Sonic Software, Bedford, MA; Sopra Group, Sophia-Antipolis, Valbonne, FRANCE; Syndesis Limited, Richmond Hill, Ontario, CANADA; TBayTel, Thunder Bay, Ontario, CANADA; Telecom Expert Group, Lisle, IL; Toyo Business Engineering Corp., Narashino, Chiba, JAPAN; Trendium, Inc., Sunrise, FL; Tropic Networks Inc., Ottawa, Ontario,

CANADA; TrueBaseline Corporation, Pittsburgh, PA; Tshibanda & Associates LLC, Kansas City, MO; Vallent Corporation, Bellevue, WA; Voltaire Consultants bv, Baarn, Utrecht, NETHERLANDS; and Xactium Limited, Sheffield, South Yorkshire, UNITED KINGDOM, have withdrawn as parties to this venture.

The following members have changed their names: Alcatel has changed its name to Alcatel-Lucent; Flextronics Software Systems has changed its name to Aricent; BOC Iberica has changed its name to BOC; DMR Consulting Group Chile S.A. has changed its name to everis Chile S.A.; Harris Corporation has changed its name to Harris Stratex Networks; Nokia Oyj has changed its name to Nokia Siemens Networks BV; Orishatech has changed its name to OT/Partners; Ronannki Infotech Private Ltd has changed its name to Ronanki Infotech Private Ltd; Digital China (SI–TECH) Information Technology Ltd has changed its name to SI–TECH Information Technology Ltd; STROM Telecom has changed its name to SITRONICS Telecom Solutions; Steria has changed its name to Steria Mummert Consulting AG; Tektronix Texas, LLC has changed its name to Tektronix; Telefonica S.A. has changed its name to Telefonica; UPC Nederland has changed its name to UPC Broadband Operations b.v.; and Agilance Inc. has changed its name to ZINC Solutions Inc.

The following members have changed their addresses: Actix has changed its address to London, UNITED KINGDOM; Arkipelago Inc. has changed its address to Toronto, Ontario, CANADA; Atos Origin has changed its address to Groningen, NETHERLANDS; Corrigent Systems has changed its address to Tel-Aviv, ISRAEL; Digital Fairway Corporation has changed its address to Toronto, Ontario, CANADA; Elitecore Technologies Limited has changed its address to Ahemedabad, Gujarat, INDIA; Hong Kong CSL Limited has changed its address to Telegraph Bay, Hong Kong, HONG KONG–CHINA; Kabira Technology has changed its address to San Mateo, CA; Level 3 Communications has changed its address to Broomfield, CO; Martin Dawes Systems has changed its address to Fearnhead, Warrington, UNITED KINGDOM; PrismTech has changed its address to Gateshead, Tyne & Wear, UNITED KINGDOM; SaskTel has changed its address to Regina, Saskatchewan, CANADA; TDC has changed its address to København C (Copenhagen), DENMARK; Telcordia Technologies has changed its address to Piscataway, NJ; Telekom Slovenije has changed its address to Ljubljana, SLOVENIA; Telstra Corporation has changed its address to Melbourne, Victoria, AUSTRALIA; Ukrainian Mobile Communications UMC has changed its address to Kiev, UKRAINE; webMethods has changed its address to Fairfax, VA; ZINC Solutions Inc. has changed its address to Montreal, Quebec, CANADA; ZTE Corporation has changed its address to Shenzhen, Guangdong, PEOPLES REPUBLIC OF CHINA.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and the Forum intends to file additional written notifications disclosing all changes in membership.

On October 21, 1988, the Forum filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on December 8, 1988 (53 FR 49615).

The last notification was filed with the Department on February 8, 2007. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on April 9, 2007 (72 FR 17583).

Patricia A. Brink,

Deputy Director of Operations, Antitrust Division.

[FR Doc. 07–5556 Filed 11–06–07; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—VSI Alliance

Notice is hereby given that, on April 30, 2007, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), VSI Alliance has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Canadian Microelectronics Corp., Kingston, Ontario, CANADA; and UMC, Hsinchu City, TAIWAN have withdrawn as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and VSI Alliance intends to file additional written notifications disclosing all changes in membership.

On November 29, 1996, VSI Alliance filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on March 4, 1997 (62 FR 9812).

The last notification was filed with the Department on January 12, 2007. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on February 26, 2007 (72 FR 8402).

Patricia A. Brink,

Deputy Director of Operations, Antitrust Division.

[FR Doc. 07–5557 Filed 11–6–07; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Cooperative Research Group on Integrated Investigations of Faulting in Carbonate Strata

Notice is hereby given that, on September 10, 2007, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Southwest Research Institute (''SwRI''): Cooperative Research Group on Integrated Investigation of Faulting in Carbonate Strata has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing (1) the identities of the parties to the venture and (2) the nature and objectives of the venture. The notifications were filed for the purpose of invoking the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances.

Pursuant to Section 6(b) of the Act, the identities of the parties to the venture are: Chevron Energy Technology Co., San Ramon, CA; ConocoPhillips Co., Houston, TX; ExxonMobil Upstream Research Co., Houston, TX; and Shell International Exploration & Production, Inc., Houston, TX. The general area of Cooperative Research Group on Integrated Investigation of Faulting in Carbonate Strata planned activity is to characterize the deformation features that develop in faulted carbonate rocks to provide analog information for understanding faulted carbonate hydrocarbon reservoirs. This

investigation is being conducted in an area where faults serve as both barriers and conduits for groundwater movement. Characterization of the faulted field exposures will include stratigraphic, lithologic, structural, hydrologic and geomechanical investigations. Quantitative deformation analysis will be performed through a combination of field- and laboratory-based analysis.

Membership in this research group remains open, and the participants intend to file additional written notification disclosing all changes in membership or planned activities.

Patricia A. Brink,

Deputy Director of Operations, Antitrust Division.

[FR Doc. 07–5566 Filed 11–06–07; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Importer of Controlled Substances; Notice of Registration

By Notice dated July 31, 2007 and published in the **Federal Register** on August 9, 2007, (72 FR 44858–44859), Alcan Packaging-Bethlehem, 2400 Baglyos Circle, Bethlehem, Pennsylvania 18020, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as an importer of Nabilone (7379), a basic class of controlled substance listed in schedule II.

The company plans to import the listed controlled substance for packaging and distribution.

No comments or objections have been received. DEA has considered the factors in 21 U.S.C. 823(a) and 952(a) and determined that the registration of Alcan Packaging-Bethlehem to import the basic class of controlled substance is consistent with the public interest and with United States obligations under international treaties, conventions, or protocols in effect on May 1, 1971, at this time. DEA has investigated Alcan Packaging-Bethlehem to ensure that the company's registration is consistent with the public interest. The investigation has included inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to 21 U.S.C. 952(a) and 958(a), and in accordance with 21 CFR 1301.34, the above named company is granted registration as an importer of the basic class of controlled substance listed.

Dated: October 31, 2007.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. E7–21865 Filed 11–6–07; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Importer of Controlled Substances; Notice of Registration

By Notice dated August 1, 2007 and published in the **Federal Register** on August 9, 2007, (72 FR 44860), Cambrex North Brunswick, Inc., Technology Centre of New Jersey, 661 Highway One, North Brunswick, New Jersey 08902, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as an importer of Phenylacetone (8501), a basic class of controlled substance listed in schedule II.

The company plans to import the listed controlled substance to manufacture amphetamine.

No comments or objections have been received. DEA has considered the factors in 21 U.S.C. 823(a) and 952(a) and determined that the registration of Cambrex North Brunswick, Inc. to import the basic class of controlled substance is consistent with the public interest and with United States obligations under international treaties, conventions, or protocols in effect on May 1, 1971, at this time. DEA has investigated Cambrex North Brunswick, Inc. to ensure that the company's registration is consistent with the public interest. The investigation has included inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to 21 U.S.C. 952(a) and 958(a), and in accordance with 21 CFR 1301.34, the above named company is granted registration as an importer of the basic class of controlled substance listed.

Dated: October 31, 2007.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. E7–21859 Filed 11–6–07; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Application

Pursuant to § 1301.33(a) of Title 21 of the Code of Federal Regulations (CFR), this is notice that on August 22, 2007, Cayman Chemical Company, 1180 East Ellsworth Road, Ann Arbor, Michigan 48108, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as a bulk manufacturer of the basic classes of controlled substances listed in schedule I:

Drug	Schedule
Marihuana (7360)	I
Tetrahydrocannabinols (7370)	I

The company plans to manufacture small quantities of marihuana derivatives for research purposes. In reference to drug code 7360 (Marihuana), the company plans to bulk manufacture cannabidiol. In reference to drug code 7370 (Tetrahydrocannabinols), the company will manufacture a synthetic THC. No other activity for this drug code is authorized for registration.

Any other such applicant and any person who is presently registered with DEA to manufacture such a substance may file comments or objections to the issuance of the proposed registration pursuant to 21 CFR 1301.33(a).

Any such written comments or objections being sent via regular mail should be addressed, in quintuplicate, to the Drug Enforcement Administration, Office of Diversion Control, Federal Register Representative (ODL), Washington, DC 20537, or any being sent via express mail should be sent to Drug Enforcement Administration, Office of Diversion Control, Federal Register Representative (ODL), 8701 Morrissette Drive, Springfield, Virginia 22152; and must be filed no later than January 7, 2008.

Dated: October 31, 2007.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. E7–21848 Filed 11–6–07; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Importer of Controlled Substances; Notice of Registration

By Notice dated August 16, 2007 and published in the **Federal Register** on August 27, 2007 (72 FR 49019), Cerilliant Corporation, 811 Paloma Drive, Suite A, Round Rock, Texas 78664, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as an importer of the basic classes of controlled substances listed in schedule I and II:

Drug	Schedule
Cathinone (1235)	I
Methcathinone (1237)	I
N-Ethylamphetamine (1475)	I
N,N-Dimethylamphetamine (1480)	I
Fenethylline (1503)	I
Gamma Hydroxybutyric Acid (2010).	I
Ibogaine (7260)	I
Lysergic acid diethylamide (7315)	I
Marihuana (7360)	I
Tetrahydrocannabinols (7370)	I
Mescaline (7381)	I
3,4,5-Trimethoxyamphetamine (7390).	I
4-Bromo-2,5-dimethoxyamphetamine (7391).	I
4-Bromo-2,5-dimethoxyphenethylamine (7392).	I
4-Methyl-2,5-dimethoxyamphetamine (7395).	I
2,5-Dimethoxyamphetamine (7396).	I
3,4-Methylenedioxyamphetamine (7400).	I
3,4-Methylenedioxy-N-ethylamphetamine (7404).	I
3,4-Methylenedioxymethamphetamine (7405).	I
4-Methoxyamphetamine (7411)	I
Alpha-methyltryptamine (7432)	I
Diethyltryptamine (7434)	I
Dimethyltryptamine (7435)	I
Psilocybin (7437)	I
Psilocyn (7438)	I
Phencyclidine (7471)	I
N-Benzylpiperazine (7493)	I
Etorphine (except HCl) (9056)	I
Heroin (9200)	I
Morphine-N-oxide (9307)	I
Normorphine (9313)	I
Pholcodine (9314)	I
Dextromoramide (9613)	I
Dipipanone (9622)	I
Trimeperidine (9646)	I
Amphetamine (1100)	II
Methamphetamine (1105)	II
Methylphenidate (1724)	II
Amobarbital (2125)	II
Pentobarbital (2270)	II
Secobarbital (2315)	II
Phenylacetone (8501)	II
Cocaine (9041)	II
Codeine (9050)	II
Dihydrocodeine (9120)	II
Oxycodone (9143)	II
Hydromorphone (9150)	II
Benzoylecgonine (9180)	II
Ethylmorphine (9190)	II
Meperidine (9230)	II
Methadone (9250)	II
Dextropropoxyphene bulk (9273) (non-dosage form).	II
Morphine (9300)	II
Thebaine (9333)	II
Levo-alphacetylmethadol (9648)	II
Oxymorphone (9652)	II
Poppy Straw Concentrate (9670)	II

The company plans to import small quantities of the listed controlled substances for the manufacture of analytical reference standards.

No comments or objections have been received. DEA has considered the factors in 21 U.S.C. 823(a) and 952(a) and determined that the registration of Cerilliant Corporation to import the basic classes of controlled substances is consistent with the public interest and with United States obligations under international treaties, conventions, or protocols in effect on May 1, 1971, at this time. DEA has investigated Cerilliant Corporation to ensure that the company's registration is consistent with the public interest. The investigation has included inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to 21 U.S.C. 952(a) and 958(a), and in accordance with 21 CFR 1301.34, the above named company is granted registration as an importer of the basic classes of controlled substances listed.

Dated: October 31, 2007.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. E7–21846 Filed 11–6–07; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Importer of Controlled Substances; Notice of Application

Pursuant to 21 U.S.C. 958(i), the Attorney General shall, prior to issuing a registration under this section to a bulk manufacturer of a controlled substance in schedule I or II and prior to issuing a regulation under 21 U.S.C. 952(a)(2) authorizing the importation of such a substance, provide manufacturers holding registrations for the bulk manufacture of the substance an opportunity for a hearing.

Therefore, in accordance with Title 21 Code of Federal Regulations (CFR), 1301.34(a), this is notice that on October 1, 2007, Hospira, Inc., 1776 North Centennial Drive, McPherson, Kansas 67460–1247 made application by renewal to the Drug Enforcement Administration (DEA) to be registered as an importer of Remifentanil (9739), a basic class of controlled substance listed in schedule II.

The company plans to import Remifentanil for use in dosage form manufacturing.

Any bulk manufacturer who is presently, or is applying to be, registered with DEA to manufacture such basic class of controlled substance may file comments or objections to the issuance of the proposed registration and may, at the same time, file a written request for a hearing on such application pursuant to 21 CFR 1301.43 and in such form as prescribed by 21 CFR 1316.47.

Any such comments or objections being sent via regular mail should be addressed, in quintuplicate, to the Drug Enforcement Administration, Office of Diversion Control, Federal Register Representative (ODL), Washington, DC 20537, or any being sent via express mail should be sent to Drug Enforcement Administration, Office of Diversion Control, Federal Register Representative (ODL), 8701 Morrissette Drive, Springfield, VA 22152; and must be filed no later than December 7, 2007.

This procedure is to be conducted simultaneously with and independent of the procedures described in 21 CFR 1301.34(b), (c), (d), (e) and (f). As noted in a previous notice published in the **Federal Register** on September 23, 1975, (40 FR 43745–46), all applicants for registration to import a basic class of any controlled substance listed in schedule I or II are, and will continue to be required to demonstrate to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, that the requirements for such registration pursuant to 21 U.S.C. 958(a), 21 U.S.C. 823(a), and 21 CFR 1301.34(b), (c), (d), (e) and (f) are satisfied.

Dated: October 31, 2007.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. E7–21847 Filed 11–6–07; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Application

Pursuant to § 1301.33(a) of Title 21 of the Code of Federal Regulations (CFR), this is notice that on October 9, 2007, Noramco Inc., 1440 Olympic Drive, Athens, Georgia 30601, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as a bulk manufacturer of the basic classes of controlled substances listed in schedule I and II:

Drug	Schedule
Codeine-N-Oxide (9053)	I
Morphine-N-Oxide (9307)	I
Amphetamine (1100)	II
Methylphenidate (1724)	II
Codeine (9050)	II
Dihydrocodeine (9120)	II
Oxycodone (9143)	II
Hydromorphone (9150)	II
Hydrocodone (9193)	II
Morphine (9300)	II
Thebaine (9333)	II
Opium, raw (9600)	II
Opium poppy (9650)	II
Oxymorphone (9652)	II
Alfentanil (9737)	II
Sufentanil (9740)	II
Carfentanil (9743)	II
Fentanyl (9801)	II

The company plans to manufacture small quantities of the Schedule I controlled substances for internal testing; the Schedule II controlled substances will be manufactured in bulk for distribution to its customers.

Any other such applicant and any person who is presently registered with DEA to manufacture such substances may file comments or objections to the issuance of the proposed registration pursuant to 21 CFR 1301.33(a).

Any such written comments or objections being sent via regular mail should be addressed, in quintuplicate, to the Drug Enforcement Administrator, Office of Diversion Control, Federal Register Representative (ODL), Washington, DC 20537, or any being sent via express mail should be sent to Drug Enforcement Administration, Office of Diversion Control, Federal Register Representative (ODL), 8701 Morrissette Drive, Springfield, Virginia 22152; and must be filed no later than January 7, 2008.

Dated: October 31, 2007.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. E7–21849 Filed 11–6–07; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Registration

By Notice dated June 26, 2007, and published in the **Federal Register** on July 3, 2007 (72 FR 36483), Penick Corporation, 33 Industrial Road, Pennsville, New Jersey 08070, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as a bulk manufacturer of the basic classes of controlled substances listed in schedule II:

Drug	Schedule
Cocaine (9041)	II
Codeine (9050)	II
Dihydrocodeine (9120)	II
Oxycodone (9143)	II
Hydromorphone (9150)	II
Diphenoxylate (9170)	II
Ecgonine (9180)	II
Hydrocodone (9193)	II
Morphine (9300)	II
Thebaine (9333)	II
Oxymorphone (9652)	II

The company plans to manufacture the listed controlled substances as bulk controlled substance intermediates for distribution to its customers for further manufacture or to manufacture pharmaceutical dosage forms.

No comments or objections have been received. DEA has considered the factors in 21 U.S.C. 823(a) and determined that the registration of Penick Corporation to manufacture the listed basic classes of controlled substances is consistent with the public interest at this time. DEA has investigated Penick Corporation to ensure that the company's registration is consistent with the public interest. The investigation has included inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to 21 U.S.C. 823, and in accordance with 21 CFR 1301.33, the above named company is granted registration as a bulk manufacturer of the basic classes of controlled substances listed.

Dated: October 31, 2007.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. E7–21850 Filed 11–6–07; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF LABOR

Office of the Secretary

Data Users Advisory Committee; Establishment

In accordance with the provisions of the Federal Advisory Committee Act, and after consultation with the General Services Administration, I have determined that the establishment of a Data Users Advisory Committee to replace the former Business Research Advisory Council and Labor Research Advisory Council is in the public interest in connection with the performance of duties imposed on the Department of Labor.

The Committee will advise the Commissioner of Labor Statistics regarding the statistical and analytical work of the Bureau of Labor Statistics, providing perspectives on these programs from the points of view of data users from various sectors of the U.S. economy, including the labor, business, research, academic, and government communities.

The Committee will not exceed 25 members. Membership and participation in the Committee and any subcommittees may be from, and are intended to be broadly representative of, the labor, business, research, academic and government communities in the United States. Membership of the Committee represents a balance in terms of the points of view represented. Membership will consist of an equal number of labor and business representatives, the total number of which is not to exceed 16.

The Committee will function solely as an advisory body and in compliance with the provisions of the Federal Advisory Committee Act. The Charter will be filed with the Library of Congress and the appropriate congressional committees.

Interested persons are invited to submit comments regarding reestablishment of the Data Users Advisory Committee. Such comments should be addressed to: Michael D. Levi, Associate Commissioner, Office of Publications and Special Studies, Bureau of Labor Statistics, Department of Labor, Postal Square Building, 2 Massachusetts Avenue, NE.,

Washington, DC 20212, telephone: 202–691–5900.

Signed November 1, 2007.

Philip L. Rones,

Acting Commissioner.

[FR Doc. E7–21823 Filed 11–6–07; 8:45 am]

BILLING CODE 4510–24–P

DEPARTMENT OF LABOR

Employment and Training Administration

Federal-State Unemployment Compensation Program: Certifications for 2007 Under the Federal Unemployment Tax Act

AGENCY: Employment and Training Administration, DOL.

ACTION: Notice.

SUMMARY: The Secretary of Labor signed the annual certifications under the Federal Unemployment Tax Act, 26 U.S.C. 3301 *et seq.,* thereby enabling employers who make contributions to state unemployment funds to obtain certain credits against their liability for the federal unemployment tax. By letter the certifications were transmitted to the Secretary of the Treasury. The letter and certifications are printed below.

Dated: Signed in Washington, DC, November 1, 2007.

Emily Stover DeRocco,

Assistant Secretary of Labor, Employment and Training Administration.

BILLING CODE 4510–30–M

SECRETARY OF LABOR
WASHINGTON

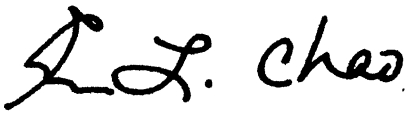
October 31, 2007

The Honorable Henry M. Paulson
Secretary of the Treasury
Department of the Treasury
1500 Pennsylvania Avenue, N.W.
Washington, DC 20220

Dear Secretary Paulson:

Transmitted herewith are an original and one copy of the certifications of the states and their unemployment compensation laws for the 12-month period ending on October 31, 2007. One is required with respect to the normal federal unemployment tax credit by Section 3304 of the Internal Revenue Code of 1986 (IRC), and the other is required with respect to the additional tax credit by Section 3303 of the IRC. Both certifications list all 53 jurisdictions.

Sincerely,



Elaine L. Chao

Enclosures

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

CERTIFICATION OF STATES TO THE SECRETARY OF THE TREASURY PURSUANT TO SECTION 3304(c) OF THE INTERNAL REVENUE CODE OF 1986

In accordance with the provisions of Section 3304(c) of the Internal Revenue Code of 1986 (26 U.S.C. 3304(c)), I hereby certify the following named states to the Secretary of the Treasury for the 12-month period ending on October 31, 2007, in regard to the unemployment compensation laws of those states which heretofore have been approved under the Federal Unemployment Tax Act:

Alabama	Idaho
Alaska	Illinois
Arizona	Indiana
Arkansas	Iowa
California	Kansas
Colorado	Kentucky
Connecticut	Louisiana
Delaware	Maine
District of Columbia	Maryland
Florida	Massachusetts

Georgia	Michigan
Hawaii	Minnesota
Mississippi	Puerto Rico
Missouri	Rhode Island
Montana	South Carolina
Nebraska	South Dakota
Nevada	Tennessee
New Hampshire	Texas
New Jersey	Utah
New Mexico	Vermont
New York	Virginia
North Carolina	Virgin Islands
North Dakota	Washington
Ohio	West Virginia
Oklahoma	Wisconsin
Oregon	Wyoming
Pennsylvania	

This certification is for the maximum normal credit allowable under Section 3302(a) of the Code.

Signed at Washington, D.C., on October 31, 2007.

Elaine L. Chao
Secretary of Labor

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

CERTIFICATION OF STATE UNEMPLOYMENT COMPENSATION LAWS TO
THE SECRETARY OF THE TREASURY PURSUANT TO SECTION 3303(b)(1) OF THE INTERNAL REVENUE CODE OF 1986

In accordance with the provisions of paragraph (1) of Section 3303(b) of the Internal Revenue Code of 1986 (26 U.S.C. 3303(b)(1)), I hereby certify the unemployment compensation laws of the following named states, which heretofore have been certified pursuant to paragraph (3) of Section 3303(b) of the Code, to the Secretary of the Treasury for the 12-month period ending on October 31, 2007:

Alabama	Idaho
Alaska	Illinois
Arizona	Indiana
Arkansas	Iowa
California	Kansas
Colorado	Kentucky
Connecticut	Louisiana
Delaware	Maine
District of Columbia	Maryland
Florida	Massachusetts

Georgia	Michigan
Hawaii	Minnesota
Mississippi	Puerto Rico
Missouri	Rhode Island
Montana	South Carolina
Nebraska	South Dakota
Nevada	Tennessee
New Hampshire	Texas
New Jersey	Utah
New Mexico	Vermont
New York	Virginia
North Carolina	Virgin Islands
North Dakota	Washington
Ohio	West Virginia
Oklahoma	Wisconsin
Oregon	Wyoming
Pennsylvania	

This certification is for the maximum additional credit allowable under Section 3302(b) of the Code.

Signed at Washington, D.C., on October 31, 2007.

Elaine L. Chao
Secretary of Labor

[FR Doc. 07–5550 Filed 11–6–07; 8:45 am]
BILLING CODE 4510–30–C

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

Maritime Advisory Committee for Occupational Safety and Health; Notice of Meeting

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

ACTION: Maritime Advisory Committee for Occupational Safety and Health; notice of meeting.

SUMMARY: The Maritime Advisory Committee for Occupational Safety and Health (''MACOSH'' or ''Committee'') was established to advise the Assistant Secretary of Labor for OSHA on issues relating to occupational safety and health in the maritime industries. The purpose of this **Federal Register** notice is to announce the MACOSH and workgroup meetings scheduled for November 27–28, 2007.

DATES: The workgroups will meet on November 27, 2007, from 8:15 a.m. until approximately 5:15 p.m. in conference rooms C–5515–A and B. MACOSH will meet on November 28, 2007, from 8:30 a.m. until approximately 5:30 p.m. in conference rooms S–5215–A, B, and C.

ADDRESSES: The Committee and workgroups will meet at the Frances Perkins Building, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. Building security requires that attendees have photographic identification (e.g., a valid driver's license) and pass through a screening device. Mail comments, views, or statements in response to this notice to Joseph V. Daddura, Acting Director, Office of Maritime, OSHA, U.S. Department of Labor, Room N–3609, 200 Constitution Avenue, NW., Washington, DC 20210; phone (202) 693–2086; FAX: (202) 693–1663.

FOR FURTHER INFORMATION CONTACT: For general information about MACOSH and this meeting, contact: Joseph V. Daddura, Acting Director, Office of Maritime, U.S. Department of Labor, Room N–3609, 200 Constitution Avenue, NW., Washington, DC 20210; phone: (202) 693–2086. Individuals with disabilities wishing to attend the meeting should contact Vanessa L. Welch at (202) 693–2086 no later than November 20, 2007, to obtain appropriate accommodations.

SUPPLEMENTARY INFORMATION: All MACOSH meetings and workgroup meetings are open to the public. All interested persons are invited to attend the MACOSH and workgroup meetings at the times and places listed above. Each workgroup may discuss one or more of the topics listed for that workgroup as time permits. The meeting times for each workgroup are approximate and subject to change without advance notice.

The Longshoring workgroup will meet from 8:15 a.m. until 10:15 a.m. in conference room C–5515–A. Discussions may include the traffic safety in marine terminals guidance document, roll-on roll-off cargo guidance document, and the International Maritime Organization's (IMO) initiative on cargo-lashing safety.

The Shipyards workgroup will meet from 8:15 a.m. until 10:15 a.m. in conference room C–5515–B. Discussions may include spray paint standards and hot work on coatings.

The Cranes and Falls workgroup will meet from 10:15 a.m. until 12:15 p.m. in conference room C–5515–A. Discussions may include working over water from aerial work platforms and the National Transportation Safety Board's recommendation to OSHA on the Athena 106 investigation.

The Outreach and Safety Culture workgroup will meet from 1:15 p.m. until 3:15 p.m. in conference room C–5515–A. Discussions may include leading indicators, e-tools, non-English worker issues, new technology and safety, updating the OSHA Training Institute shipyard and longshoring courses, the new maritime outreach training course, and an update from the Mobile Area OSHA maritime alliance on the 10-hour and 30-hour outreach courses.

The Health workgroup will meet from 3:15 p.m. until 5:15 p.m. in conference room C–5515–A. Discussions will include radiation exposure in marine terminals.

MACOSH agenda: The agenda will include: An OSHA activities update, report on Ergonomics for the Prevention of Musculoskeletal Disorders: Guidelines for Shipyards, reports from each workgroup, an update on the NIOSH maritime hearing-protection study, a briefing on the NIOSH National Occupational Research Agenda (''NORA''), an update on OSHA's electrical standard, and a review of the minutes from the previous meeting.

Public Participation: Written data, views, or comments for consideration by MACOSH on the various agenda items listed above should be submitted to Vanessa L. Welch at the address listed above. Submissions received by November 20, 2007, will be provided to Committee members and will be included in the record of the meeting. Requests to make oral presentations to the Committee may be granted as time permits. Anyone wishing to make an oral presentation to the Committee on any of the agenda items listed above should notify Vanessa L. Welch by November 20, 2007. The request should state the amount of time desired, the capacity in which the person will appear, and a brief outline of the content of the presentation.

Authority: Edwin G. Foulke, Jr., Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice under the authority granted by Sections 6(b)(1) and 7(b) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 655, 656), the Federal Advisory Committee Act (5 U.S.C. App. 2), Secretary of Labor's Order 5–2007 (72 FR 31159), and 29 CFR part 1912.

Signed at Washington, DC on November 2, 2007.

Edwin G. Foulke, Jr.,

Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. E7–21845 Filed 11–6–07; 8:45 am]

BILLING CODE 4510–26–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 70–143]

Nuclear Fuel Services, Inc., Environmental Assessment and Finding of No Significant Impact Related to Proposed License Amendment Authorizing Increased Possession Limit

AGENCY: Nuclear Regulatory Commission.

ACTION: Environmental Assessment and Finding of No Significant Impact.

FOR FURTHER INFORMATION CONTACT: Kevin M. Ramsey, Fuel Manufacturing Branch, Division of Fuel Cycle Safety and Safeguards, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Mail Stop E–2C40M, Washington, DC 20555–0001, telephone (301) 492–3123 and e-mail *kmr@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

The U. S. Nuclear Regulatory Commission (NRC) staff is considering a request to amend Materials License SNM–124, issued to Nuclear Fuel Services, Inc. (NFS) (the licensee), to authorize an increase in the possession limit of high-enriched uranium (HEU). The NRC has prepared an

Environmental Assessment (EA) in support of this action. Based upon the EA, the NRC has concluded that a Finding of No Significant Impact (FONSI) is appropriate and, therefore, an Environmental Impact Statement (EIS) will not be prepared.

II. Environmental Assessment

Background

The NFS facility in Erwin, Tennessee is authorized, under License SNM–124, to manufacture high-enriched nuclear reactor fuel. In addition, NFS is authorized to blend HEU with natural uranium and manufacture low-enriched nuclear reactor fuel. License SNM–124 limits the amount of HEU that NFS may possess for these operations. On May 15, 2007, NFS requested a license amendment to increase its possession limit of HEU (Ref. 5).

Review Scope

The purpose of this EA is to assess the environmental impacts of the proposed license amendment. It does not approve the request. This EA is limited to the proposed possession limit increase and any cumulative impacts to existing plant operations. The existing conditions and operations at the Erwin facility were evaluated, by the NRC, for environmental impacts in a 1999 EA related to the renewal of the NFS license (Ref. 1), and a 2002 EA related to the first amendment for the Blended Low-Enriched Uranium (BLEU) Project (Ref. 2). The 2002 EA assessed the impact of the entire BLEU Project, using the information available at that time. A 2003 EA (Ref. 3) and a 2004 EA (Ref. 4), related to additional BLEU Project amendments confirmed the FONSI issued in 2002. This assessment presents information and an analysis for determining that the issuance of a FONSI is appropriate and that an EIS will not be prepared.

Proposed Action

The proposed action is to amend NRC Materials License SNM–124, to authorize an increase in the possession limit for uranium enriched up to 100 weight percent in the uranium-235 isotope (Ref. 5). The proposed action is limited to possession and storage only. No changes to processing operations are requested, and no construction of new facilities are requested.

Need for Proposed Action

The proposed action is being requested because a larger inventory of HEU is needed to support NFS operations. Two factors are driving this need. One factor is a request from the U.S. Department of Energy (DOE) that NFS establish an inventory of HEU that would allow continuous operations for six to twelve months of processes that support DOE programs. This would allow NFS to continue operating if an increased threat level or other incidents required shipments of HEU to be interrupted or curtailed. Another factor is the lower-than-planned processing rate at the Blended Low-Enriched Uranium Preparation Facility (BPF). BPF operations support commercial programs that are separate from DOE programs. Difficulties with BPF equipment and operations have caused delays and low processing rates. This has created a backlog of material in storage because material is being received faster than it is being processed.

Alternatives

The alternatives available to the NRC are:

1. Approve the license amendment as described; or

2. No action (i.e., deny the request).

Affected Environment

The affected environment for the proposed action and the alternative is the NFS site. The affected environment is identical to the affected environment assessed in the 2002 EA that is related to the first amendment for the BLEU Project (Ref. 2). A full description of the site and its characteristics is given in the 2002 EA. Additional information can be found in the 1999 EA related to the renewal of the NFS license (Ref. 1). The NFS facility is located in Unicoi County, Tennessee, about 32 km (20 mi) southwest of Johnson City, Tennessee. The plant is about 0.8 km (0.5 mi) southwest of the Erwin city limits. The site occupies about 28 hectares (70 acres). The site is bounded to the northwest by the CSX Corporation (CSX) railroad property and the Nolichucky River, and by Martin Creek to the northeast. The plant elevation is about 9 m (30 ft) above the nearest point on the Nolichucky River.

The area adjacent to the site consists primarily of residential, industrial, and commercial areas, with a limited amount of farming to the northwest. Privately owned residences are located to the east and south of the facility. Tract size is relatively large, leading to a low housing density in the areas adjacent to the facility. The CSX railroad right-of-way is parallel to the western boundary of the site. Industrial development is located adjacent to the railroad on the opposite side of the right-of-way. The site is bounded by Martin Creek to the north, with privately owned, vacant property and low-density residences.

Effluent Releases and Monitoring

A full description of the effluent monitoring program at the site is provided in the 2002 EA, related to the first amendment for the BLEU Project (Ref. 2). Additional information is available in the 1999 EA related to the renewal of the NFS license (Ref. 1). The NFS Erwin plant conducts effluent and environmental monitoring programs to evaluate potential public health impacts and comply with the NRC effluent and environmental monitoring requirements. The effluent program monitors the airborne, liquid, and solid waste streams produced during operation of the NFS plant. The environmental program monitors the air, surface water, sediment, soil, groundwater, and vegetation in and around the NFS plant.

Airborne, liquid, and solid effluent streams that contain radioactive material are generated at the NFS plant and monitored to ensure compliance with the NRC regulations in 10 CFR Part 20. Each effluent is monitored at or just before the point of release. The results of effluent monitoring are reported to the NRC on a semi-annual basis, in accordance with 10 CFR 70.59.

Airborne and liquid effluents are also monitored for nonradiological constituents in accordance with State discharge permits. For the purpose of this EA, the State of Tennessee is expected to set limits on effluents, under its regulatory control, that are protective of health and safety and the local environment.

Impacts of Proposed Action

1. Normal Operations

The proposed action is limited to increasing the authorized amount of HEU in storage. No construction of new facilities is proposed and no changes to processing operations have been requested. Based on the information provided by NFS, the safety controls to be employed for the proposed action, appear to be sufficient to ensure that planned operations will have no significant impact on the environment.

Radiological Impacts: The proposed action involves no changes to processing operations. No increase is expected in effluent air emissions discharged through stacks at the site. In addition, no increase is expected in liquid effluents discharged to the sanitary sewer. Therefore, the proposed action will have no impact on the total annual dose estimate for the maximally exposed individual from all planned

effluents. The dose to workers may increase slightly because more radioactive material will be stored at the site. However, occupational dose is monitored and controlled in accordance with applicable NRC regulations; therefore, no adverse impacts are expected. Surface water quality at the NFS site is currently protected by enforcing release limits and monitoring programs. No change in surface water impacts is expected. The proposed action will not discharge any effluents to the groundwater; therefore, no adverse impacts to groundwater are expected.

The proposed action involves transportation of radioactive feed material to the NFS site, which will lead to transportation of radioactive products and waste material from the NFS site. All transportation will be conducted in accordance with the applicable NRC and U.S. Department of Transportation regulations; therefore, no adverse impacts from transportation activities are expected.

Land Use: The proposed action involves storage of radioactive material at existing facilities. No new facilities will be constructed; therefore, no adverse impact to land use is expected.

Cultural Resources: The proposed action involves storage of radioactive material at existing facilities. The NRC staff considers this a type of activity that does not have the potential to affect historic properties. No adverse impact to cultural resources is expected.

Biotic Resources: The proposed action will not change current land use or effluents at the site. Therefore, the NRC finds that the proposed action will not affect any Federally endangered or threatened species.

2. Potential Accidents

The proposed action will not result in any new or modified accident sequences. The Integrated Safety Analysis performed by NFS already considers all authorized storage locations to be filled to maximum capacity with HEU. The NRC finds that the safety controls to be employed in the proposed action are sufficient to ensure planned activities will be safe.

3. Cumulative Impacts

The NRC has considered the impacts of the proposed action together with the known impacts of the existing facility. After reviewing the information provided, the NRC concludes that the cumulative impacts represent an insignificant change to the existing conditions in the area surrounding the NFS site.

Impacts of No Action Alternative

Under the no action alternative, NFS would not be able to increase its inventory of HEU to support current operations. This would require NFS to stop receiving HEU shipments until enough material has been processed and removed from the site before another shipment could be received. Failure to fulfill its role in government and commercial programs could cause NFS's customers to select other alternatives that may be less cost effective and incur greater environmental impacts. If NFS is unable to fulfill its contractual obligations, customers may transfer work to other facilities.

Conclusion

Based on its review, the NRC has concluded that the environmental impacts associated with the proposed action are not significant and, therefore, do not warrant denial of the proposed license amendment. The NRC has determined that the proposed action, the approval of the license amendment as described, is the appropriate alternative for selection. Based on an evaluation of the environmental impacts of the proposed license amendment, the NRC has determined that the proper action is to issue a FONSI.

Agencies and Persons Contacted

On September 21, 2007, the NRC staff contacted the Deputy Director of the Division of Radiological Health at the Tennessee Department of Environment and Conservation (TDEC) concerning this EA. On October 1, 2007, the Deputy Director responded that TDEC reviewed the draft EA and had no comments (Ref. 6).

The NRC staff has determined that the proposed action will not affect listed species or critical habitat. Therefore, no consultation is required under Section 7 of the Endangered Species Act. Likewise, the NRC staff has determined that the proposed action is not the type of activity that has the potential to cause effects on historic properties. Therefore, no consultation is required, under Section 106 of the National Historic Preservation Act.

References

1. U.S. Nuclear Regulatory Commission, ''Environmental Assessment for Renewal of Special Nuclear Material License No. SNM–124,'' January 1999, ADAMS No. ML031150418

2. U.S. Nuclear Regulatory Commission, ''Environmental Assessment for Proposed License Amendments to Special Nuclear Material License No. SNM–124 Regarding Downblending and Oxide Conversion of Surplus High-Enriched Uranium,'' June 2002, ADAMS No. ML021790068.

3. U.S. Nuclear Regulatory Commission, ''Environmental Assessment and Finding of No Significant Impact for the BLEU Preparation Facility,'' September 2003, ADAMS No. ML032390428.

4. U.S. Nuclear Regulatory Commission, ''Environmental Assessment and Finding of No Significant Impact for the Oxide Conversion Building and the Effluent Processing Building at the BLEU Complex,'' June 2004, ADAMS No. ML041470176.

5. Nuclear Fuel Services, ''Amendment Request to Increase the U–235 Possession Limit for the NFS Site,'' May 15, 2007, ADAMS No. ML072550166.

6. D. Shults, Tennessee Division of Radiological Health, e-mail to K. Ramsey, U.S. Nuclear Regulatory Commission, ''Consultation with Tennessee on EA for NFS Possession Limit Increase,'' October 1, 2007, ADAMS No. ML072760398.

III. Finding of No Significant Impact

Pursuant to 10 CFR Part 51, the NRC staff has considered the environmental consequences of amending NRC Materials License SNM–124 to increase the possession limit for the NFS facility. On the basis of this assessment, the Commission has concluded that environmental impacts associated with the proposed action would not be significant and the Commission is making a finding of no significant impact. Accordingly, the preparation of an EIS is not warranted.

IV. Further Information

Documents related to this action, including the application for amendment and supporting documentation, are available electronically at the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html*. From this site, you can access the NRC's Agencywide Document Access and Management System (ADAMS), which provides text and image files of NRC's public documents. The ADAMS accession numbers for the documents related to this notice are listed in the references above. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC Public Document Room (PDR) Reference staff at 1–800–397–4209, 301–415–4737 or by e-mail to *pdr@nrc.gov*.

These documents may also be viewed electronically on the public computers located at the NRC's Public Document Room (PDR), O 1 F21, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852. The PDR reproduction contractor will copy documents for a fee.

Dated at Rockville, Maryland this 25th day of October, 2007.

For the Nuclear Regulatory Commission.

Peter J. Habighorst,

Chief, Fuel Manufacturing Branch, Fuel Facility Licensing Directorate, Division of Fuel Cycle Safety and Safeguards, Office of Nuclear Material Safety and Safeguards.

[FR Doc. E7–21861 Filed 11–6–07; 8:45 am]

BILLING CODE 7590–01–P

OFFICE OF PERSONNEL MANAGEMENT

Submission for OMB Review; Comment Request for Review of an Extension, Without Change, of a Currently Approved Information Collection: SF 2823

AGENCY: Office of Personnel Management.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, May 22, 1995), this notice announces that the Office of Personnel Management (OPM) will submit to the Office of Management and Budget (OMB) a request for review of an extension, without change, of a currently approved information collection. SF 2823, Designation of Beneficiary: Federal Employees' Group Life Insurance, is used by any Federal employee or retiree covered by the Federal Employees' Group Life Insurance Program to instruct the Office of Federal Employees' Group Life Insurance how to distribute the proceeds of his or her life insurance when the statutory order of precedence does not meet his or her needs.

Approximately 47,000 SF 2823 forms are completed annually by annuitants and 1,000 forms are completed by assignees. Each form takes approximately 15 minutes to complete. The annual estimated burden is 12,000 hours.

For copies of this proposal, contact Mary Beth Smith-Toomey on (202) 606–8358, FAX (202) 418–3251 or via e-mail to *MaryBeth.Smith-Toomey@opm.gov*. Please include a mailing address with your request.

DATES: Comments on this proposal should be received within 30 calendar days from the date of this publication.

ADDRESSES: Send or deliver comments to—

Christopher N. Meuchner, Life Insurance and Long Term Care Group, Insurance Services Program, Center for Retirement and Insurance Services, U.S. Office of Personnel Management, 1900 E Street, NW., Room 2H22, Washington, DC 20415–3661;

and

Brenda Aguilar, OPM Desk Officer, Office of Information & Regulatory Affairs, Office of Management and Budget, New Executive Office Building, NW., Room 10235, Washington, DC 20503.

For Information Regarding Administrative Coordination Contact: Cyrus S. Benson, Team Leader, Publications Team, RIS Support Services/Support Group, (202) 606–0623.

U.S. Office of Personnel Management.

Howard Weizmann,

Deputy Director.

[FR Doc. E7–21862 Filed 11–6–07; 8:45 am]

BILLING CODE 6325–38–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–56730; File No. SR–CBOE–2007–74]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing of Proposed Rule Change, as Modified by Amendment No. 1 Thereto, To Amend CBOE Rule 6.13A To Modify the Simple Auction Liaison Auction Process and Incorporate Specific Provisions for Hybrid 3.0 Classes

November 1, 2007.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on July 2, 2007, The Chicago Board Options Exchange, Incorporated (''CBOE'' or ''Exchange''), 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 substantially prepared by CBOE. On October 16, 2007, CBOE filed Amendment No. 1 to the proposed rule change.[3] The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

CBOE proposes to amend CBOE Rule 6.13A to (i) modify the increments in which responses may be submitted during the Simple Auction Liaison (''SAL'') auction process and (ii) incorporate provisions for Hybrid 3.0 Classes in which SAL is activated. The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.com/Legal*), at the Exchange's Office of the Secretary, 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, CBOE included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. CBOE has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

CBOE Rule 6.13A governs the operation of the Exchange's SAL system. SAL is a feature on CBOE's Hybrid system that auctions marketable orders for price improvement over the National Best Bid and Offer. The purpose of this proposed rule change is to amend CBOE Rule 6.13A to (i) modify the increments in which responses may be submitted during the SAL auction process and (ii) incorporate provisions for Hybrid 3.0 Classes in which SAL is activated. Although modifying the auction increments in which responses could be submitted to include standard increments would widen the quote as compared to one-cent increments, the Exchange believes this modification may encourage Market-Makers and other market participants to quote more aggressively overall. In addition, incorporating SAL on the Hybrid 3.0 Platform will further automate the order handling process on Hybrid 3.0.

In providing marketable orders with the potential for price improvement, SAL provides an auction, for a period of time not to exceed two seconds as determined by the Exchange on a class-by-class basis, for any qualifying order (''Agency Order'') that is eligible for automatic execution by CBOE's Hybrid System.[4] Under the current SAL rule, during the auction process, Market-Makers with an appointment in the relevant option class and CBOE members acting as agents for orders

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Amendment No. 1 replaced and superseded the original filing in its entirety.

[4] *See* CBOE Rule 6.13(b)(C)(i).

resting at the top of the Exchange's book opposite the Agency Order could submit a response during the auction. CBOE Rule 6.13A(b) outlines the procedures regarding how a response shall be submitted during the auction and provides that the response may be submitted in one-cent increments. This filing proposes to modify this rule to allow the auction response in all option classes in which SAL is activated to be submitted in one-cent increments, unless for the relevant option class the Exchange has determined that responses shall be submitted in standard increments.[5]

Pursuant to CBOE's existing SAL rule, Agency Orders would be allocated intwo rounds.[6] For Hybrid 3.0 Classes, the filing proposes to conduct only one round of allocations, since the DPM/LMM is the only ''quoter'' on the Hybrid 3.0 Platform.[7] Specifically, the first round allocation specified in paragraph (c)(i) shall not apply. In Hybrid 3.0 Classes, the single round allocation will be conducted pursuant to the criteria in paragraph (c)(ii), with a few differences.

Such differences involve proposed modifications to the allocation and participation entitlement process for SAL on Hybrid 3.0 Classes. The current SAL rule allocates the Agency Order pursuant to the matching algorithm that is in effect for the class pursuant to Rule 6.45A or Rule 6.45B.[8] This filing proposes to provide the Exchange with some flexibility regarding the allocation of the Agency Order to permit the matching algorithm as applied to SAL to be different from the matching algorithm that is currently in effect for the Hybrid 3.0 Class. Therefore, for Hybrid 3.0 Classes, the Exchange proposes to allow the appropriate Exchange Procedure Committee to determine, on a class-by-class basis, which electronic matching algorithm shall apply to SAL executions. The matching algorithm applied to SAL in Hybrid 3.0 Classes will continue to be pursuant to Rule 6.45B.

The existing SAL rule also provides for a Market-Maker to receive a participation entitlement only if the applicable matching algorithm (from Rule 6.45A or 6.45B) that is in effect for the class includes a participation entitlement.[9] Currently, Hybrid 3.0 does not permit an LMM or DPM to receive a participation entitlement as it pertains to the allocation of incoming electronic orders. In Hybrid 3.0 Classes, pursuant to existing rules, all eligible orders pursuant to Rule 6.13 can receive automatic execution against public customer orders in the electronic book. The remaining balance of the eligible order, if any, may be represented in the electronic book, provided such order is eligible for book entry pursuant to Rule 7.4; if not book eligible, the remaining balance of the eligible order will route to PAR, BART, or the order entry firm's book printer.[10] Orders not eligible for automatic execution will route on a class-by-class basis to PAR, BART, or the order entry firm's booth printer.[11] Since the LMM or DPM does not receive a participation entitlement with regard to incoming electronic orders, this filing proposes to permit the appropriate Exchange Market Performance Committee to establish, on a class-by-class basis, an LMM or DPM participation entitlement applicable only to SAL executions in Hybrid 3.0 Classes. Incorporating SAL on the Hybrid 3.0 Platform will provide not only a more automated order handling process in Hybrid 3.0 Classes, but will also provide Market-Makers with electronic access to the Agency Order since Market-Makers will be able to electronically respond to the Agency Order through SAL. The Exchange believes that with Market-Makers having access to electronically respond to the Agency Order, incorporating an LMM/DPM participation entitlement to SAL executions may in turn provide more aggressive quoting. The participation entitlement shall be in compliance with the provisions of Rule 6.45B(a)(i)(2). The size of each response to the SAL auction shall continue to be capped to the size of the Agency Order for allocation purposes.

When the SAL system is enabled, the Exchange will conduct a SAL auction only when the Exchange's quote is represented by the DPM/LMM quote. The Exchange will not conduct a SAL auction when the Exchange's quote is represented by a manual quote.[12] All other aspects of SAL pursuant to CBOE Rule 6.13A shall apply to Hybrid 3.0 Classes.

2. Statutory Basis

As noted above, modifying the SAL auction increments in which responses could be submitted to include standard increments may encourage more aggressive quoting, and incorporating SAL on the Hybrid 3.0 Platform will further automate the order handling process on Hybrid 3.0. Accordingly, the Exchange believes the proposed rule change is consistent with Section 6(b) of the Act[13] in general and furthers the objectives of Section 6(b)(5) of the Act[14] in particular in that it should promote just and equitable principles of trade, serve to remove impediments to and perfect the mechanism of a free and open market and a national market system, and protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

This proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding, or (ii) as to which CBOE 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

[5] *See* proposed changes to CBOE Rule 6.13A(b)(ii).

[6] *See* CBOE Rule 6.13A(c).

[7] Pursuant to CBOE Rule 1.1(aaa), the Hybrid 3.0 Platform is an electronic trading platform on the Hybrid trading system that allows a single quoter to submit an electronic quote which represents the aggregate Market-Maker quoting interest in a series for the trading crowd.

[8] *See* CBOE Rule 6.13A(c)(1).

[9] *See* CBOE Rule 6.13A(c)(3).

[10] *See* CBOE Rule 6.13(b)(i)(A)(2).

[11] *See* CBOE Rule 6.13(b)(i)(B).

[12] *See* proposed CBOE 6.13A.04(iii).

[13] 15 U.S.C. 78f(b).

[14] 15 U.S.C. 78f(b)(5).

Number SR–CBOE–2007–74 on the subject line.

Paper Comments

• Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2007–74. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room 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 CBOE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

All submissions should refer to File Number SR–CBOE–2007–74 and should be submitted on or before November 28, 2007.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[15]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E7–21838 Filed 11–6–07; 8:45 am]

BILLING CODE 8011–01–P

[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–56733; File No. SR–ISE–2007–101]

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing of Proposed Rule Change Relating to a Corporate Transaction in Which Its Parent, International Securities Exchange Holdings, Inc., Will Become a Wholly-Owned Indirect Subsidiary of Eurex Frankfurt AG

November 1, 2007.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 1, 2007, the International Securities Exchange, LLC (''Exchange'' or ''ISE'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which items have been prepared substantially by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Under the proposed rule change, the ISE is proposing a corporate transaction (''Transaction'') in which its parent, International Securities Exchange Holdings, Inc. (''Holdings'' or ''Corporation''), will become a wholly-owned indirect subsidiary of Eurex Frankfurt AG (''Eurex Frankfurt''), which operates a derivatives exchange. Article FOURTH, Section III of Holdings' Certificate of Incorporation (''Certificate'') imposes certain ownership and voting restrictions (''Restrictions'') that, in effect, require approval of the Transaction by the Commission. Specifically, the Certificate provides that Holdings' board of directors (''Board of Directors'') may waive the Restrictions in an amendment to the Bylaws of the Holdings (''Bylaws'') if the Board of Directors makes certain findings and the amendment to the Bylaws is approved by the Commission. Acting pursuant to this waiver provision, the Board of Directors has approved the following amendment to the Bylaws:

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

Article XI—Waiver of Limits

Section 1.1 Waiver of Ownership Limits and Voting Limits To Permit Merger.

(a) The Board of Directors hereby waives (i) pursuant to Article FOURTH, Section III(a)(i) of the certificate of incorporation of the Corporation dated November 16, 2004, as amended, (''2004 Certificate''), the restrictions on ownership of capital stock of the Corporation described in Article FOURTH, Section III(a)(i) of the 2004 Certificate, and (ii) pursuant to Article FOURTH, Section III(b)(i) of the 2004 Certificate, the restrictions on voting rights with respect to the capital stock of the Corporation as described in Article FOURTH, Section III(b)(i) of the 2004 Certificate, in each case solely in order to permit the merger and the other transactions contemplated by that certain Agreement and Plan of Merger, dated as of April 30, 2007, by and among Eurex Frankfurt AG, a stock corporation organized under the laws of the Federal Republic of Germany (''Eurex Frankfurt''), Ivan Acquisition Co., a Delaware corporation and a wholly-owned indirect subsidiary of Eurex Frankfurt, and the Corporation, under which the Corporation (A) will become a wholly-owned subsidiary of U.S. Exchange Holdings, Inc., a Delaware corporation that is a wholly-owned subsidiary of Eurex Frankfurt, and (B) will become an indirect subsidiary of Eurex Frankfurt, Eurex Zurich AG (''Eurex Zurich''), a stock corporation organized under the laws of Switzerland, Deutsche Brse AG (''Deutsche Brse''), a stock corporation organized under the laws of the Federal Republic of Germany, SWX Swiss Exchange (''SWX''), a stock corporation organized under the laws of Switzerland, SWX Group, a stock corporation organized under the laws of Switzerland, and Verein SWX Swiss Exchange, an association organized under the laws of Switzerland. For the purpose of this Article XI, Deutsche Brse, Eurex Frankfurt, Eurex Zurich, SWX, SWX Group, Verein SWX Swiss Exchange, and U.S. Exchange Holdings, Inc. are collectively referred to as the ''Upstream Owners.''

(b) In so waiving the applicable Ownership Limits and Voting Limits to allow ownership and voting of the capital stock of the Corporation by the Upstream Owners, the Board of Directors has determined, with respect to each Upstream Owner, that: (i) Such waiver will not impair the ability of the Corporation and ISE, LLC to carry out ISE, LLC's functions and responsibilities as an ''exchange'' under the Exchange

Act and the rules promulgated thereunder; (ii) such waiver is otherwise in the best interests of the Corporation, its stockholders, and ISE, LLC; (iii) such waiver will not impair the ability of the Commission to enforce the Exchange Act; (iv) neither the Upstream Owner nor any of its Related Persons are subject to any applicable ''statutory disqualification'' (within the meaning of Section 3(a)(39) of the Exchange Act); and (v) neither the Upstream Owner nor any of its Related Persons is an Exchange Member (as such term is defined in the Constitution of ISE, LLC).

The Transaction

Pursuant to the Agreement and Plan of Merger by and among Eurex Frankfurt, Ivan Acquisition, Co., a newly-formed, indirect, wholly-owned subsidiary of Eurex Frankfurt (''Acquisition Co.''), and Holdings, dated April 30, 2007 (''Agreement''), Acquisition Co. will merge with and into Holdings,[3] which will become a wholly-owned subsidiary of U.S. Exchange Holdings, Inc. (''U.S. Exchange Holdings''), which in turn is a wholly-owned subsidiary of Eurex Frankfurt. Holdings' stockholders will receive cash in exchange for their shares. Consummation of the Transaction is subject to satisfaction of customary conditions for a transaction of this nature, including the approval of Holdings' stockholders[4] and the approval of this rule change by the Commission.

Eurex Frankfurt is a wholly-owned subsidiary of Eurex Zürich AG (''Eurex Zürich''), which in turn is jointly owned by Deutsche Börse AG (''Deutsche Börse'') and SWX Swiss Exchange (''SWX''). SWX is owned by SWX Group, which in turn is owned by Verein SWX Swiss Exchange (Eurex Frankfurt, Eurex Zürich, Deutsche Börse, SWX, SWX Group, Verein SWX Swiss Exchange, and U.S. Exchange Holdings are collectively referred to herein as ''Upstream Owners''). The Transaction will not affect Holdings' ownership of the ISE. After the Transaction, Holdings will continue to be the sole member of the ISE, which is organized as a Delaware limited liability company. The ISE's members will continue to own ''exchange rights,'' as that term is defined in the Second Amended and Restated Limited Liability Agreement of the ISE (''LLC Agreement'').[5] As such, ISE members will continue to have the same trading and voting rights in the ISE as they had prior to the Transaction.

In addition to the amendment to the Bylaws to waive the Restrictions, the ISE is proposing the following changes to its governing documents relating to the Transaction:

• *Public Company Related Provisions.* Under the proposed rule change, the Certificate and the Bylaws would be amended to remove or revise certain provisions that will no longer be necessary after the consummation of the Transaction in view of the fact that Holdings will cease to be a publicly traded company on the New York Stock Exchange (''NYSE''). Specifically, the proposals are to: (i) Decrease the capital stock of Holdings from 150,000,000 shares of common stock to 1,000 shares of common stock and from 100,000 shares of preferred stock to 100 shares of preferred stock; (ii) eliminate the classified board structure and remove term limits for directors; (iii) remove the requirement that the Board of Directors establish an Executive Committee, a Finance & Audit Committee, a Corporate Governance Committee, and a Compensation Committee; (iv) decrease the affirmative vote requirement with respect to the election of the Chairman and Vice Chairman of the Board of Directors; (v) delete the requirement that the Chief Executive Officer of Holdings not engage in any other occupation during his or her incumbency except with the approval of the Board of Directors; (vi) provide that the Chief Executive Officer of the Corporation may be removed by the Board of Directors with or without cause; (vii) empower the Board of Directors to adopt bylaws and from time to time alter, amend, or repeal bylaws without the approval of stockholders; (viii) delete stockholder voting and notice requirements with respect to the adoption, amendment, or repeal of Bylaw provisions; and (ix) delete notice requirements for stockholder action required at any annual or special meeting of stockholders and provide for the taking of stockholder action by written consent.[6]

• *Ownership and Voting Restrictions.* The Certificate currently provides that, other than persons approved by the Commission through a proposed rule change under Section 19(b) of the Act: (1) No person or group may, directly or indirectly, own more than 40% of the outstanding shares of Holdings; and (2) no person or group may, directly or indirectly, have voting control over more than 20% of the outstanding shares of Holdings.[7] Under the proposed rule change, the Certificate would be amended to provide further that if a person that is not approved by the Commission directly or indirectly owns more than 40% of the outstanding shares of Holdings, or if a person that is not approved by the Commission directly or indirectly acquires voting control over more than 20% of the outstanding shares of Holdings, then an amount of shares of Holdings sufficient to reduce that person's ownership or voting control to the applicable limit would be transferred to a trust, as described in more detail below.

Each of the Upstream Owners would take appropriate steps to incorporate concepts regarding ownership, jurisdiction, books and records, and other issues related to their control of the ISE. Specifically, the U.S. Upstream Owner (*i.e.*, U.S. Exchange Holdings) would include appropriate provisions in its governing documents to incorporate the above mentioned concepts with respect to itself, as well as its directors, officers, employees, and agents (as applicable). Each of the non-U.S. Upstream Owners (*i.e.*, Deutsche Börse, Eurex Frankfurt, Eurex Zürich, SWX, SWX Group, and Verein SWX Swiss Exchange) would adopt resolutions to incorporate these concepts with respect to itself, as well as its board members, officers, employees, and agents (as applicable).[8]

• *Jurisdiction.* Under the proposed rule change, each Upstream Owner would adopt either resolutions or appropriate provisions in its governing documents to provide for jurisdiction of the U.S. federal courts and the Commission over the Upstream Owner and its directors or board members, officers, and employees for the purposes of any suit, action, or proceeding pursuant to the U.S. federal securities laws, and the rules or regulations thereunder, arising out of, or relating to, the activities of the ISE. In addition,

[3] Under the terms of the Agreement, the bylaws of Acquisition Co. will become the bylaws of the surviving corporation of the Transaction, which will be Holdings. The proposed bylaws of Holdings filed as Exhibit 5B to this proposed rule change currently are the bylaws of Acquisition Co. Upon the closing of the Transaction, those bylaws will become the bylaws of Holdings.

[4] Holdings' stockholders approved the Transaction at a special meeting of stockholders held on July 27, 2007.

[5] *See* Article VI of the LLC Agreement.

[6] These proposed amendments apply only to Holdings, the current public company. The ISE is not proposing any changes to the organizational documents or governing structure of the ISE, the registered exchange.

[7] Additionally, the Certificate provides that no ISE member may directly or indirectly own or vote more than 20% of the outstanding shares of Holdings. The proposed rule change would not affect this restriction.

[8] Persons who are selected to be board members of the non-U.S. Upstream Owners after consummation of the Transaction would be required to consent to the matters included in the resolutions in order to become a board member.

each Upstream Owner would adopt either resolutions or appropriate provisions in its governing documents to provide that, to the extent the directors or board members, officers, and employees of the Upstream Owners are involved in the activities of the ISE, such directors or board members, officers, and employees would be deemed to be directors or board members, officers, and employees of the ISE.

• *Books and Records*. Under the proposed rule change, each Upstream Owner would adopt either resolutions or appropriate provisions in its governing documents to provide that the books and records of the Upstream Owner would be deemed to be the books and records of the ISE to the extent the books and records are related to the activities of the ISE and that such books and records will at all times be made available for inspection and copying by the Commission and by the ISE.

• *Additional Matters*. Under the proposed rule change, each Upstream Owner would adopt either resolutions or appropriate provisions in its governing documents regarding notification of certain ownership levels, cooperation with the Commission and the ISE, compliance with the federal securities laws, confidentiality of information regarding the ISE's self-regulatory function, preservation of the independence of the ISE's self-regulatory function, and directors' consideration of the effect of the Upstream Owner's actions on the ISE's ability to carry out its responsibilities under the Act. Further, each non-U.S. Upstream Owner would adopt resolutions regarding taking reasonable steps to cause Holdings to be in compliance with the ownership limits and voting limits.

The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and on the Exchange's Web site (*http://www.ise.com*). The text of Exhibits 5A through 5H of the proposed rule change are also available on the Exchange's Web site and on the Commission's Web site (*http://www.sec.gov/rules/sro/ise.shtml*). This proposed rule change will be effective upon Commission approval and will be operative at the closing of the Transaction.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this rule filing is to adopt the rules necessary to permit the Exchange and Holdings to effect the Transaction.

General. Other than as specifically described in this filing, the ISE will not be making any changes to its governance structure in connection with the consummation of the Transaction. Thus, the ISE will continue to have a 15-member board of directors, consisting of the Chief Executive Officer, six industry directors elected by the members, and eight non-industry directors elected by Holdings as the sole LLC member. Moreover, the ISE is not proposing any changes to its trading rules or to any of the rules governing the operation of its markets or regulatory functions. If the ISE determines to make any changes to its regulatory activities in the future, it will seek the approval of the Commission as necessary.

Each of the Upstream Owners and Holdings acknowledges that it is responsible for referring possible rule violations to the ISE. In addition, there will be an explicit agreement among the Upstream Owners, Holdings, and the ISE to provide adequate funding for the ISE's regulatory responsibilities.

Public Company Related Provisions

Holdings' Capital Stock; Board and Management Structure. Following the consummation of the Transaction, Holdings' common stock will no longer be publicly traded on the NYSE, and the registration of Holdings' common stock will be terminated upon application to the Commission. In connection therewith, Holdings will no longer be subject to the NYSE's listing standards [9] or to corporate governance requirements applicable to publicly traded companies. As such, the ISE is proposing that provisions relating to the capital stock and the board and management structure of Holdings be amended as follows:

Article FOURTH of the Certificate currently provides that the total number of shares of all classes of capital stock which Holdings has the authority to issue is 150,100,000 shares, which is divided as 150,000,000 shares of common stock, par value $.01 per share, and 100,000 shares of preferred stock, par value $.01 per share. In light of the fact that Holdings will no longer be a publicly traded company after the consummation of the Transaction and will no longer need to maintain a public float or reserve shares of common stock for future acquisitions, issuance of stock options, stock purchase, or other equity compensation plans, the ISE proposes that the number of authorized shares of common stock be decreased from 150,000,000 shares to 1,000 shares and that the number of authorized shares of preferred stock be decreased from 100,000 shares to 100 shares.

Article FIFTH of the Certificate and Section 3.2 of the Bylaws currently provide for the number, tenure, and qualifications of directors of Holdings. Under the proposed rule change, the Certificate would be amended to remove Article FIFTH in its entirety and the requirements relating to the number, tenure, and qualifications of directors of Holdings would be addressed in the Bylaws. Specifically, Section 3.2 of the Bylaws would be amended to eliminate the classified board structure and term limitations and provide that each director shall hold office until his or her successor shall be duly elected and qualified or until his or her earlier death, resignation, or removal.

Section 3.10 of the Bylaws currently requires the establishment of an Executive Committee, a Finance & Audit Committee, a Corporate Governance Committee, and a Compensation Committee. Under the proposed rule change, Section 3.10 of the Bylaws would be amended to delete the requirement that the Board of Directors establish an Executive Committee, a Finance & Audit Committee, a Corporate Governance Committee, and a Compensation Committee and would instead provide that the Board of Directors may establish, by resolution, an Executive Committee and one or more other committees.

The ISE is also proposing to make the following amendments to the Bylaws: (i) Decrease the affirmative vote requirement in Sections 3.11 and 3.12 with respect to the election of the Chairman and Vice Chairman of the Board of Directors, respectively, from a two-thirds vote to a majority vote of the directors then in office; (ii) delete in

[9] Section 303A of the NYSE Listed Company Manual.

Section 4.5(a), the requirement that the Chief Executive Officer of Holdings not engage in any other occupation during his or her incumbency except with the approval of the Board of Directors; and (iii) amend Section 4.5 to provide that the Chief Executive Officer of the Corporation may be removed by the Board of Directors with or without cause.

Holdings' Stockholder Rights. Following the consummation of the Transaction, certain provisions in the Certificate and the Bylaws relating to the rights of Holdings' stockholders will no longer be applicable due to the fact that U.S. Exchange Holdings, a wholly-owned subsidiary of Eurex Frankfurt, will be the sole stockholder with ownership of 100% of Holdings' common stock. As such, the ISE is proposing that such provisions relating to stockholder rights be amended as follows:

Article SEVENTH of the Certificate and Section 10.1 of the Bylaws currently provide for certain stockholder rights with respect to voting and notice requirements for the adoption, amendment, or repeal of provisions in the Certificate and the Bylaws and the inspection of the accounts and books of Holdings. The ISE proposes that Article SEVENTH be deleted in its entirety and replaced by a provision that provides that the Board of Directors be empowered to make bylaws and from time to time alter, amend, or repeal bylaws and that Section 10.1 of the Bylaws be amended to delete the stockholder voting and notice requirements with respect to the adoption, amendment, or repeal of bylaw provisions.

In addition, Articles EIGHTH and NINTH of the Certificate and Sections 2.7 and 2.10 of the Bylaws currently provide for certain notice requirements for stockholder action required at any annual or special meeting of stockholders and prohibit the taking of stockholder action by written consent. The ISE proposes that Article EIGHTH and subsections (b) and (c) of Article NINTH of the Certificate and Section 2.7 of the Bylaws be deleted in their entirety. Furthermore, the ISE proposes that Section 2.10 of the Bylaws be amended to allow for the taking of stockholder action without prior notice and by written consent.

Holdings' Current Ownership and Voting Limitations. Article FOURTH, Section III of the Certificate contains the Restrictions, which provide in general that: (1) No person, acting alone or with others, may own, directly or indirectly, more than 40% of any class of Holdings' outstanding capital stock; (2) no ISE member, acting alone or with others, may own, directly or indirectly, more than 20% of any class of Holdings' outstanding capital stock; and (3) no person, acting alone or with others, may control, directly or indirectly, the vote of more than 20% of any class of Holdings' outstanding capital stock.

The Board of Directors may waive certain of the Restrictions if it makes the following three findings: (1) The waiver will not impair the ability of the ISE to carry out its functions and responsibilities as an exchange under the Act and the rules thereunder; (2) the waiver is otherwise in the best interests of Holdings, its stockholders, and the ISE; and (3) the waiver will not impair the ability of the Commission to enforce the Act. However, the Board of Directors may not waive the Restrictions as they apply to ISE members. In addition, the Board of Directors may not waive any Restriction that would result in a person subject to a ''statutory disqualification'' [10] owning or voting shares above the stated thresholds. Any waiver of the Restrictions must be by way of an amendment to the Bylaws approved by the Board of Directors, which amendment must be approved by the Commission.

The Board of Directors has considered the Transaction, and it has made the three necessary findings with respect to each of the Upstream Owners. None of the Upstream Owners is a member of the ISE or is subject to a statutory disqualification. In making the findings, the Board of Directors determined that ownership of Holdings by the Upstream Owners would not impair the ISE's ability to carry out its functions and responsibilities as an exchange and self-regulatory organization. The ISE will continue to operate its market and regulate its market and members exactly as it has done prior to the Transaction. As noted, the ISE is not proposing any amendments to its trading or regulatory rules. The current governance of the Exchange will remain unchanged, and it is the current intention of the ISE's senior management to remain in place, subject to the previously-announced retirement of the ISE's Chief Executive Officer, as of January 1, 2008.

The Board of Directors also determined that ownership of Holdings by the Upstream Owners is in the best interests of Holdings, its stockholders, and the ISE. With respect to Holdings and its stockholders, Eurex Frankfurt has offered to purchase 100% of Holdings' stock for $67.50 a share, significantly above the closing price of $45.72 on the last public trading date before the rumor of a possible business transaction was publicly reported by *The Wall Street Journal Online*. Once Eurex Frankfurt completes its purchase of the Corporation's stock, Holdings' current stockholders will have no continuing interest in Holdings or the ISE. With respect to the interests of the ISE, the Exchange notes the continuing consolidation and internationalization of the securities markets. In particular, the boards of Holdings and the ISE note the recent merger of NYSE Group, Inc. and Euronext N.V. to create a large transatlantic exchange complex offering derivatives markets in both North America and Europe.[11] In order to remain competitive in this increasingly global market, the ISE believes it is imperative to align with strong international partners such as Eurex Frankfurt and its parents, Deutsche Börse and SWX.

With respect to the ability of the Commission to enforce the Act as it applies to the ISE after the Transaction closes, the ISE will operate in the same manner following the Transaction in which it operates today. Thus, the Commission will continue to have plenary regulatory authority over the ISE, as is the case currently with the ISE being a wholly-owned subsidiary of a public company. As described in the following sections of this filing, the ISE is proposing a series of amendments to Holdings' governing documents, as well as resolutions and governing documents of the Upstream Owners, that will create an ownership structure and will provide the Commission with appropriate oversight tools to ensure that the Commission will have the ability to enforce the Act with respect to the ISE, the Upstream Owners, and their respective directors, officers, employees, and agents to the extent that they are involved in the activities of the ISE.

Ownership and Voting Restrictions After the Transaction. As discussed above, the Restrictions currently limit ownership and voting of Holdings' capital stock. The ISE initially adopted certain voting and ownership restrictions prior to its initial public offering as part of a package of rule changes that provide protections against inappropriate persons acquiring direct or indirect control of the ISE.[12] Holdings adopted the Restrictions, in connection with the ISE's reorganization into a

[10] *See* Section 3(a)(39) of the Act. 15 U.S.C. 78c(a)(39).

[11] *See* Securities Exchange Act Release No. 55293 (February 14, 2007), 72 FR 8033 (February 22, 2007) (SR–NYSE–2006–120).

[12] *See* Securities Exchange Act Release No. 51029 (January 12, 2005), 70 FR 3233 (January 21, 2005) (SR–ISE–2004–29).

holding company structure.[13] The Restrictions will remain in effect at Holdings after the closing of the Transaction. In addition, the proposed rule change would add provisions to the Certificate to provide for an automatic transfer of Holdings' shares to a trust (''ISE Trust'') if a person [14] were to obtain an ownership or voting interest in Holdings in excess of the Restrictions through ownership of one or more of the Upstream Owners without obtaining the approval of the Commission.[15] Under the proposed rule change, each of the Upstream Owners would adopt resolutions or governing document provisions requiring notification to the board of directors of the ISE and the ISE Trust if any person acquired 10% or more of the U.S. Upstream Owner or 20% or more of the non-U.S. Upstream Owners. The Certificate would be amended to provide that Holdings would deliver notice to the ISE Trust. In addition, each of the non-U.S. Upstream Owners would adopt resolutions requiring the non-U.S. Upstream Owner to take reasonable steps necessary to cause Holdings to be in compliance with the Restrictions.

Under the proposed rule change, the Certificate would be amended to provide that, if a person or group that the Commission had not approved through a proposed rule change under Section 19(b) of the Act (an ''Unapproved Person'') were to directly or indirectly own more than 40% (or 20%, if the Unapproved Person is an ISE member) of the outstanding shares of Holdings, or if an Unapproved Person directly or indirectly acquired voting control over more than 20% of the outstanding shares of Holdings, then an amount of Holdings' shares (''Excess Shares'') sufficient to reduce the Unapproved Person's ownership of Holdings to 40% (or 20% with respect to ISE members) or below, or sufficient to reduce the Unapproved Person's voting control over outstanding shares of Holdings to 20% or below, would be transferred to the ISE Trust.[16]

ISE Trust Agreement. The ISE Trust will operate pursuant to a trust agreement (''Trust Agreement'') among Holdings, U.S. Exchange Holdings, the trustees of the ISE Trust (''Trustees''), and a Delaware trustee. The Trustees will be persons who are independent of the Upstream Owners, Holdings, the ISE, and their affiliates; are not subject to any statutory disqualification (as defined in Section 3(a)(39) of the Act); are of high repute and have experience and expertise in, or knowledge of, the securities industry, regulation and/or corporate governance; are independent to such a degree that they can be entrusted to resist undue pressures; and are not unacceptable to the Commission staff.

The ISE Trust would serve two general purposes. First, as described above, the ISE Trust would hold Excess Shares in the event that a person obtained direct or indirect ownership or voting interest in Holdings in excess of the Restrictions without obtaining the approval of the Commission. In the event that Excess Shares are transferred to the ISE Trust:

- The Trustees would be required under the terms of the Trust Agreement to vote any Excess Shares held by the ISE Trust consistent with the public interests of the markets operated by the ISE.
- While the shares are held by the ISE Trust, U.S. Exchange Holdings, as the trust beneficiary, would continue to receive the economic benefit of the Excess Shares (*e.g.*, dividends and other distributions).
- U.S. Exchange Holdings would have the right to reacquire the Excess Shares from the ISE Trust if the Unapproved Person's direct or indirect ownership of Holdings no longer exceeds the Restrictions (*e.g.*, if the Commission approved the Unapproved Person or if the Unapproved Person sold its interest such that the Unapproved Person no longer exceeds the Restrictions).
- If directed by U.S. Exchange Holdings, the ISE Trust would sell the Excess Shares, in one or more transactions, in market transactions, by public offering, or otherwise, at a time or times and in a manner so as to maximize the return on the Excess Shares to any person or persons designated by the Trustees whose ownership or voting would not violate the Restrictions, and that is not a non-U.S. Upstream Owner with respect to which a Material Compliance Event (as described below) has occurred and is continuing.
- Upon a sale of the Excess Shares, the net proceeds of the sale (plus any accrued dividends and less any administrative fees incurred by the Trustees in administering the ISE Trust) would be paid to U.S. Exchange Holdings.

Second, the ISE Trust would hold a call option over Holdings' shares (''Call Option'') that could be exercised after the occurrence of a Material Compliance Event. Under the Trust Agreement, the term ''Material Compliance Event'' would be defined, with respect to a non-U.S. Upstream Owner, as any state of facts, development, event, circumstance, condition, occurrence, or effect that results in the failure of any of the non-U.S. Upstream Owners to adhere to their respective commitments under the resolutions in any material respect.[17] Under the proposed rule change, the Trust Agreement would provide generally that, if a Material Compliance Event had occurred and continued to be in effect, then the ISE Trust would exercise the Call Option.

However, the Trust Agreement also would provide for certain steps to be carried out prior to any exercise of the Call Option. Specifically, upon becoming aware of facts, developments, events, circumstances, conditions, occurrences, or effects that could reasonably be expected to result in the occurrence of a Material Compliance Event, the Trustees would be required to meet promptly and to make a determination of whether or not a Material Compliance Event had occurred, within five (5) business days of that meeting. After making a determination that a Material Compliance Event had occurred, and prior to any exercise of the Call Option, the Trustees would provide written notice to the non-U.S. Upstream Owners and to the Commission of the occurrence of the Material Compliance Event, which notice would provide for sixty (60) calendar days in which to address the Material Compliance Event (''Cure Period'').

The Trust Agreement would provide further that, during the Cure Period, the

[13] *See* Securities Exchange Act Release No. 53705 (April 21, 2006), 71 FR 25260 (April 28, 2006) (SR–ISE–2006–04).

[14] The Certificate currently provides, and will continue to provide, that the term ''person'' shall mean an individual, partnership (general or limited), joint stock company, corporation, limited liability company, trust, or unincorporated organization or any governmental entity or agency or political subdivision thereof.

[15] If a person were to obtain an indirect ownership or voting interest in Holdings in excess of the Restrictions through ownership of one or more of the Upstream Owners without the approval of the Commission, shares of Holdings would be transferred to the ISE Trust automatically by operation of law. *See* Section 202(c)(4) of the Delaware General Corporation Law.

[16] The factors used to determine the extent of an Unapproved Person's ownership or voting interest in Holdings would include, among other things, the amount of the Unapproved Person's ownership or voting interest in a particular Upstream Owner, the amount of that Upstream Owner's direct or indirect ownership or voting interest in Holdings, and the board composition of Holdings and the applicable Upstream Owners.

[17] The Trust Agreement also would provide that the term Material Compliance Event would apply with respect to the resolutions of any future upstream owner of Holdings.

Trustees would consult with the boards of directors (or equivalent) of the ISE, ISE Holdings, and the non-U.S. Upstream Owners, and with the Commission, to consider alternatives to the exercise of the Call Option to address the Material Compliance Event. After such consultation, if the Trustees determine that the Material Compliance Event had not been addressed, they would provide written notice to the boards of directors (or equivalent) of the ISE, Holdings, and the non-U.S. Upstream Owners that they have determined that the exercise of the Call Option is necessary to address the effects of the Material Compliance Event.

If the ISE Trust were to exercise the Call Option, it would deliver a written notice to Holdings and U.S. Exchange Holdings, promptly after the end of the Cure Period, that the ISE Trust had determined to exercise the Call Option in accordance with the terms of the Trust Agreement. Subsequently, Holdings and U.S. Exchange Holdings would be required to promptly transfer to the ISE Trust the minimum number of Holdings' shares necessary, in the reasonable opinion of the Trustees, to address the Material Compliance Event (''Deposited Shares'').

Under the Trust Agreement, the Trustees would transfer the Deposited Shares from the ISE Trust to U.S. Exchange Holdings in the event that: (a) No Material Compliance Event is continuing; or (b) notwithstanding the continuation of a Material Compliance Event, the Trustees determine that the retention of the Deposited Shares by the ISE Trust could not reasonably be expected to address any continuing Material Compliance Event (in this specific case, any such determination would not be effective unless it is filed with, or filed with and approved by, the Commission under Section 19 of the Act and the rules thereunder).

As would be the case with Excess Shares, while Deposited Shares are held by the ISE Trust, U.S. Exchange Holdings would continue to receive the economic benefit of the Deposited Shares (*e.g.*, dividends and other distributions). Additionally, if directed by U.S. Exchange Holdings, the ISE Trust would sell the Deposited Shares, in one or more transactions, in market transactions, by public offering or otherwise, at a time or times and in a manner so as to maximize the return on the Deposited Shares to any person or persons designated by the Trustees whose ownership or voting would not violate the Restrictions, and that is not a non-U.S. Upstream Owner with respect to which a Material Compliance Event has occurred and is continuing. Upon a sale of the Deposited Shares, the net proceeds of the sale (plus any accrued dividends and less any administrative fees incurred by the Trustees in administering the ISE Trust) would be paid to U.S. Exchange Holdings.

Jurisdiction over Individuals. Article FOURTEENTH of the Certificate currently provides that, as long as Holdings controls the ISE, the directors, officers, and employees of Holdings shall be deemed to be directors, officers, and employees of the ISE for purposes of, and subject to oversight pursuant to, the Act but only to the extent that such directors, officers, and employees of Holdings relate to the exchange business of the ISE. In addition, Section 1.4 of the Bylaws currently provides that Holdings and its directors, officers, and employees are deemed to irrevocably submit to the jurisdiction of the U.S. federal courts and the Commission for the purposes of any suit, action, or proceeding pursuant to the U.S. federal securities laws, and the rules or regulations thereunder, arising out of, or relating to, the activities of the ISE.

Under the proposed rule change, each Upstream Owner would adopt resolutions or appropriate provisions in its governing documents to include jurisdictional provisions tailored to the proposed ISE-Eurex ownership structure. Specifically, the resolutions or governing documents of the Upstream Owners would provide that, to the extent the directors, officers, and employees of any Upstream Owner are involved in the activities of the ISE, such directors, officers, and employees would be deemed to be directors, officers, and employees of the ISE for purposes of, and subject to oversight pursuant to, the Act.

In addition, the resolutions or governing documents of the Upstream Owners would provide that the Upstream Owners, and the directors, officers, and employees of the Upstream Owners, would irrevocably submit to the jurisdiction of the U.S. federal courts and the Commission for the purposes of any suit, action, or proceeding pursuant to the U.S. federal securities laws, and the rules and regulations thereunder, commenced or initiated by the Commission arising out of, or relating to, the activities of the ISE to the extent such Upstream Owner or such Upstream Owner's directors, officers, and employees are involved in the activities of the ISE. The resolutions or governing documents of the Upstream Owners also would provide that, with respect to any such suit, action, or proceeding brought by the Commission, the Upstream Owners and their respective directors, officers, and employees would, to the extent they are involved in the activities of the ISE: (1) Agree that Holdings (or, in the case of U.S. Exchange Holdings, U.S. Exchange Holdings) may serve as U.S. agent for purposes of service of process in such suit, action, or proceeding; and (2) waive, and agree not to assert by way of motion, as a defense or otherwise, in any such suit, action, or proceeding, any claims that it or they are not personally subject to the jurisdiction of the Commission, that the suit, action, or proceeding is an inconvenient forum or that the venue of the suit, action, or proceeding is improper, or that the subject matter thereof may not be enforced in or by the U.S. federal courts or the Commission. The board members of the non-U.S. Upstream Owners would consent to the applicability to them of the jurisdictional provisions and the resolutions of the non-U.S. Upstream Owners would provide that the non-U.S. Upstream Owners would take reasonable steps to cause their officers and employees to so consent, all to the extent that such non-U.S. Upstream Owners and their board members, officers, and employees are involved in the activities of the ISE.[18] Likewise, the governing documents of the U.S. Upstream Owner would provide that such U.S. Upstream Owner would take reasonable steps to cause its directors, officers, and employees involved in the activities of the ISE to consent to these provisions.

The ISE anticipates that these functions and activities generally will be carried out by the officers and directors of the Exchange itself, over whom the Commission has direct authority under Section 19(h)(4) of the Act. In addition, however, the ISE acknowledges that the conditions under which the Commission might assert jurisdiction over Upstream Owners or their directors, officers, or employees would depend on the particular circumstances.

Access to Books and Records. As discussed above, Article FOURTEENTH of the Certificate provides that Holdings' books and records are deemed to be the books and records of the ISE to the extent that they relate to the activities of the ISE. Under the proposed rule change, each Upstream Owner would adopt resolutions or provisions in its governing documents to provide that the books and records of the Upstream

[18] As noted above, persons who become board members of the non-U.S. Upstream Owners after consummation of the Transaction would be required to consent to the matters included in the resolutions in order to become a board member.

Owners are deemed to be the books and records of the ISE for purposes of, and subject to oversight pursuant to, the Act to the extent that such books and records are related to the activities of the ISE. In addition, the resolutions or governing documents of each Upstream Owners would provide that the Upstream Owner's books and records related to the activities of the ISE shall at all times be made available for inspection and copying by the Commission and the ISE.[19]

Additional Matters. Holdings' current governing documents include provisions relating to cooperation with the Commission and the ISE,[20] confidentiality of information regarding the ISE's self-regulatory function,[21] preservation of the independence of the self-regulatory function of the ISE,[22] and directors' consideration of the effect of Holdings' actions on the ISE's ability to carry out its responsibilities under the Act.[23] Under the proposed rule change, each Upstream Owner would adopt either resolutions or provisions in its governing documents to incorporate these concepts.

Specifically, the resolutions or governing documents of each Upstream Owner would provide that such Upstream Owner shall comply with the U.S. federal securities laws and the rules and regulations thereunder and shall cooperate with the Commission and with the ISE.[24] In addition, the resolutions of the non-U.S. Upstream Owners would provide that the board members would so consent to comply and cooperate and that each non-U.S. Upstream Owner would take reasonable steps to cause its officers and employees to also comply and cooperate. Likewise, the governing documents of the U.S. Upstream Owner would provide that it would take reasonable steps to cause its directors, officers, and employees to consent to comply with the U.S. federal securities laws and the rules and regulations thereunder and to cooperate with the Commission and with the ISE.

The resolutions or governing documents of each Upstream Owner also would provide that, to the fullest extent permitted by applicable law, all confidential information that shall come into the possession of such Upstream Owner pertaining to the self-regulatory function of the ISE shall: (a) Not be made available to any persons other than to those officers, directors (or equivalent), employees and agents of the Upstream Owner that have a reasonable need to know the contents thereof; (b) be retained in confidence by the Upstream Owner and the officers, directors (or equivalent), employees, and agents of the Upstream Owner; and (c) not be used for any commercial purposes. In addition, the resolutions and governing documents would provide that the terms regarding such confidential information shall not be interpreted so as to limit or impede: (i) The rights of the Commission or the ISE to have access to and examine such confidential information pursuant to the U.S. federal securities laws and the rules and regulations thereunder; or (ii) the ability of any officers, directors, employees, or agents of the Upstream Owners to disclose such confidential information to the Commission or the ISE. The resolutions of the non-U.S. Owners would also provide that the board members consent to these requirements regarding confidential information and that each non-U.S. Upstream Owner would take reasonable steps to cause its officers, employees, and agents to agree to the requirements. The U.S. Upstream Owner would also take reasonable steps to cause its directors, officers, employees, and agents to so agree.

Additionally, the resolutions or governing documents of each Upstream Owner would provide that such Upstream Owner shall, to the extent it is involved in the activities of the ISE, give due regard to the preservation of the independence of the self-regulatory function of the ISE and to its obligations to investors and the general public, and shall not take any actions that would interfere with the effectuation of any decisions by the board of directors of the ISE relating to its regulatory responsibilities (including enforcement and disciplinary matters) or that would interfere with the ability of the ISE to carry out its responsibilities under the Act. The resolutions of each non-U.S. Upstream Owner also would provide that the board members would consent to the requirements and that such non-U.S. Upstream Owner would take reasonable steps to cause its officers and employees to agree to the requirements. Similarly, the U.S. Upstream Owner would take reasonable steps to cause its directors, officers, employees, and agents to so agree.

Finally, the resolutions or governing documents of each Upstream Owner would provide that the board members or directors of such Upstream Owners would, in discharging his or her responsibilities, to the extent such board member or director is involved in the activities of the ISE and to the fullest extent permitted by applicable law, take into consideration the effect that such Upstream Owner's actions would have on the ability of: (a) The ISE to carry out its responsibilities under the Act; and (b) the ISE and such Upstream Owner: (i) To engage in conduct that fosters and does not interfere with the ability of the ISE and such Upstream Owner to prevent fraudulent and manipulative acts and practices in the securities markets; (ii) to promote just and equitable principles of trade in the securities markets; (iii) to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities; (iv) to remove impediments to and perfect the mechanisms of a free and open market in securities and a U.S. national securities market system; and (v) in general, to protect investors and the public interest.

Amendments to Upstream Owners' Resolutions and Governing Documents. Currently, Article SIXTEENTH of the Certificate and Section 10.1 of the Bylaws provide that, before any amendment or repeal of any provision of Holdings' governing documents may become effective, the amendment or repeal must be submitted to the ISE's board of directors, which then determines whether the amendment or repeal must be filed with, or filed with and approved by, the Commission under Section 19 of the Act. Under the proposed rule change, each Upstream Owner would adopt either resolutions or provisions in its governing documents to incorporate these concepts regarding amendments and repeals. The resolutions or governing documents of each Upstream Owner would provide that, before any amendment to or repeal of any provision of any of the resolutions or governing documents became effective, the same shall be submitted to the board of directors of the ISE and if said board shall determine that the same must be filed with, or filed with and approved by, the Commission before the same may be effective under Section 19 of the

[19] With respect to Eurex Zürich, SWX, SWX Group, and Verein SWX Swiss Exchange, the resolutions would provide that, where necessitated by Swiss law, information related to the activities of the ISE, including books and records of the Swiss Upstream Owners related to the activities of the ISE, will be provided to the Commission promptly, through the Swiss Federal Banking Commission (''SFBC''), and that oral exchanges between the entities and the Commission related to the activities of the ISE will include the participation of the SFBC, where necessitated by Swiss law.

[20] Article FIFTEENTH of the Certificate.

[21] Article THIRTEENTH of the Certificate.

[22] Section 1.5 of the Bylaws.

[23] Article TWELFTH of the Certificate.

[24] With respect to the non-U.S. Upstream Owners, these provisions would apply in connection with such Upstream Owners' involvement in the activities of the ISE.

Act and the rules promulgated thereunder then the same shall not be effective until filed with, or filed with and approved by, the Commission, as the case may be. In addition, the resolutions of each non-U.S. Upstream Owner would apply these requirements to any action by such Upstream Owner that would have the effect of amending or repealing any provision of the resolutions.

2. Basis

The basis under the Act for this proposed rule change is the requirement under Section 6(b)(5) of the Act [25] that an exchange have rules that are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism for a free and open market and a national market system, and, in general, to protect investors and the public interest. In particular, the proposal will permit the ISE to enter into the Transaction with Eurex Frankfurt, a leading international derivatives exchange, providing the ISE with strong ownership to be competitive in an increasingly global market.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any written comments from members or other interested parties.

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–ISE–2007–101 on the subject line.

Paper Comments

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

All submissions should refer to File Number SR–ISE–2007–101. 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 ISE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–ISE–2007–101 and should be submitted on or before November 28, 2007.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[26]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E7–21836 Filed 11–6–07; 8:45 am]

BILLING CODE 8011–01–P

[25] 15 U.S.C. 78f(b)(5).

[26] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF STATE

[Public Notice: 5985]

60-Day Notice of Proposed Information Collection: DS–10, Birth Affidavit, OMB Control Number 1405–0132

ACTION: Notice of request for public comments.

SUMMARY: The Department of State is seeking Office of Management and Budget (OMB) approval for the information collection described below. The purpose of this notice is to allow 60 days for public comment preceding submission to OMB. We are conducting this process in accordance with the Paperwork Reduction Act of 1995.

- *Title of Information Collection:* Birth Affidavit.
- *OMB Control Number:* 1405–0132.
- *Type of Request:* Revision of a Currently Approved Collection.
- *Originating Office:* Bureau of Consular Affairs, CA/PPT/FO/FC.
- *Form Number:* DS–10.
- *Respondents:* Individuals or households.
- *Estimated Number of Respondents:* 154,850 per year.
- *Estimated Number of Responses:* 154,850 per year.
- *Average Hours Per Response:* 15 minutes.
- *Total Estimated Burden:* 38,713.
- *Frequency:* On occasion.
- *Obligation to Respond:* Required to obtain or retain a benefit.

DATES: The Department will accept comments from the public up to 60 days from January 7, 2008.

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

- E-mail: *voelzlm@state.gov.*
- Mail (paper, disk, or CD–ROM submissions): Lori Voelz, U.S. Department of State, Passport Services, 2100 Pennsylvania Avenue, NW., 3rd Floor, Washington, DC 20037.

You must include the DS form number (if applicable), information collection title, and OMB control number in any correspondence.

FOR FURTHER INFORMATION CONTACT: Direct requests for additional information regarding the collection

listed in this notice, including requests for copies of the proposed information collection and supporting documents, to Lori Voelz, U.S. Department of State, CA/PPT/FO/FC, 2100 Pennsylvania Avenue, NW., 3rd Floor, Washington, DC 20037, who may be reached on 202–663–3113 or at *voelzlm@state.gov.*

SUPPLEMENTARY INFORMATION: We are soliciting public comments to permit the Department to:

- Evaluate whether the proposed information collection is necessary for the proper performance of our functions.
- Evaluate the accuracy of our estimate of the burden of the proposed collection, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of technology.

Abstract of Proposed Collection

The Birth Affidavit is submitted in conjunction with an application for a U.S. passport and used by Passport Services to collect information for the purpose of establishing the citizenship of a passport applicant who has not submitted an acceptable United States birth certificate with his/her passport application.

Methodology

When needed, a Birth Affidavit is completed at the time a U.S. citizen applies for a U.S. passport.

Dated: October 17, 2007.

Betsy Anderson,

Acting Deputy Assistant Secretary for Passport Services, Bureau of Consular Affairs, Department of State.

[FR Doc. E7–21855 Filed 11–6–07; 8:45 am]

BILLING CODE 4710–06–P

DEPARTMENT OF STATE

[Public Notice: 5984]

60-Day Notice of Proposed Information Collection: DS–60, Affidavit Regarding a Change of Name, OMB Control Number 1405–0133

ACTION: Notice of request for public comments.

SUMMARY: The Department of State is seeking Office of Management and Budget (OMB) approval for the information collection described below. The purpose of this notice is to allow 60 days for public comment preceding submission to OMB. We are conducting this process in accordance with the Paperwork Reduction Act of 1995.

- *Title of Information Collection:* Affidavit Regarding a Change of Name.
- *OMB Control Number:* 1405–0133.
- *Type of Request:* Revision of a Currently Approved Collection.
- *Originating Office:* Bureau of Consular Affairs, CA/PPT/FO/FC.
- *Form Number:* DS–60.
- *Respondents:* Individuals or households.
- *Estimated Number of Respondents:* 202,920 per year.
- *Estimated Number of Responses:* 202,920 per year.
- *Average Hours Per Response:* 15 minutes.
- *Total Estimated Burden:* 50,730.
- *Frequency:* On occasion.
- *Obligation to Respond:* Required to obtain or retain a benefit.

DATES: The Department will accept comments from the public up to 60 days from November 7, 2007.

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

- E-mail: *voelzlm@state.gov.*
- Mail (paper, disk, or CD–ROM submissions): Lori Voelz, U.S. Department of State, Passport Services, 2100 Pennsylvania Avenue, NW., 3rd Floor, Washington, DC 20037.

You must include the DS form number (if applicable), information collection title, and OMB control number in any correspondence.

FOR FURTHER INFORMATION CONTACT: Direct requests for additional information regarding the collection listed in this notice, including requests for copies of the proposed information collection and supporting documents, to Lori Voelz, U.S. Department of State, Passport Services, 2100 Pennsylvania Avenue, NW., 3rd Floor, Washington, DC 20037, who may be reached on 202–663–3113 or at *voelzlm@state.gov.*

SUPPLEMENTARY INFORMATION: We are soliciting public comments to permit the Department to:

- Evaluate whether the proposed information collection is necessary for the proper performance of our functions.
- Evaluate the accuracy of our estimate of the burden of the proposed collection, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of technology.

Abstract of Proposed Collection

The Affidavit Regarding a Change of Name is submitted in conjunction with an application for a U.S. passport. It is used by Passport Services to collect information for the purpose of establishing that a passport applicant who has adopted a new name without formal court proceedings or by marriage has publicly and exclusively used the adopted name over a period of time (at least five years).

Methodology

When needed, the Affidavit Regarding a Change of Name is completed at the time a U.S. citizen applies for a U.S. passport.

Dated: October 17, 2007.

Betsy Anderson,

Acting Deputy Assistant Secretary for Passport Services, Bureau of Consular Affairs, Department of State.

[FR Doc. E7–21857 Filed 11–6–07; 8:45 am]

BILLING CODE 4710–06–P

DEPARTMENT OF STATE

[Public Notice: 5983]

60-Day Notice of Proposed Information Collection: Department of State Form DS–1504; Request for Customs Clearance of Merchandise; OMB Control Number 1405–0104

ACTION: Notice of request for public comments.

SUMMARY: The Department of State is seeking Office of Management and Budget (OMB) approval for the information collection described below. The purpose of this notice is to allow 60 days for public comment in the **Federal Register** preceding submission to OMB. We are conducting this process in accordance with the Paperwork Reduction Act of 1995.

- *Title of Information Collection:* Request for Customs Clearance of Merchandise.
- *OMB Control Number:* 1405–0104.
- *Type of Request:* Extension of a Currently Approved Collection.
- *Originating Office:* DS/OFM/VTC/TC.
- *Form Number:* DS–1504.
- *Respondents:* Eligible foreign diplomatic or consular missions, certain foreign government organizations, and designated international organizations.
- *Estimated Number of Respondents:* 350.
- *Estimated Number of Responses:* 7,800.
- *Average Hours Per Response:* 30 minutes.

• *Total Estimated Burden:* 3,900 hours.

• *Frequency:* On Occasion.

• *Obligation to Respond:* Required to Obtain or Retain a Benefit.

DATES: The Department will accept comments from the public up to 60 days from November 7, 2007.

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

• E-mail: *ofmtaxcustoms@state.gov*.

• Mail (paper, disk, or CD–ROM submissions): Office of Foreign Missions, International Place, NW., U.S. Department of State, Washington, DC 20008.

• Fax: 202–895–3533.

You must include the DS form number, information collection title, and OMB control number in any correspondence.

FOR FURTHER INFORMATION CONTACT: Direct requests for additional information regarding the collection listed in this notice, including requests for copies of the proposed information collection and supporting documents, to Ms. Irina Kaufman, DS/OFM/TC, 3507 International Place, NW., U.S. Department of State, Washington, DC 2008, who may be reached on 202–895–3683, or by e-mail at *kaufmani@state.gov*.

SUPPLEMENTARY INFORMATION: We are soliciting public comments to permit the Department to:

• Evaluate whether the proposed information collection is necessary for the proper performance of our functions.

• Evaluate the accuracy of our estimate of the burden of the proposed collection, including the validity of the methodology and assumptions used.

• Enhance the quality, utility, and clarity of the information to be collected.

• Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of technology.

Abstract of proposed collection: Exemption from customs duties is a privilege enjoyed by foreign diplomatic and consular personnel on assignment in the Unites States under the provision of the Vienna Conventions on Diplomatic and Consular Relations and the terms of various bilateral agreements. Under the Foreign Missions Act of 1982 (as amended), 22 U.S.C. 4301 *et seq.*, the Department of State's Office of Foreign Missions (OFM) is given the authority to grant privileges and benefits, based on reciprocity. Form DS–1504 ''Request for Customs Clearance of Merchandise'' provides OFM with the necessary information to provide and administer the benefit effectively and efficiently.

Methodology: Paper copies of the Form DS–1504 are either hand carried or mailed to OFM. Foreign Missions can access this from on the OFM Web site in Portable Document Format (PDF), which provides a data-input and print feature for clean and legible paper copies. An electronic submission option is expected to be made available to respondents in 2008.

Dated: October 3, 2007.

Claude J. Nebel,

Deputy Assistant Secretary of State and Deputy Director, Office of Foreign Missions, Bureau of Diplomatic Security, Department of State.

[FR Doc. E7–21858 Filed 11–6–07; 8:45 am]

BILLING CODE 4710–43–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Fourth Meeting, Special Committee 213 Enhanced Flight Vision Systems/ Synthetic Vision System (EFVS/SVS)

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of RTCA Special Committee 213, Enhanced Flight Vision Systems/Synthetic Vision System, (EFVS/SVS).

SUMMARY: The FAA is issuing this notice to advise the public of a meeting of RTCA Special Committee 213, Enhanced Flight Vision Systems/ Synthetic Vision System, (EFVS/SVS).

DATES: The meeting will be held November 27–29, 2007 from 9 a.m.–5 p.m.

ADDRESSES: The meeting will be held at Hilton Savannah DeSoto Hotel, 15 East Liberty Street, Savannah, Georgia 31401.

FOR FURTHER INFORMATION CONTACT: RTCA Secretariat, 1828 L Street, NW., Suite 805, Washington, DC, 20036; telephone (202) 833–9339; fax (202) 833–9434; Web site *http://www.rtca.org* for directors. Hilton Gardens: telephone (425) 430–1414.

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., Appendix 2), notice is hereby given for a Special Committee 213 meeting. The agenda will include:

• November 27th.

• Opening Plenary Session (Welcome, Introductions, and Agenda Review).

• Review SC–213 Objectives, Action Items, and SC–213 website content.

• Review initial reports from WG 1, and WG 2.

• Presentations.

• WG 1 and WG 2 meetings:

• Review/edit most recent MASPS.

• Consensus of draft MASPS among WG 1.

• Incorporate helicopter issues.

• WG 2A:

• Review/edit draft MASPS.

• WG 2B:

• Continue to formulate plan performance criteria.

• November 28th.

• Continuation of WG 1 and WG 2 meetings.

• November 29th.

• Review of action items.

• Define next steps for continued MASPS development.

• Closing Plenary Session (Other Business, Establish date and time for next meeting, Adjourn).

Attendance is open to the interested public but limited to space availability. With the approval of the chairmen, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. Members of the public may present a written statement to the committee at any time.

Issued in Washington, DC, on November 29, 2007.

Francisco Estrada C.,

RTCA Advisory Committee.

[FR Doc. 07–5543 Filed 11–6–07; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Policy Statement, 14 CFR Part 23, §§ 23.853, 23.855, 23.863 and 23.1359, Flammability of MIL–C–17/60, /93, /94, /113, /127, and /128 Coaxial Cable

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of issuance and availability.

SUMMARY: Policy Statement PS–ACE100–2007–002, 14 CFR Part 23, §§ 23.853, 23.855, 23.863 and 23.1359, Flammability of MIL–C–17/60, /93, /94, /113, /127, and /128 Coaxial Cable clarifies certification policy on part 23 and the Airship Design Criteria (ADC). The policy statement clarifies part 23, §§ 23.853, 23.855, 23.863 and 23.1359 for installing coaxial cable in part 23 aircraft. It applies to normal, utility, acrobatic, and commuter category airplanes. It also applies to non-rigid airships (ADC sections 4.39, 4.40 and 6.21) certificated in the normal category

(14 CFR part 21, § 21.17(b)) with nine passenger seats or less. Material in the policy is neither mandatory nor regulatory in nature and does not constitute a regulation.

DATES: Policy statement PS–ACE100–2007–002 was issued by the Small Airplane Directorate, Aircraft Certification Service, on October 15, 2007.

Discussion of Comments

The comment period for the proposed policy closed on August 29, 2007. No comments were received, and the policy is being adopted as proposed.

How To Obtain Copies: A paper copy of policy statement PS–ACE100–2007–002 may be obtained by writing to us at the Small Airplane Directorate, ACE–111; Federal Aviation Administration, Room 301; 901 Locust; Kansas City, Missouri 64106.

The policy statement is available on the Internet at *http://www.faa.gov/regulations_policies/policy_guidance/*.

Issued in Kansas City, Missouri on October 15, 2007.

David R. Showers,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. E7–21826 Filed 11–6–07; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2007–0004]

Agency Information Collection Activities; Revision of a Currently Approved Information Collection: Motor Carrier Identification Report

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice and request for information.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FMCSA announces its plan to submit the Information Collection Request (ICR) described below to the Office of Management and Budget (OMB) for review and approval and invites public comment. The FMCSA requests approval to revise an ICR entitled, ''Motor Carrier Identification Report,'' which is used to identify FMCSA regulated entities, help prioritize the agency's activities, aid in assessing the safety outcomes of those activities, and for statistical purposes.

DATES: We must receive your comments on or before *January 7, 2008*.

ADDRESSES: You may submit comments bearing the Department of Transportation (DOT) Docket Management System (DMS) Docket Number FMCSA Docket Number FMCSA–2007–0004 using any of the following methods:

- Federal eRulemaking Portal: Go to *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- Mail: Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Group Floor, Room W12–140, Washington, DC 20590–0001.
- Hand Delivery: West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington DC, 20590 between 9 a.m. and 5 p.m., e.t., Monday through Friday, except Federal holidays.
- Fax: 1–202–493–2251.

Each submission must include the Agency name and the docket number for this Notice. Note that DOT posts all comments received without change to *http://www.regulations.gov*, including any personal information included in a comment. Please see the Privacy Act heading below:

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* at any time or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The DMS is available 24 hours each day, 365 days each year. If you want acknowledgement that we received your comments, please include a self-addressed, stamped envelope or post card or print the acknowledgement page that appears after submitting on-line.

Privacy Act: Anyone may search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review the DOT's complete Privacy Act Statement in the **Federal Register** on April 11, 2000 (65 FR 19477–78; Apr. 11, 2000). This information is also available at *http://Docketinfo.dot.gov*.

FOR FURTHER INFORMATION CONTACT: Ms. Arlene D. Thompson, Information Systems Specialist, Office of Information Technology, Operations Division, Department of Transportation, Federal Motor Carrier Safety Administration, 6th Floor, West Building, 1200 New Jersey Ave., SE., Washington, DC 20590. Telephone Number: (202) 366–2094; e-mail Address: *Arlene.thompson@dot.gov*. Office hours are from 9 a.m. to 5 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background: Title 49 U.S.C. 504(b)(2) provides the Secretary of Transportation (Secretary) with authority to require carriers, lessors, associations, or classes of them to file annual, periodic, and special reports containing answers to questions asked by the Secretary. The Secretary may also prescribe the form of records required to be prepared or compiled and the time period during which records must be preserved (See §§ 504(b)(1) and (d)). The FMCSA will use this data to administer its safety programs by establishing a database of entities that are subject to its regulations. This database necessitates that these entities notify the FMCSA of their existence. For example, under 49 CFR 390.19(a), FMCSA requires all motor carriers beginning operations to file a Form MCS–150 entitled, ''Motor Carrier Identification Report.'' This report is filed by all motor carriers conducting operations in interstate or international commerce within 90 days after beginning operations. It asks the respondent to provide the name of the business entity that owns and controls the motor carrier operation, address and telephone of principal place of business, assigned identification number(s), type of operation, types of cargo usually transported, number of vehicles owned, term leased and trip leased, driver information, and certification statement signed by an individual authorized to sign documents on behalf of the business entity.

The Department of Transportation (DOT) and Related Agencies Appropriations Act for fiscal year 2002 (DOT Appropriations Act) (Pub. L. 107–87, 115 Stat. 833 (December 18, 2001) directed the agency to issue an interim final rule (IFR) to ensure that new entrant motor carriers are knowledgeable about the Federal Motor Carrier Safety Regulations (FMCSRs) and standards. The IFR was published on May 13, 2002 (67 FR 31983). The Form MCS–150A associated with this rule is entitled, ''Safety Certification for Application for U.S. DOT Number,'' and is used to help ensure that new entrants are knowledgeable about the Federal motor carrier safety regulations and standards before being granted registration authority to operate in interstate commerce (Intrastate carriers are not considered new entrants since they do not operate in interstate

commerce; and thus do not need to complete or file the Form MCS–150A.). Under the Form MCS–150A, as required by 49 CFR 385.305, the new entrant must certify that it has a system(s) in place to ensure compliance with applicable requirements covering driver qualifications, hours-of-service, controlled substance and alcohol testing, vehicle condition, accident monitoring and hazardous materials (HM) transportation. The certification reminds the new entrant of its statutory and regulatory responsibilities, which if neglected or violated, may subject the applicant to civil penalties and lead to the revocation of the new entrant registration.

On June 30, 2004, the agency issued another final rule entitled, ''Federal Motor Carrier Safety Regulations: Hazardous Materials Safety Permits,'' (69 FR 39350) which required all HM carriers (both interstate and intrastate) to complete and file the Form MCS–150B entitled, ''Combined Motor Carrier Identification Report and HM Permit Application,'' to obtain a safety permit to transport hazardous materials. The safety program under 49 CFR 390.19(a) also requires all HM permitted carriers to complete Form MCS–150B in place of the current Form MCS–150 to ''renew'' both their permit and their DOT numbers according to the DOT number renewal schedule.

Accordingly, FMCSA seeks to revise this currently-approved information collection to update the records and forms associated with its safety programs identified above; and to identify the regulated entities currently engaged in these activities.

Title: Motor Carrier Identification Report.

OMB Control Number: 2126–0013.

Type of Request: Revision of a currently-approved information collection.

Respondents: Motor carriers and commercial motor vehicle drivers.

Estimated Number of Respondents: 472,470.

Estimated Time per Response: To complete Form MCS–150—20 minutes; and for Form MCS–150A—9 minutes. To complete Form MCS–150B (HM Permit Application)—6 minutes for interstate carriers that have already completed the Form MCS–150; and for intrastate carriers that have never completed a Form MCS–150—they will need about 16 minutes to complete the permit renewal.

Expiration Date: January 31, 2008.

Frequency of Response: One-time for Form MCS–150; biennially for MCS–150A; and MCS–150B.

Estimated Total Annual Burden: 119,270 hours [108,825 hours for Form MCS–150 + 10,305 hours for Form MCS–150A + 140 hours for Form MCS–150B = 119,270 hours].

Public Comments Invited: You are asked to comment on any aspect of this information collection, including: (1) Whether the proposed collection is necessary for the FMCSA's performance; (2) the accuracy of the estimated burden; (3) ways for the FMCSA to enhance the quality, usefulness, and clarity of the collected information; and (4) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize or include your comments in the request for OMB's clearance of this information collection.

Issued on: November 1, 2007.

Terry Shelton,

Associate Administrator for Research and Information Technology.

[FR Doc. E7–21880 Filed 11–6–07; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket Nos. FMCSA–98–4334, FMCSA–99–5578, FMCSA–00–7363, FMCSA–00–7918, FMCSA–01–9258, FMCSA–01–9561, FMCSA–03–14504, FMCSA–03–15268, FMCSA–05–20027, FMCSA–05–21254]

Qualification of Drivers; Exemption Renewals; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of final disposition.

SUMMARY: FMCSA previously announced its decision to renew the exemptions from the vision requirement in the Federal Motor Carrier Safety Regulations for 25 individuals. FMCSA has statutory authority to exempt individuals from the vision requirement if the exemptions granted will not compromise safety. The Agency has reviewed the comments submitted in response to the previous announcement and concluded that granting these exemptions will provide a level of safety that will be equivalent to, or greater than, the level of safety maintained without the exemptions by these drivers.

FOR FURTHER INFORMATION CONTACT: Dr. Mary D. Gunnels, Chief, Physical Qualifications Division, (202) 366–4001, *fmcsamedical@dot.gov*, FMCSA, Department of Transportation, 1200 New Jersey Avenue, SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

You may see all the comments online through the Federal Document Management System (FDMS) at *http://www.regulations.gov.*

Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption for a 2-year period if it finds ''such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption.'' The statutes also allow the Agency to renew exemptions at the end of the 2-year period. The Notice was published on September 13, 2007. The comment period ended on October 15, 2007.

Discussion of Comments

FMCSA received no comments in this proceeding.

Conclusion

The Agency has not received any adverse evidence on any of these commercial motor vehicle drivers that indicates that safety is being compromised. Based upon its evaluation of the 25 renewal applications, FMCSA renews the Federal vision exemptions for Linda L. Billings, John A. Chizmar, Ronald D. Danberry, Weldon R. Evans, Richard L. Gagnebin, Orasio Garcia, Leslie W. Good, Chester L. Gray, James P. Guth, Rayford R. Harper, Britt D. Hazelwood, Joseph V. Johns, Robert C. Leathers, Michael S. Maki, Mark D. Page, Kenneth A. Reddick, Leonard Rice, Jr., Juan M. Rosas, Richard C. Simms, James T. Sullivan, Thomas J. Sweeny, Jr., Steven C. Thomas, Edward A. Vanderhei, Larry J. Waldner, and Kevin L. Wickard.

In accordance with 49 U.S.C. 31136(e) and 31315, each renewal exemption will be valid for 2 years unless revoked earlier by FMCSA. The exemption will be revoked if: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136 and 31315.

Issued on October 31, 2007.

Larry W. Minor,

Associate Administrator for Policy and Program Development.

[FR Doc. 07–5546 Filed 11–6–07; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–01–9561, FMCSA–05–22194]

Qualification of Drivers; Exemption Applications; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of renewal of exemptions; request for comments.

SUMMARY: FMCSA announces its decision to renew the exemptions from the vision requirement in the Federal Motor Carrier Safety Regulations for 25 individuals. FMCSA has statutory authority to exempt individuals from the vision requirement if the exemptions granted will not compromise safety. The Agency has concluded that granting these exemption renewals will provide a level of safety that is equivalent to, or greater than, the level of safety maintained without the exemptions for these drivers.

DATES: This decision is effective December 6, 2007. Comments should be received on or before December 7, 2007.

ADDRESSES: You may submit comments bearing the Federal Docket Management System (FDMS) Docket ID FMCSA–01–9561, FMCSA–05–22194, using any of the following methods.

- Federal eRulemaking Portal: Go to *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- Mail: Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- Hand Delivery or Courier: West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.
- Fax: 1–202–493–2251.

Each submission must include the Agency name and the docket number for this Notice. Note that DOT posts all comments received without change to *http://www.regulations.gov,* including any personal information included in a comment. Please see the Privacy Act heading below.

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* at any time or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The FDMS is available 24 hours each day, 365 days each year. If you want acknowledgment that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

Privacy Act: Anyone may search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78; Apr. 11, 2000). This information is also available at http://DocketInfo.dot.gov.

FOR FURTHER INFORMATION CONTACT: Dr. Mary D. Gunnels, Chief, Physical Qualifications Division, (202)–366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue, SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m. Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may renew an exemption from the vision requirements in 49 CFR 391.41(b)(10), which applies to drivers of commercial motor vehicles (CMVs) in interstate commerce, for a two-year period if it finds ''such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption.'' The procedures for requesting an exemption (including renewals) are set out in 49 CFR part 381.

Exemption Decision

This notice addresses 25 individuals who have requested a renewal of their exemptions in accordance with FMCSA procedures. FMCSA has evaluated these 25 applications for renewal on their merits and decided to extend each exemption for a renewable two-year period. They are:

Norman E. Braden, Levi A. Brown, Henry L. Chastain, Thomas R. Crocker, Clinton D. Edwards, Gerald W. Fox, Ronald K Fultz, Richard L. Gandee, John C. Holmes, John L. Hynes, John G. Kaye, Richard H. Kind, Bobby G. LaFleur, Robert S. Larrance, John D. McCormick, Thomas C, Meadows, Timothy S. Miller, David A. Morris, Leigh E. Moseman, Gary T. Murray, Richard P. Stanley, Paul D. Stoddard, Robert L. Tankersley, Jr., Scott A. Tetter, Benny R. Toothman.

These exemptions are extended subject to the following conditions: (1) That each individual have a physical examination every year (a) by an ophthalmologist or optometrist who attests that the vision in the better eye continues to meet the standard in 49 CFR 391.41(b)(10), and (b) by a medical examiner who attests that the individual is otherwise physically qualified under 49 CFR 391.41; (2) that each individual provide a copy of the ophthalmologist's or optometrist's report to the medical examiner at the time of the annual medical examination; and (3) that each individual provide a copy of the annual medical certification to the employer for retention in the driver's qualification file and retain a copy of the certification on his/her person while driving for presentation to a duly authorized Federal, State, or local enforcement official. Each exemption will be valid for two years unless rescinded earlier by FMCSA. The exemption will be rescinded if: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315.

Basis for Renewing Exemptions

Under 49 U.S.C. 31315(b)(1), an exemption may be granted for no longer than two years from its approval date and may be renewed upon application for additional two year periods. In accordance with 49 U.S.C. 31136(e) and 31315, each of the 25 applicants has satisfied the entry conditions for obtaining an exemption from the vision requirements (66 FR 30502; 66 FR 41654; 70 FR 57353; 70 FR 72689). Each of these 25 applicants has requested renewal of the exemption and has submitted evidence showing that the vision in the better eye continues to meet the standard specified at 49 CFR 391.41(b)(10) and that the vision impairment is stable. In addition, a review of each record of safety while driving with the respective vision deficiencies over the past two years indicates each applicant continues to meet the vision exemption standards. These factors provide an adequate basis for predicting each driver's ability to continue to drive safely in interstate commerce. Therefore, FMCSA concludes that extending the exemption for each renewal applicant for a period

of two years is likely to achieve a level of safety equal to that existing without the exemption.

Request for Comments

FMCSA will review comments received at any time concerning a particular driver's safety record and determine if the continuation of the exemption is consistent with the requirements at 49 U.S.C. 31136(e) and 31315. However, FMCSA requests that interested parties with specific data concerning the safety records of these drivers submit comments by December 7, 2007.

FMCSA believes that the requirements for a renewal of an exemption under 49 U.S.C. 31136(e) and 31315 can be satisfied by initially granting the renewal and then requesting and evaluating, if needed, subsequent comments submitted by interested parties. As indicated above, the Agency previously published notices of final disposition announcing its decision to exempt these 25 individuals from the vision requirement in 49 CFR 391.41(b)(10). The final decision to grant an exemption to each of these individuals was based on the merits of each case and only after careful consideration of the comments received to its notices of applications. The notices of applications stated in detail the qualifications, experience, and medical condition of each applicant for an exemption from the vision requirements. That information is available by consulting the above cited **Federal Register** publications.

Interested parties or organizations possessing information that would otherwise show that any, or all of these drivers, are not currently achieving the statutory level of safety should immediately notify FMCSA.

The Agency will evaluate any adverse evidence submitted and, if safety is being compromised or if continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315, FMCSA will take immediate steps to revoke the exemption of a driver.

Issued on: November 1, 2007.

Larry W. Minor,

Associate Administrator for Policy and Program Development.

[FR Doc. E7–21878 Filed 11–6–07; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

[FTA Docket No. FTA–2007–0015]

Agency Information Collection Activity Under OMB Review

AGENCY: Federal Transit Administration, DOT.

ACTION: Notice of request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.), this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Management and Budget (OMB) for approval. The **Federal Register** Notice with a 60-day comment period soliciting comments was published on August 24, 2007. No comments were received in response to that notice.

DATES: Comments must be submitted before December 7, 2007. A comment to OMB is most effective if OMB receives it within 30 days of publication.

FOR FURTHER INFORMATION CONTACT: LaStar Matthews, Office of Administration, Office of Management Planning, (202) 366–2295 or e-mail: *LaStar.Matthews@dot.gov.*

ADDRESSES: All written comments must refer to the docket number that appears at the top of this document and be submitted to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503, Attention: FTA Desk Officer.

SUPPLEMENTARY INFORMATION:

Title: Charter Service Operations (*OMB Number: 2132–0549*).

Abstract: 49 U.S.C. 5323(d) requires all applicants for financial assistance from FTA to enter into a charter bus agreement with the Secretary of Transportation (delegated to the Administrator of FTA in 49 CFR 1.51(a)). 49 U.S.C. 5323(d) provides protections for private intercity charter bus operators from unfair competition by FTA recipients. 49 U.S.C. Section 5302(a)(10) as interpreted by the Comptroller General permits FTA recipients, but does not state that recipients have a right, to provide charter bus service with FTA-funded facilities and equipment only if it is incidental to the provision of mass transportation service. These statutory requirements have been implemented in FTA's charter regulation, 49 CFR 604.7. 49 CFR 604.7 requires all applicants for financial assistance under 49 U.S.C. 5309, 5336, or 5311 to include two copies of a charter bus agreement with the first grant application submitted after the effective date of the rule. The applicant signs the agreement, but FTA executes it only upon approval of the application. This is a one-time submission with incorporation by reference in subsequent grant applications. 49 CFR 604.11(b) requires recipients to provide notice to all private charter operators and allows them to submit written evidence demonstrating that they are willing and able to provide the charter service the recipient is proposing to provide. The notice must be published in a newspaper and sent to any private operator requesting notice and to the United Bus Owners of America and the American Bus Association, the two trade associations to which most private charter operators belong. To continue receiving federal financial assistance, recipients must publish this notice annually. 49 CFR 604.13(b) requires recipients to review the evidence submitted and notify the submitter of its decision. This notice is also an annual requirement. On December 30, 1988, FTA issued an amendment to the Charter Service regulation that allows additional exceptions for certain non-profit social service groups that meet eligibility requirements.

Estimated Total Annual Burden: 1,984 hours.

Comments Are Invited On: Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department's estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

Issued: November 1, 2007.

Ann M. Linnertz,

Associate Administrator for Administration.

[FR Doc. E7–21827 Filed 11–6–07; 8:45 am]

BILLING CODE 4910–57–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

Voluntary Intermodal Sealift Agreement

AGENCY: Maritime Administration, DOT.

ACTION: Notice of Voluntary Intermodal Sealift Agreement (VISA).

SUMMARY: The Maritime Administration announces the extension of the Voluntary Intermodal Sealift Agreement (VISA) until October 1, 2009, pursuant to the Defense Production Act of 1950, as amended. The purpose of the VISA is to make intermodal shipping services/systems, including ships, ships' space, intermodal equipment and related management services, available to the Department of Defense as required to support the emergency deployment and sustainment of U.S. military forces. This is to be accomplished through cooperation among the maritime industry, the Department of Transportation and the Department of Defense.

FOR FURTHER INFORMATION CONTACT: Taylor E. Jones II, Director, Office of Sealift Support, Room W25–209, Maritime Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590, (202) 366–2323, Fax (202) 493–2180.

SUPPLEMENTARY INFORMATION: Section 708 of the Defense Production Act of 1950, as amended, (50 U.S.C. App. 2158), as implemented by regulations of the Federal Emergency Management Agency (44 CFR Part 332), Voluntary agreements and plans of action for preparedness programs and expansion of production capacity and supply, authorizes the President, upon a finding that conditions exist which may pose a direct threat to the national defense or its preparedness programs to consult with representatives of industry, business, financing, agriculture, labor, or other interests in order to provide the making of such voluntary agreements. It further authorizes the President to delegate that authority to individuals who are appointed by and with the advice and consent of the Senate, upon the condition that such individuals obtain the prior approval of the Attorney General after the Attorney General's consultation with the Federal Trade Commission. Section 501 of Executive Order 12919, as amended, delegated this authority of the President to the Secretary of Transportation (Secretary), among others. By DOT Order 1900.9, the Secretary delegated to the Maritime Administrator the authority under which the VISA is sponsored. Through advance arrangements in joint planning, it is intended that participants in VISA will provide capacity to support a significant portion of surge and sustainment requirements in the deployment of U.S. military forces during war or other national emergency.

The text of the VISA was first published in the **Federal Register** on February 13, 1997, to be effective for a two-year term until February 13, 1999. The VISA document has been extended and subsequently published in the **Federal Register** every two years. The last extension was published on September 23, 2005. The text published herein will now be implemented. Copies will be made available to the public upon request.

Text of the Voluntary Intermodal Sealift Agreement:

Voluntary Intermodal Sealift Agreement (VISA)

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Figure 1—VISA Activation Process Diagram

Abbreviations

''AMC''—Air Mobility Command.
''CCA''—Carrier Coordination Agreements.
''CFR''—Code of Federal Regulations.
''CONOPS''—Concept of Operations.
''DoD''—Department of Defense.
''DOJ''—Department of Justice.
''DOT''—Department of Transportation.
''DPA''—Defense Production Act.
''EUSC''—Effective United States Control.
''FAR''—Federal Acquisition Regulations.
''FEMA''—Federal Emergency Management Agency. FEMA is an element of the Emergency Preparedness and Response Directorate, Department of Homeland Security.
''FTC''—Federal Trade Commission.
''JCS''—Joint Chiefs of Staff.
''JPAG''—Joint Planning Advisory Group.
''MARAD''—Maritime Administration, DOT.
''MSP''—Maritime Security Program.
''MSC''—Military Sealift Command.
''NCA''—National Command Authorities.
''NDRF''—National Defense Reserve Fleet maintained by MARAD.
''RRF''—Ready Reserve Force component of the NDRF.
''SecDef''—Secretary of Defense.
''SecTrans''—Secretary of Transportation.
''SDDC''—Military Surface Deployment and Distribution Command.
''Commander''—Commander, United States Transportation Command.
''USTRANSCOM''—United States Transportation Command (including its components, Air Mobility Command, Military Sealift Command and Military Surface Deployment and Distribution Command).
''VISA''—Voluntary Intermodal Sealift Agreement.
''VSA''—Vessel Sharing Agreement.

Definitions—For purposes of this agreement, the following definitions apply:

Administrator—Maritime Administrator.

Agreement—Agreement (proper noun) refers to the Voluntary Intermodal Sealift Agreement (VISA).

Attorney General—Attorney General of the United States.

Broker—A person who arranges for transportation of cargo for a fee.

Carrier Coordination Agreement (CCA)—An agreement between two or more Participants or between Participant and non-Participant carriers to coordinate their services in a Contingency, including agreements to: (i) Charter vessels or portions of the cargo-carrying capacity of vessels; (ii) share cargo handling equipment, chassis, containers and ancillary transportation equipment; (iii) share wharves, warehouse, marshaling yards and other marine terminal facilities; and (iv) coordinate the movement of vessels.

Chairman—FTC—Chairman of the Federal Trade Commission (FTC).

Charter—Any agreement or commitment by which the possession or services of a vessel are secured for a period of time, or for one or more voyages, whether or not a demise of the vessel.

Commercial—Transportation service provided for profit by privately owned (not government owned) vessels to a private or government shipper. The type of service may be either common carrier or contract carriage.

Contingency—Includes, but is not limited to a ''contingency operation'' as defined at 10 U.S.C. 101(a)(13), and a JCS-directed, NCA-approved action undertaken with military forces in response to: (i) Natural disasters; (ii) terrorists or subversive activities; or (iii) required military operations, whether or not there is a declaration of war or national emergency.

Contingency contracts—DoD contracts in which Participants implement advance commitments of capacity and services to be provided in the event of a Contingency.

Contract carrier—A for-hire carrier who does not hold out regular service to the general public, but instead contracts, for agreed compensation, with a particular shipper for the carriage of cargo in all or a particular part of a ship for a specified period of time or on a specified voyage or voyages.

Controlling interest—More than a 50-percent interest by stock ownership.

Director—FEMA—Director of Federal Emergency Management Agency (FEMA). The Director-FEMA is also Under Secretary for Emergency Preparedness and Response, Department of Homeland Security.

Effective U.S. Control (EUSC)—U.S. citizen-owned ships which are registered in certain open registry countries and which the United States can rely upon for defense in national security emergencies. The term has no legal or other formal significance. U.S. citizen-owned ships registered in Liberia, Panama, Honduras, the Bahamas and the Republic of the Marshall Islands are considered under effective U.S. control because these do not have any laws that prohibit U.S. requisition. EUSC registries are recognized by the Maritime Administration after consultation with DoD. (MARAD OPLAN 001A, 17 July 1990).

Enrollment Contract—The document, executed and signed by MSC, and the individual carrier enrolling that carrier into VISA Stage III.

Foreign flag vessel—A vessel registered or documented under the law of a country other than the United States of America.

Intermodal equipment—Containers (including specialized equipment), chassis, trailers, tractors, cranes and other materiel handling equipment, as well as other ancillary items.

Liner—Type of service offered on a definite, advertised schedule and giving relatively frequent sailings at regular intervals between specific ports or ranges.

Liner throughput capacity—The system/intermodal capacity available and committed, used or unused, depending on the system cycle time necessary to move the designated capacity through to destination. Liner throughput capacity shall be calculated as: static capacity (outbound from CONUS) X voyage frequency X.5.

Management services—Management expertise and experience, intermodal terminal management, information resources, and control and tracking systems.

Ocean common carrier—An entity holding itself out to the general public to provide transportation by water of passengers or cargo for compensation; which assumes responsibility for transportation from port or point of receipt to port or point of destination; and which operates and utilizes a vessel operating on the high seas for all or part of that transportation. (As defined in 46 App. U.S.C. 1702 and 801 regarding international and interstate commerce, respectively).

Operator—An ocean common carrier or contract carrier that owns or controls or manages vessels by which ocean transportation is provided.

Organic sealift—For the purposes of this agreement ships considered to be under government control or long-term charter—Fast Sealift Ships, Ready Reserve Force and commercial ships under long-term charter to DoD.

Participant—A signatory party to VISA, and otherwise as defined within section VI of this document.

Person—Includes individuals and corporations, partnerships, and associations existing under or authorized by the laws of the United States or any state, territory, district, or possession thereof, or of a foreign country.

Service contract—A contract between a shipper (or a shipper's association) and an ocean common carrier (or conference) in which the shipper makes a commitment to provide a certain minimum quantity of cargo or freight revenue over a fixed time period, and the ocean common carrier or conference commits to a certain rate or rate schedule, as well as a defined service level (such as assured space, transit time, port rotation, or similar service features), as defined in the Shipping Act of 1984. The contract may also specify provisions in the event of nonperformance on the part of either party.

Standby period—The interval between the effective date of a Participant's acceptance into the Agreement and the activation of any stage, and the periods between deactivation of all stages and any later activation of any stage.

U.S.-flag Vessel—A vessel registered or documented under the laws of the United States of America.

Vessel Sharing Agreement (VSA) Capacity—Space chartered to a Participant for carriage of cargo, under its commercial contracts, service contracts or in common carriage, aboard vessels shared with another carrier or carriers pursuant to a commercial vessel sharing agreement under which the carriers may compete with each other for the carriage of cargo. In U.S. foreign trades the agreement is filed with the Federal Maritime Commission (FMC) in conformity with the Shipping Act of 1984 and implementing regulations.

Volunteers—Any vessel owner/operator who is an ocean carrier and who offers to make capacity, resources or systems available to support contingency requirements.

Preface

The Administrator, pursuant to the authority contained in section 708 of the Defense Production Act of 1950, as amended (50 App. U.S.C. 2158)(Section 708)(DPA), in cooperation with DoD, has developed this Agreement [hereafter called the Voluntary Intermodal Sealift Agreement (VISA)] to provide DoD the commercial sealift and intermodal shipping services/systems necessary to meet national defense Contingency requirements.

USTRANSCOM procures commercial shipping capacity to meet requirements for ships and intermodal shipping services/systems through arrangements with common carriers, with contract carriers and by charter. DoD (through USTRANSCOM) and DOT (through MARAD) maintain and operate a fleet of ships owned by or under charter to the Federal Government to meet the logistic needs of the military services which cannot be met by existing commercial service. Government controlled ships are selectively activated for peacetime military tests and exercises, and to satisfy military operational requirements which cannot be met by commercial shipping in time of war, national emergency, or military Contingency. Foreign-flag shipping is used in accordance with applicable laws, regulations and policies.

The objective of VISA is to provide DoD a coordinated, seamless transition from peacetime to wartime for the acquisition of commercial sealift and intermodal capability to augment DoD's organic sealift capabilities. This Agreement establishes the terms, conditions and general procedures by which persons or parties may become VISA Participants. Through advance joint planning among USTRANSCOM, MARAD and the Participants, Participants may provide predetermined capacity in designated stages to support DoD Contingency requirements.

VISA is designed to create close working relationships among MARAD, USTRANSCOM and Participants through which Contingency needs and the needs of the civil economy can be met by cooperative action. During Contingencies, Participants are afforded maximum flexibility to adjust commercial operations by Carrier Coordination Agreements (CCA), in accordance with applicable law.

Participants will be afforded the first opportunity to meet DoD peacetime and Contingency sealift requirements within applicable law and regulations, to the extent that operational requirements are met. In the event VISA Participants are unable to fully meet Contingency requirements, the shipping capacity made available under VISA may be supplemented by ships/capacity from non-Participants in accordance with applicable law and by ships requisitioned under section 902 of the Merchant Marine Act, 1936 (as amended) (46 App. U.S.C. 1242). In addition, containers and chassis made available under VISA may be supplemented by services and equipment acquired by USTRANSCOM or accessed by the Administrator through the provisions of 46 CFR Part 340.

TheSecDef has approved VISA as a sealift readiness program for the purpose of section 909 of the Merchant Marine Act, 1936, as amended (46 App. U.S.C. 1248) and (46 U.S.C. 53107).

Voluntary Intermodal Sealift Agreement

I. Purpose

A. The Administrator has made a determination, in accordance with section 708(c)(1) of the Defense Production Act (DPA) of 1950, that conditions exist which may pose a direct threat to the national defense of the United States or its preparedness programs and, under the provisions of Section 708, has certified to the Attorney General that a standby agreement for utilization of intermodal shipping services/systems is necessary for the national defense. The Attorney General, in consultation with the Chairman of the Federal Trade Commission, has issued a finding that dry cargo shipping capacity to meet national defense requirements cannot be provided by the industry through a voluntary agreement having less anticompetitive effects or without a voluntary agreement.

B. The purpose of VISA is to provide a responsive transition from peace to Contingency operations through pre-coordinated agreements for sealift capacity to support DoD Contingency requirements. VISA establishes procedures for the commitment of intermodal shipping services/systems to satisfy such requirements. VISA will change from standby to active status upon activation by appropriate authority of any of the Stages, as described in section V.

C. It is intended that VISA promote and facilitate DoD's use of existing commercial transportation resources and integrated intermodal transportation systems, in a manner which minimizes disruption to commercial operations, whenever possible.

D. Participants' capacity which may be committed pursuant to this Agreement may include all intermodal shipping services/systems and all ship types, including container, partial container, container/bulk, container/roll-on/roll-off, roll-on/roll-off (of all varieties), breakbulk ships, tug and barge combinations, and barge carrier (LASH, SeaBee).

II. Authorities

A. MARAD

1. Sections 101 and 708 of the DPA, as amended (50 App. U.S.C. 2158); Executive Order 12919 as amended, 59 FR 29525, June 7, 1994; Executive Order 12148, as amended, 3 CFR 1979 Comp., p. 412, as amended; 44 CFR part 332; DOT Order 1900.9; 46 CFR part 340.

2. Section 501 of Executive Order 12919, as amended, delegated the authority of the President under section 708 to SecTrans, among others. By DOT Order 1900.9, SecTrans delegated to the Administrator the authority under which VISA is sponsored.

B. USTRANSCOM

1. Section 113 and Chapter 6 of Title 10 of the United States Code.

2. DoD Directive 5158.4 designating the Commander to provide common user air, land, and sea transportation for DoD.

III. General

A. Concept

1. VISA provides for the staged, time-phased availability of Participants' shipping services/systems to meet NCA-directed DoD Contingency requirements in the most demanding defense oriented sealift emergencies and for less demanding defense oriented situations through prenegotiated Contingency contracts between the government and Participants (see Figure 1). Such arrangements will be jointly planned with MARAD, USTRANSCOM, and Participants in peacetime to allow effective, and efficient and best valued use of commercial sealift capacity, provide DoD assured Contingency access, and minimize commercial disruption, whenever possible.

a. Stages I and II provide for prenegotiated contracts between DoD and Participants to provide sealift capacity against all projected DoD Contingency requirements. These agreements will be executed in accordance with approved DoD contracting methodologies.

b. Stage III will provide for additional capacity to DoD when Stages I and II commitments or volunteered capacity are insufficient to meet Contingency requirements, and adequate shipping services from non-Participants are not available through established DoD contracting practices or U.S. Government treaty agreements.

2. Activation will be in accordance with procedures outlined in Section V of this Agreement.

3. Following is the prioritized order for utilization of commercial sealift capacity to meet DoD peacetime and Contingency requirements:

a. U.S.-flag vessel capacity operated by a Participant and U.S.-flag Vessel Sharing Agreement (VSA) capacity of a Participant.

b. U.S.-flag vessel capacity operated by a non-Participant.

c. Combination U.S./foreign flag vessel capacity operated by a Participant and combination U.S./foreign flag VSA capacity of a Participant.

d. Combination U.S./foreign flag vessel capacity operated by a non-Participant.

e. U.S. owned or operated foreign flag vessel capacity and VSA capacity of a Participant.

f. U.S. owned or operated foreign flag vessel capacity and VSA capacity of a non-Participant.

g. Foreign-owned or operated foreign flag vessel capacity of a non-Participant.

4. Under Section VI.F. of this Agreement, Participants may implement CCAs to fulfill their contractual commitments to meet VISA requirements.

B. Responsibilities

1. The SecDef, through USTRANSCOM, shall:

a. Define time-phased requirements for Contingency sealift capacity and resources required in Stages I, II and III to augment DoD sealift resources.

b. Keep MARAD and Participants apprised of Contingency sealift capacity required and resources committed to Stages I and II.

c. Obtain Contingency sealift capacity through the implementation of specific prenegotiated DoD Contingency contracts with Participants.

d. Notify the Administrator upon activation of any stage of VISA.

e. Co-chair (with MARAD) the Joint Planning Advisory Group (JPAG).

f. Establish procedures, in accordance with applicable law and regulation, providing Participants with necessary determinations for use of foreign flag vessels to replace an equivalent U.S.-flag capacity to transport a Participant's normal peacetime DoD cargo, when Participant's U.S.-flag assets are removed from regular service to meet VISA Contingency requirements.

g. Provide a reasonable time to permit an orderly return of a Participant's vessel(s) to its regular schedule and termination of its foreign flag capacity arrangements as determined through coordination between DoD and the Participants.

h. Review and endorse Participants' requests to MARAD for use of foreign flag replacement capacity for non-DoD government cargo, when U.S.-flag capacity is required to meet Contingency requirements.

2. The SecTrans, through MARAD, shall:

a. Review the amount of sealift resources committed in DoD contracts to Stages I and II and notify USTRANSCOM if a particular level of VISA commitment will have serious adverse impact on the commercial sealift industry's ability to provide essential services. MARAD's analysis

shall be based on the consideration that all VISA Stage I and II capacity committed will be activated. This notification will occur on an as required basis upon the Commander's acceptance of VISA commitments from the Participants. If so advised by MARAD, USTRANSCOM will adjust the size of the stages or provide MARAD with justification for maintaining the size of those stages. USTRANSCOM and MARAD will coordinate to ensure that the amount of sealift assets committed to Stages I and II will not have an adverse, national economic impact.

b. Coordinate with DOJ for the expedited approval of CCAs.

c. Upon request by the Commander and approval by SecDef to activate Stage III, allocate sealift capacity and intermodal assets to meet DoD Contingency requirements. DoD shall have priority consideration in any allocation situation.

d. Establish procedures, pursuant to section 53107(f) of the Maritime Security Act of 2003 (MSA 2003) (Pub. L. 108–136, 117 Stat. 1392), for determinations regarding the equivalency and duration of the use of foreign flag vessels to replace U.S.-flag vessel capacity to transport the cargo of a Participant which has entered into an operating agreement under section 53103 of the MSA 2003 and whose U.S.-flag vessel capacity has been removed from regular service to meet VISA contingency requirements. Such foreign flag vessels shall be eligible to transport cargo that is subject to the Cargo Preference Act of 1904 (10 U.S.C. 2631), P.R. 17 (46 App. U.S.C. 1241–1), and Public Law 664 (46 App. U.S.C. 1241(a) and (b)). However, any procedures regarding the use of such foreign flag vessels to transport cargo subject to the Cargo Preference Act of 1904 must have the concurrence of USTRANSCOM before it becomes effective.

e. Co-chair (with USTRANSCOM) the JPAG.

f. Seek necessary Jones Act waivers as required. To the extent feasible, participants with Jones Act vessels or vessel capacity will use CCAs or other arrangements to protect their ability to maintain services for their commercial customers and to fulfill their commercial peacetime commitments with U.S.-flag vessels. In situations where the activation of this Agreement deprives a Participant of all or a portion of its Jones Act vessels or vessel capacity and, at the same time, creates a general shortage of Jones Act vessel(s) or vessel capacity on the market, the Administrator may request that the Secretary of Homeland Security grant a temporary waiver of the provisions of the Jones Act to permit a Participant to charter or otherwise utilize non-Jones Act vessel(s) or vessel capacity, with priority consideration recommended for U.S. crewed vessel(s) or vessel capacity. The vessel(s) or vessel capacity for which such waivers are requested will be approximately equal to the Jones Act vessel(s) or vessel capacity chartered or under contract to DoD, and any waiver that may be granted will be effective for the period that the Jones Act vessel(s) or vessel capacity is on charter or under contract to DoD plus a reasonable time for termination of the replacement charters as determined by the Administrator.

C. Termination of Charters, Leases and Other Contractual Arrangements

1. USTRANSCOM will notify the Administrator as soon as possible of the prospective termination of charters, leases, management service contracts or other contractual arrangements made by DoD under this Agreement.

2. In the event of general requisitioning of ships under 46 App. U.S.C. 1242, the Administrator shall consider commitments made with DoD under this Agreement.

D. Modification/Amendment of This Agreement

1. The Attorney General may modify this Agreement, in writing, after consultation with the Chairman—FTC, SecTrans, through his representative MARAD, and SecDef, through his representative the Commander. Although Participants may withdraw from this Agreement pursuant to section VI.D, they remain subject to VISA as amended or modified until such withdrawal.

2. The Administrator, Commander and Participants may modify this Agreement at any time by mutual agreement, but only in writing with the approval of the Attorney General and the Chairman—FTC.

3. Participants may propose amendments to this Agreement at any time.

E. Administrative Expenses—Administrative and Out-of-pocket Expenses Incurred by a Participant Shall Be Borne Solely by the Participant

F. Record Keeping

1. MARAD has primary responsibility for maintaining carrier VISA application records in connection with this Agreement. Records will be maintained in accordance with MARAD Regulations. Once a carrier is selected as a VISA Participant, a copy of the VISA application form will be forwarded to USTRANSCOM.

2. In accordance with 44 CFR 332.2(c), MARAD is responsible for the making and record maintenance of a full and verbatim transcript of each JPAG meeting. MARAD shall send this transcript, and any voluntary agreement resulting from the meeting, to the Attorney General, the Chairman—FTC, the Director—FEMA, any other party or repository required by law and to Participants upon their request.

3. USTRANSCOM shall be the official custodian of records related to the contracts to be used under this Agreement, to include specific information on enrollment of a Participant's capacity in VISA.

4. In accordance with 44 CFR 332.3(d), a Participant shall maintain for five (5) years all minutes of meetings, transcripts, records, documents and other data, including any communications with other Participants or with any other member of the industry or their representatives, related to the administration, including planning related to and implementation of Stage activations of this Agreement. Each Participant agrees to make such records available to the Administrator, the Commander, the Attorney General, and the Chairman—FTC for inspection and copying at reasonable times and upon reasonable notice. Any record maintained by MARAD or USTRANSCOM pursuant to paragraphs 1, 2, or 3 of this subsection shall be available for public inspection and copying unless exempted on the grounds specified in 5 U.S.C 552(b) or identified as privileged and confidential information in accordance with Section 708(e).

G. MARAD Reporting Requirements—MARAD Shall Report to the Director—FEMA, as Required, on the Status and Use of This Agreement

IV. Joint Planning Advisory Group

A. The JPAG provides USTRANSCOM, MARAD and VISA Participants a planning forum to:

1. Analyze DoD Contingency sealift/intermodal service and resource requirements.

2. Identify commercial sealift capacity that may be used to meet DoD requirements, related to Contingencies and, as requested by USTRANSCOM, exercises and special movements.

3. Develop and recommend CONOPS to meet DoD-approved Contingency requirements and, as requested by USTRANSCOM, exercises and special movements.

B. The JPAG will be co-chaired by MARAD and USTRANSCOM, and will

convene as jointly determined by the co-chairs.

C. The JPAG will consist of designated representatives from MARAD, USTRANSCOM, each Participant, and maritime labor. Other attendees may be invited at the discretion of the co-chairs as necessary to meet JPAG requirements. Representatives will provide technical advice and support to ensure maximum coordination, efficiency and effectiveness in the use of Participants' resources. All Participants will be invited to all open JPAG meetings. For selected JPAG meetings, attendance may be limited to designated Participants to meet specific operational requirements.

1. The co-chairs may establish working groups within JPAG. Participants may be assigned to working groups as necessary to develop specific CONOPS.

2. Each working group will be co-chaired by representatives designated by MARAD and USTRANSCOM.

D. The JPAG will not be used for contract negotiations and/or contract discussions between carriers and DoD; such negotiations and/or discussions will be in accordance with applicable DoD contracting policies and procedures.

E. The JPAG co-chairs shall:

1. Notify the Attorney General, the Chairman-FTC, Participants and the maritime labor representative of the time, place and nature of each JPAG meeting.

2. Provide for publication in the **Federal Register** of a notice of the time, place and nature of each JPAG meeting. If the meeting is open, a **Federal Register** notice will be published reasonably in advance of the meeting. If a meeting is closed, a **Federal Register** notice will be published within ten (10) days after the meeting and will include the reasons for closing the meeting.

3. Establish the agenda for each JPAG meeting and be responsible for adherence to the agenda.

4. Provide for a full and complete transcript or other record of each meeting and provide one copy each of transcript or other record to the Attorney General, the Chairman-FTC, and to Participants, upon request.

F. Security Measures—The co-chairs will develop and coordinate appropriate security measures so that Contingency planning information can be shared with Participants to enable them to plan their commitments.

V. Activation of VISA Contingency Provisions

A. General

VISA may be activated at the request of the Commander, with approval of SecDef, as needed to support Contingency operations. Activating voluntary commitments of capacity to support such operations will be in accordance with prenegotiated Contingency contracts between DoD and Participants.

B. Notification of Activation

1. The Commander will notify the Administrator of the activation of Stages I, II, and III.

2. The Administrator shall notify the Attorney General and the Chairman-FTC when it has been determined by DoD that activation of any Stage of VISA is necessary to meet DoD Contingency requirements.

C. Voluntary Capacity

1. Throughout the activation of any Stages of this Agreement, DoD may utilize voluntary commitment of sealift capacity or systems.

2. Requests for volunteer capacity will be extended simultaneously to both Participants and other carriers. First priority for utilization will be given to Participants who have signed Stage I and/or II contracts and are capable of meeting the operational requirements. Participants providing voluntary capacity may request USTRANSCOM to activate their prenegotiated Contingency contracts; to the maximum extent possible, USTRANSCOM, where appropriate, shall support such requests. Volunteered capacity will be credited against Participants' staged commitments, in the event such stages are subsequently activated.

3. In the event Participants are unable to fully meet Contingency requirements, or do not voluntarily offer to provide the required capacity, the shipping capacity made available under VISA may be supplemented by ships/capacity from non-Participants.

4. When voluntary capacity does not meet DoD Contingency requirements, DoD will activate the VISA stages as necessary.

D. Stage I

1. Stage I will be activated in whole or in part by the Commander, with approval of SecDef, when voluntary capacity commitments are insufficient to meet DoD Contingency requirements. The Commander will notify the Administrator upon activation.

2. USTRANSCOM will implement Stage I Contingency contracts as needed to meet operational requirements.

E. Stage II

1. Stage II will be activated, in whole or in part, when Contingency requirements exceed the capability of Stage I and/or voluntarily committed resources.

2. Stage II will be activated by the Commander, with approval of SecDef, following the same procedures discussed in paragraph D above.

F. Stage III

1. Stage III will be activated, in whole or in part, when Contingency requirements exceed the capability of Stages I and II, and other shipping services are not available. This stage involves DoD use of capacity and vessels operated by Participants which will be furnished to DoD when required in accordance with this Agreement. The capacity and vessels are allocated by MARAD on behalf of SecTrans to the Commander.

2. Stage III will be activated by the Commander upon approval by SecDef. Upon activation, SecDef will request SecTrans to allocate sealift capacity based on DoD requirements, in accordance with Title 1 of DPA, to meet the Contingency requirement. All Participants' capacity committed to VISA is subject to use during Stage III.

3. Upon allocation of sealift assets by SecTrans, through its designated representative MARAD, the Commander will negotiate and execute Contingency contracts with Participants, using pre-approved rate methodologies as established jointly by SecTrans and SecDef in fulfillment of section 53107 of the MSA 2003. Until execution of such contract, the Participant agrees that the assets remain subject to the provisions of Section 902 of the Merchant Marine Act of 1936, Title 46 App. U.S.C. 1242.

4. Simultaneously with activation of Stage III, the DoD Sealift Readiness Program (SRP) will be activated for those carriers still under obligation to that program.

G. Partial Activation

As used in this section V, activation ''in part'' of any Stage under this Agreement shall mean one of the following:

1. Activation of only a portion of the committed capacity of some, but not all, of the Participants in any Stage that is activated; or

2. Activation of the entire committed capacity of some, but not all, of the Participants in any Stage that is activated; or

3. Activation of only a portion of the entire committed capacity of all of the Participants in any Stage that is activated.

VI. Terms and Conditions

A. Participation

1. Any U.S.-flag vessel operator organized under the laws of a State of the United States, or the District of Columbia, may become a ''Participant'' in this Agreement by submitting an executed copy of the form referenced in Section VII, and by entering into a VISA Enrollment Contract with DoD which establishes a legal obligation to perform and which specifies payment or payment methodology for all services rendered.

2. The term ''Participant'' includes the entity described in VI.A.1 above, and all United States subsidiaries and affiliates of the entity which own, operate, charter or lease ships and intermodal equipment in the regular course of their business and in which the entity holds a controlling interest.

3. Upon request of the entity executing the form referenced in Section VII, the term ''Participant'' may include the controlled non-domestic subsidiaries and affiliates of such entity signing this Agreement, provided that the Administrator, in coordination with the Commander, grants specific approval for their inclusion.

4. Any entity receiving payments under the Maritime Security Program (MSP), pursuant to the MSA 2003 (Pub. L. 108–136, 117 Stat. 1392)), shall become a ''Participant'' with respect to all vessels enrolled in MSP at all times until the date the MSP operating agreement would have terminated according to its original terms. The MSP operator shall be enrolled in VISA as a Stage III Participant, at a minimum. Such participation will satisfy the requirement for an MSP participant to be enrolled in an emergency preparedness program approved by SecDef as provided in section 53107 of the MSA 2003.

5. A Participant shall be subject only to the provisions of this Agreement and not to the provisions of the SRP.

6. MARAD shall publish periodically in the **Federal Register** a list of Participants.

B. Agreement of Participant

1. Each Participant agrees to provide commercial sealift and/or intermodal shipping services/systems in accordance with DoD Contingency contracts. USTRANSCOM will review and approve each Participant's commitment to ensure it meets DoD Contingency requirements. A Participant's capacity commitment to Stages I and II will be one of the considerations in determining the level of DoD peacetime contracts awarded with the exception of Jones Act capacity (as discussed in paragraph 4 below).

2. DoD may also enter into Contingency contracts, not linked to peacetime contract commitments, with Participants, as required to meet Stage I and II requirements.

3. Commitment of Participants' resources to VISA is as follows:

a. Stage III: A carrier desiring to participate in DoD peacetime contracts/traffic must commit no less than 50% of its total U.S.-flag capacity into Stage III. Carriers receiving DOT payments under the MSP, or carriers subject to Section 909 of Merchant Marine Act of 1936, as amended, that are not enrolled in the SRP will have vessels receiving such assistance enrolled in Stage III. Participants' capacity under charter to DoD will be considered ''organic'' to DoD, and does not count towards the Participant's Contingency commitment during the period of the charter. Participants utilized under Stage III activation will be compensated based upon a DoD pre-approved rate methodology.

b. Stages I and II: DoD will annually develop and publish minimum commitment requirements for Stages I and II. Normally, the awarding of a long-term (*i.e.*, one year or longer) DoD contract, exclusive of charters, will include the annual predesignated minimum commitment to Stages I and/or II. Participants desiring to bid on DoD peacetime contracts will be required to provide commitment levels to meet DoD-established Stage I and/or II minimums on an annual basis. Participants may gain additional consideration for peacetime contract cargo allocation awards by committing capacity to Stages I and II beyond the specified minimums. If the Participant is awarded a contract reflecting such a commitment, that commitment shall become the actual amount of a Participant's U.S.-flag capacity commitment to Stages I and II. A Participant's Stage III U.S.-flag capacity commitment shall represent its total minimum VISA commitment. That Participant's Stage I and II capacity commitments as well as any volunteer capacity contribution by Participant are portions of Participant's total VISA commitment. Participants activated during Stages I and II will be compensated in accordance with prenegotiated Contingency contracts.

4. Participants exclusively operating vessels engaged in domestic trades will be required to commit 50% of that capacity to Stage III. Such Participants will not be required to commit capacity to Stages I and II as a consideration of domestic peacetime traffic and/or contract award. However, such Participants may voluntarily agree to commit capacity to Stages I and/or II.

5. The Participant owning, operating, or controlling an activated ship or ship capacity will provide intermodal equipment and management services needed to utilize the ship and equipment at not less than the Participant's normal efficiency, in accordance with the prenegotiated Contingency contracts implementing this Agreement.

C. Effective Date and Duration of Participation

1. Participation in this Agreement is effective upon execution by MARAD of the submitted form referenced in Section VII, and approval by USTRANSCOM by execution of an Enrollment Contract, for Stage III, at a minimum.

2. VISA participation remains in effect until the Participant terminates the Agreement in accordance with paragraph D below, or termination of the Agreement in accordance with 44 CFR 332.4. Notwithstanding termination of VISA or participation in VISA, obligations pursuant to executed DoD peacetime contracts shall remain in effect for the term of such contracts and are subject to all terms and conditions thereof.

D. Participant Termination of VISA

1. Except as provided in paragraph 2 below, a Participant may terminate its participation in VISA upon written notice to the Administrator. Such termination shall become effective 30 days after written notice is received, unless obligations incurred under VISA by virtue of activation of any Contingency contract cannot be fulfilled prior to the termination date, in which case the Participant shall be required to complete the performance of such obligations. Voluntary termination by a carrier of its VISA participation shall not act to terminate or otherwise mitigate any separate contractual commitment entered into with DoD.

2. A Participant having an MSP operating agreement with SecTrans shall not withdraw from this Agreement at any time during the original term of the MSP operating agreement.

3. A Participant's withdrawal, or termination of this Agreement, will not deprive a Participant of an antitrust defense otherwise available to it in accordance with DPA Section 708 for

the fulfillment of obligations incurred prior to withdrawal or termination.

4. A Participant otherwise subject to the DoD SRP that voluntarily withdraws from this Agreement will become subject again to the DoD SRP.

E. Rules and Regulations

Each Participant acknowledges and agrees to abide by all provisions of DPA Section 708, and regulations related thereto which are promulgated by the Secretary, the Attorney General, and the Chairman-FTC. Standards and procedures pertaining to voluntary agreements have been promulgated in 44 CFR Part 332. 46 CFR Part 340 establishes procedures for assigning the priority for use and the allocation of shipping services, containers and chassis. The JPAG will inform Participants of new and amended rules and regulations as they are issued in accordance with law and administrative due process. Although Participants may withdraw from VISA, they remain subject to all authorized rules and regulations while in Participant status.

F. Carrier Coordination Agreements (CCA)

1. When any Stage of VISA is activated or when DoD has requested volunteer capacity pursuant to Section V.B. of VISA, Participants may implement approved CCAs to meet the needs of DoD and to minimize the disruption of their services to the civil economy.

2. A CCA for which the parties seek the benefit of Section 708(j) of the DPA shall be identified as such and shall be submitted to the Administrator for approval and certification in accordance with section 708(f)(1)(A) of the DPA. Upon approval and certification, the Administrator shall transmit the Agreement to the Attorney General for a finding in accordance with section 708(f)(1)(B) of the DPA. Parties to approved CCAs may avail themselves of the antitrust defenses set forth in section 708(j) of the DPA. Nothing in VISA precludes Participants from engaging in lawful conduct (including carrier coordination activities) that lies outside the scope of an approved Carrier Coordination Agreement; but antitrust defenses will not be available pursuant to section 708(j) of the DPA for such conduct.

3. Participants may seek approval for CCAs at any time.

G. Enrollment of Capacity (Ships and Equipment)

1. A list identifying the ships/capacity and intermodal equipment committed by a Participant to each Stage of VISA will be prepared by the Participant and submitted to USTRANSCOM within seven days after a carrier has become a Participant. USTRANSCOM will maintain a record of all such commitments. Participants will notify USTRANSCOM of any changes not later than seven days prior to the change.

2. USTRANSCOM will provide a copy of each Participant's VISA commitment data and all changes to MARAD.

3. Information which a Participant identifies as privileged or business confidential/proprietary data shall be withheld from public disclosure in accordance with Section 708(h)(3) and Section 705(e) of the DPA, 5 U.S.C. 552(b), and 44 CFR Part 332.

4. Enrolled ships are required to comply with 46 CFR Part 307, Establishment of Mandatory Position Reporting System for Vessels.

H. War Risk Insurance

1. Where commercial war risk insurance is not available on reasonable terms and conditions, DOT shall provide non-premium government war risk insurance, subject to the provisions of section 1205 of the Merchant Marine Act, 1936, as amended (46 App. U.S.C. 1285(a)).

2. Pursuant to 46 CFR 308.1(c), the Administrator (or DOT) will find each ship enrolled or utilized under this agreement eligible for U.S. Government war risk insurance.

I. Antitrust Defense

1. Under the provisions of DPA Section 708, each carrier shall have available as a defense to any civil or criminal action brought under the antitrust laws (or any similar law of any State) with respect to any action taken to develop or carry out this Agreement, that such act was taken in the course of developing or carrying out this Agreement and that the Participant complied with the provisions of DPA Section 708 and any regulation thereunder, and acted in accordance with the terms of this Agreement.

2. This defense shall not be available to the Participant for any action occurring after termination of this Agreement. This defense shall not be available upon the modification of this Agreement with respect to any subsequent action that is beyond the scope of the modified text of this Agreement, except that no such modification shall be accomplished in a way that will deprive the Participant of antitrust defense for the fulfillment of obligations incurred.

3. This defense shall be available only if and to the extent that the Participant asserting it demonstrates that the action, which includes a discussion or agreement, was within the scope of this Agreement.

4. The person asserting the defense bears the burden of proof.

5. The defense shall not be available if the person against whom it is asserted shows that the action was taken for the purpose of violating the antitrust laws.

6. As appropriate, the Administrator, on behalf of SecTrans, and DoD will support agreements filed by Participants with the Federal Maritime Commission that are related to the standby or Contingency implementation of VISA.

J. Breach of Contract Defense

Under the provisions of DPA Section 708, in any action in any Federal or State court for breach of contract, there shall be available as a defense that the alleged breach of contract was caused predominantly by action taken by a Participant during an emergency (including action taken in imminent anticipation of an emergency) to carry out this Agreement. Such defense shall not release the party asserting it from any obligation under applicable law to mitigate damages to the greatest extent possible.

K. Vessel Sharing Agreements (VSA)

1. VISA allows Participants the use of a VSA to utilize non-Participant U.S.-flag or foreign-owned and operated foreign flag vessel capacity as a substitute for VISA Contingency capability provided:

a. The foreign flag capacity is utilized in accordance with cargo preference laws and regulations.

b. The use of a VSA, either currently in use or a new proposal, as a substitution to meet DoD Contingency requirements is agreed upon by USTRANSCOM and MARAD.

c. The Participant carrier demonstrates adequate control over the offered VSA capacity during the period of utilization.

d. Service requirements are satisfied.

e. Participant is responsible to DoD for the carriage or services contracted for. Though VSA capacity may be utilized to fulfill a Contingency commitment, a Participant's U.S.-flag VSA capacity in another Participant's vessel shall not act in a manner to increase a Participant's capacity commitment to VISA.

2. Participants will apprise MARAD and USTRANSCOM in advance of any change in a VSA of which it is a member, if such changes reduce the availability of Participant capacity provided for in any approved and accepted Contingency Concept of Operations.

3. Participants will not act as a broker for DoD cargo unless requested by USTRANSCOM.

VII. Application and Agreement

The Administrator, in coordination with the Commander has adopted the following form (''Application to Participate in the Voluntary Intermodal Sealift Agreement'') on which intermodal ship operators may apply to become a Participant in this Agreement. The form incorporates, by reference, the terms of this Agreement.

United States of America, Department of Transportation, Maritime Administration

Application To Participate in the Voluntary Intermodal Sealift Agreement

The applicant identified below hereby applies to participate in the Maritime Administration's agreement entitled ''Voluntary Intermodal Sealift Agreement.'' The text of said Agreement is published in _____ **Federal Register** _____, _____, 20_____. This Agreement is authorized under section 708 of the Defense Production Act of 1950, as amended (50 App. U.S.C. 2158). Regulations governing this Agreement appear at 44 CFR part 332 and are reflected at 49 CFR subtitle A.

The applicant, if selected, hereby acknowledges and agrees to the incorporation by reference into this Application and Agreement of the entire text of the Voluntary Intermodal Sealift Agreement published in _____ **Federal Register** _____, _____, 20___, as though said text were physically recited herein.

The Applicant, as a Participant, agrees to comply with the provisions of section 708 of the Defense Production Act of 1950, as amended, the regulations of 44 CFR part 332 and as reflected at 49 CFR subtitle A, and the terms of the Voluntary Intermodal Sealift Agreement. Further, the applicant, if selected as a Participant, hereby agrees to contractually commit to make specifically enrolled vessels or capacity, intermodal equipment and management of intermodal transportation systems available for use by the Department of Defense and to other Participants as discussed in this Agreement and the subsequent Department of Defense Voluntary Intermodal Sealift Agreement Enrollment Contract for the purpose of meeting national defense requirement.

Attest:

_____

(Corporate Secretary)
(CORPORATE SEAL)
Effective Date: _____

_____

(Secretary)
(SEAL)

_____

(Applicant-Corporate Name)

_____

(Signature)

_____

(Position Title)
United States of America, Department of Transportation, Maritime Administration
By: _____
Maritime Administrator

Dated: November 1, 2007.

By Order of the Maritime Administrator.

Christine S. Gurland,

Acting Secretary, Maritime Administration.

[FR Doc. E7–21867 Filed 11–6–07; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

International Standards on the Transport of Dangerous Goods; Public Notice

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), Department of Transportation.

ACTION: Notice of public meeting.

SUMMARY: This notice is to advise interested persons that PHMSA will conduct a public meeting in preparation for the 32nd session of the United Nation's Sub-Committee of Experts on the Transport of Dangerous Goods (UNSCOE) to be held December 3–7, 2007 in Geneva, Switzerland. In addition, input will be solicited on a five year agenda prioritizing PHMSA's international work.

DATES: Tuesday, November 27, 2007; 9:30 am–1:30 pm.

ADDRESSES: The meeting will be held at the new DOT Headquarters, West Building, Oklahoma City Conference Room, 1200 New Jersey Avenue, SE., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Mr. Duane Pfund, Director, Office of International Standards, Office of Hazardous Materials Safety, Department of Transportation, Washington, DC 20590; (202) 366–0656.

SUPPLEMENTARY INFORMATION: The primary purpose of this meeting will be to prepare for the 32nd session of the UNSCOE and to discuss draft U.S. positions on UNSCOE proposals. The 32nd session of the UNSCOE is the second meeting in the current biennium cycle. The UNSCOE will consider proposals for the 16th Revised Edition of the United Nations Recommendations on the Transport of Dangerous Goods Model Regulations which will come into force in the international regulations from January 1, 2011. Topics to be covered during the public meetings include:

Transport of limited quantities and consumer commodities, classification of corrosive substances, provisions for training of personnel, use of electronic documentation, subsidiary labeling for toxic by inhalation liquids, requirements for cryogenic receptacles, provisions for impact testing of portable tanks, requirements for lithium batteries, fumigated units and dry ice, harmonization with the IAEA Regulations for the safe transport of radioactive materials, guiding principles for the development of the Model Regulations, and various miscellaneous proposals related to listing, classification, and hazard communication.

In addition to the discussion on proposals to be submitted to the UNSCOE, time will be provided to discuss two issues of importance to our stakeholders: (1) Transport of limited quantities and consumer commodities, and (2) docket HM–215F. The discussion on limited quantities will be for the purpose of summarizing progress made during the first year of the biennium and identifying a way forward for further work during the second year. The discussion on HM–215F will include a review of the recently issued corrections document under the same docket, and will provide time for any additional comments regarding the conditions and limitations for the use of international regulations.

Finally, PHMSA is soliciting comments on how to further enhance harmonization for international transport of hazardous materials. PHMSA is developing a five year plan to address international harmonization and welcomes input on items which stakeholders believe should be included in this plan.

The public is invited to attend without prior notification. Due to the heightened security measures participants are encouraged to arrive early to allow time for security checks necessary to obtain access to the building. In lieu of conducting a public meeting after the 32nd session of the UNSCOE to present the results of the session, PHMSA will place a copy of the Sub-Committee's report and an updated copy of the pre-meeting summary document on PHMSA's Hazardous Materials Safety Homepage at *http://*

hazmat.dot.gov/regs/intl/intstandards.htm.

Documents

Copies of documents for the UNSCOE meeting and the meeting agenda may be obtained by downloading them from the United Nations Transport Division's Web site at: *http://www.unece.org/trans/main/dgdb/dgsubc/c32007.html*. This site may also be accessed through PHMSA's Hazardous Materials Safety Web site at: *http://hazmat.dot.gov/regs/intl/intstandards.htm*. PHMSA's site provides additional information regarding the UNSCOE and related matters such as a summary of decisions taken at previous sessions of the UNSCOE.

Robert A. Richard,

Deputy Associate Administrator for Hazardous Materials Safety.

[FR Doc. 07–5544 Filed 11–6–07; 8:45 am]

BILLING CODE 4910–60–M

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Docket No. AB–290 (Sub-No. 297X)]

Norfolk Southern Railway Company—Discontinuance of Service Exemption—in Chester County, PA

Norfolk Southern Railway Company (NSR) has filed a verified notice of exemption under 49 CFR part 1152 subpart F—*Exempt Abandonments and Discontinuances of Service* to discontinue service over a 7.70 mile line of railroad between milepost PX 3.10 and milepost PX 10.80 in Phoenixville, Chester County, PA. The line traverses United States Postal Service Zip Codes 19453 and 19460, and includes the stations of Phoenixville, Pickering, and Devault.

NSR has certified that: (1) No local traffic has moved over the line for at least 2 years; (2) that all overhead traffic, if any, has been rerouted over other lines; (3) no formal complaint filed by a user of rail service on the line (or by a state or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Board or with any U.S. District Court or has been decided in favor of complainant within the 2-year period; and (4) the requirements at 49 CFR 1105.12 (newspaper publication), and 49 CFR 1152.50(d)(1) (notice to governmental agencies) have been met.

As a condition to these exemptions, any employee adversely affected by the discontinuance of service shall be protected under *Oregon Short Line R. Co.—Abandonment—Goshen*, 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10502(d) must be filed.

Provided no formal expression of intent to file an offer of financial assistance (OFA) has been received, this exemption will be effective on December 7, 2007, unless stayed pending reconsideration. Petitions to stay that do not involve environmental issues and formal expressions of intent to file an OFA for continued rail service under 49 CFR 1152.27(c)(2),[1] must be filed by November 19, 2007.[2] Petitions to reopen must be filed by November 27, 2007, with: Surface Transportation Board, 395 E Street, SW., Washington, DC 20423–0001.

A copy of any petition filed with the Board should be sent to NSR's representative: James R. Paschall, Senior General Attorney, Norfolk Southern Railway Company, Three Commercial Place, Norfolk, VA 23510.

If the verified notice contains false or misleading information, the exemption is void *ab initio*.

Board decisions and notices are available on our Web site at: *http://www.stb.dot.gov.*

Decided: October 30, 2007.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. E7–21832 Filed 11–6–07; 8:45 am]

BILLING CODE 4915–01–P

[1] Each OFA must be accompanied by the filing fee, which currently is set at $1,300. *See* 49 CFR 1002.2(f)(25).

[2] Because this is a discontinuance proceeding and not an abandonment, trail use/rail banking and public use conditions are not appropriate. Likewise, no environmental or historical documentation is required here under 49 CFR 1105.6(c) and 1105.8(b), respectively.

DEPARTMENT OF VETERANS AFFAIRS

Veterans' Advisory Committee on Rehabilitation; Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under Public Law 92–463 (Federal Advisory Committee Act) that a meeting of the Veterans' Advisory Committee on Rehabilitation will be held on November 27–28, 2007 in Room 819 at the Department of Veterans Affairs, 811 Vermont Avenue, NW., Washington, DC. The sessions will begin at 8 a.m. and will end at 4:30 p.m. each day. The meeting is open to the public.

The purpose of the Committee is to provide recommendations to the Secretary of Veterans Affairs on the rehabilitation needs of veterans with disabilities and on the administration of VA's rehabilitation programs.

During the meeting, there will be briefings on various VA rehabilitation-related initiatives. The Committee will discuss VA's polytrauma centers and how their programs address rehabilitation needs of veterans with disabilities.

No time will be allocated at this meeting for oral presentations from the public. Any member of the public wishing to attend the meeting is requested to contact Mr. Joseph Tucker, Designated Federal Officer, at (202) 461–9637. The Committee will accept written comments. Comments should be addressed to Mr. Tucker at the Department of Veterans Affairs, Veterans Benefits Administration (28), 810 Vermont Avenue, NW., Washington, DC 20420. In communication with the Committee, writers must identify themselves and state the organizations, associations, or person(s) they represent.

By Direction of the Secretary.

Dated: October 31, 2007.

E. Philip Riggin,

Committee Management Officer.

[FR Doc. 07–5540 Filed 11–6–07; 8:45 am]

BILLING CODE 8320–01–M

Federal Register

Wednesday,
November 7, 2007

Part II

Department of the Treasury
Office of the Comptroller of the Currency
12 CFR Part 41

Federal Reserve System
12 CFR Part 222

Federal Deposit Insurance Corporation
12 CFR Part 334

Department of the Treasury
Office of Thrift Supervision
12 CFR Part 571

National Credit Union Administration
12 CFR Part 717

Fair Credit Reporting Affiliate Marketing Regulations; Final Rule

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Part 41

[Docket ID. OCC–2007–0010]

RIN 1557–AC88

FEDERAL RESERVE SYSTEM

12 CFR Part 222

[Regulation V; Docket No. R–1203]

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 334

RIN 3064–AC83

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

12 CFR Part 571

[Docket ID. OTS–2007–0020]

RIN 1550–AB90

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 717

Fair Credit Reporting Affiliate Marketing Regulations

AGENCIES: Office of the Comptroller of the Currency, Treasury (OCC); Board of Governors of the Federal Reserve System (Board); Federal Deposit Insurance Corporation (FDIC); Office of Thrift Supervision, Treasury (OTS); and National Credit Union Administration (NCUA).

ACTION: Final rules.

SUMMARY: The OCC, Board, FDIC, OTS, and NCUA (Agencies) are publishing final rules to implement the affiliate marketing provisions in section 214 of the Fair and Accurate Credit Transactions Act of 2003, which amends the Fair Credit Reporting Act. The final rules generally prohibit a person from using information received from an affiliate to make a solicitation for marketing purposes to a consumer, unless the consumer is given notice and a reasonable opportunity and a reasonable and simple method to opt out of the making of such solicitations.

DATES: *Effective Date:* These rules are effective January 1, 2008.

Mandatory Compliance Date: October 1, 2008.

FOR FURTHER INFORMATION CONTACT: *OCC:* Amy Friend, Assistant Chief Counsel, (202) 874–5200; Michael Bylsma, Director, or Stephen Van Meter, Assistant Director, Community and Consumer Law, (202) 874–5750; or Patrick T. Tierney, Senior Attorney, Legislative and Regulatory Activities Division, (202) 874–5090, Office of the Comptroller of the Currency, 250 E Street, SW., Washington, DC 20219.

Board: David A. Stein, Counsel; Ky Tran-Trong, Counsel; or Amy E. Burke, Attorney, Division of Consumer and Community Affairs, (202) 452–3667 or (202) 452–2412; or Kara Handzlik, Attorney, Legal Division, (202) 452–3852, Board of Governors of the Federal Reserve System, 20th and C Streets, NW., Washington, DC 20551. For users of a Telecommunications Device for the Deaf (TDD) only, contact (202) 263–4869.

FDIC: Ruth R. Amberg, Senior Counsel, (202) 898–3736, or Richard M. Schwartz, Counsel, Legal Division, (202) 898–7424; April Breslaw, Chief, Compliance Section, (202) 898–6609; David P. Lafleur, Policy Analyst, Division of Supervision and Consumer Protection, (202) 898–6569, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.

OTS: Suzanne McQueen, Consumer Regulations Analyst, Compliance and Consumer Protection Division, (202) 906–6459; or Richard Bennett, Senior Compliance Counsel, (202) 906–7409, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

NCUA: Linda Dent, Staff Attorney, Office of General Counsel, (703) 518–6540, National Credit Union Administration, 1775 Duke Street, Alexandria, VA 22314–3428.

SUPPLEMENTARY INFORMATION:

I. Background

The Fair Credit Reporting Act

The Fair Credit Reporting Act (FCRA or Act), which was enacted in 1970, sets standards for the collection, communication, and use of information bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living. (15 U.S.C. 1681–1681x.) In 1996, the Consumer Credit Reporting Reform Act extensively amended the FCRA. (Pub. L. 104–208, 110 Stat. 3009.)

The FCRA, as amended, provides that a person may communicate to an affiliate or a non-affiliated third party information solely as to transactions or experiences between the consumer and the person without becoming a consumer reporting agency.[1] In addition, the communication of such transaction or experience information among affiliates will not result in any affiliate becoming a consumer reporting agency. *See* FCRA §§ 603(d)(2)(A)(i) and (ii).

Section 603(d)(2)(A)(iii) of the FCRA provides that a person may communicate ''other'' information—that is, information that is not transaction or experience information—among its affiliates without becoming a consumer reporting agency if it is clearly and conspicuously disclosed to the consumer that such information may be communicated among affiliates and the consumer is given an opportunity, before the information is communicated, to ''opt out'' or direct that the information not be communicated among such affiliates, and the consumer has not opted out.

The Fair and Accurate Credit Transactions Act of 2003

The President signed into law the Fair and Accurate Credit Transactions Act of 2003 (FACT Act) on December 4, 2003. (Pub. L. 108–159, 117 Stat. 1952.) In general, the FACT Act amends the FCRA to enhance the ability of consumers to combat identity theft, increase the accuracy of consumer reports, restrict the use of medical information in credit eligibility determinations, and allow consumers to exercise greater control regarding the type and number of solicitations they receive.

Section 214 of the FACT Act added a new section 624 to the FCRA. This provision gives consumers the right to restrict a person from using certain information obtained from an affiliate to make solicitations to that consumer. Section 624 generally provides that if a person receives certain consumer eligibility information from an affiliate, the person may not use that information to make solicitations to the consumer about its products or services, unless the consumer is given notice and an opportunity and a simple method to opt out of such use of the information, and the consumer does not opt out. The statute also provides that section 624 does not apply, for example, to a person using eligibility information: (1) To make solicitations to a consumer with whom the person has a pre-existing business relationship; (2) to perform services for another affiliate subject to certain conditions; (3) in response to a communication initiated by the

[1] The FCRA creates substantial obligations for a person that meets the definition of a ''consumer reporting agency'' in section 603(f) of the statute.

consumer; or (4) to make a solicitation that has been authorized or requested by the consumer. Unlike the FCRA affiliate sharing opt-out and the Gramm-Leach-Bliley Act (GLBA) non-affiliate sharing opt-out, which apply indefinitely, section 624 provides that a consumer's affiliate marketing opt-out election must be effective for a period of at least five years. Upon expiration of the opt-out period, the consumer must be given a renewal notice and an opportunity to renew the opt-out before information received from an affiliate may be used to make solicitations to the consumer.

Section 624 governs the *use* of information by an affiliate, not the *sharing* of information among affiliates, and thus is distinct from the affiliate sharing opt-out under section 603(d)(2)(A)(iii) of the FCRA. Nevertheless, the affiliate marketing and affiliate sharing opt-outs and the information subject to the two opt-outs overlap to some extent. As noted above, the FCRA allows transaction or experience information to be shared among affiliates without giving the consumer notice and an opportunity to opt out, but provides that ''other'' information, such as information from credit reports and credit applications, may not be shared among affiliates without giving the consumer notice and an opportunity to opt out. The new affiliate marketing opt-out applies to both transaction or experience information and ''other'' information. Thus, certain information will be subject to two opt-outs, a sharing opt-out and a marketing use opt-out.

Section 214(b) of the FACT Act requires the Agencies, the Federal Trade Commission (FTC), and the Securities and Exchange Commission (SEC) to prescribe regulations, in consultation and coordination with each other, to implement the FCRA's affiliate marketing opt-out provisions. In adopting regulations, each Agency must ensure that the affiliate marketing notification methods provide a simple means for consumers to make choices under section 624, consider the affiliate sharing notification practices employed on the date of enactment by persons subject to section 624, and ensure that notices may be coordinated and consolidated with other notices required by law.

II. The Interagency Proposal

On July 15, 2004, the Agencies published a notice of proposed rulemaking in the **Federal Register** (69 FR 42502) to implement section 214 of the FACT Act.[2] The proposal defined the key terms ''pre-existing business relationship'' and ''solicitation'' essentially as defined in the statute. The Agencies did not propose to include additional circumstances within the meaning of ''pre-existing business relationship'' or other types of communications within the meaning of ''solicitation.''

To address the scope of the affiliate marketing opt-out, the proposal defined ''eligibility information'' to mean any information the communication of which would be a ''consumer report'' if the statutory exclusions from the definition of ''consumer report'' in section 603(d)(2)(A) of the FCRA for transaction or experience information and for ''other'' information that is subject to the affiliate-sharing opt-out did not apply. The Agencies substituted the term ''eligibility information'' for the more complicated statutory language regarding the communication of information that would be a consumer report, but for clauses (i), (ii), and (iii) of section 603(d)(2)(A) of the FCRA.[3] In addition, the proposal incorporated each of the scope limitations contained in the statute, such as the pre-existing business relationship exception.

Section 624 does not state which affiliate must give the consumer the affiliate marketing opt-out notice. The proposal provided that the person communicating information about a consumer to its affiliate would be responsible for satisfying the notice requirement, if applicable. A rule of construction provided flexibility to allow the notice to be given by the person that communicates information to its affiliate, by the person's agent, or through a joint notice with one or more other affiliates. The Agencies designed this approach to provide flexibility and to facilitate the use of a single coordinated notice, while taking into account existing affiliate sharing notification practices. At the same time, the approach sought to ensure that the notice would be effective because it generally would be provided by or on behalf of an entity from which the consumer would expect to receive important notices, and would not be provided along with solicitations.

The proposal also provided guidance on the contents of the opt-out notice, what constitutes a reasonable opportunity to opt out, reasonable and simple methods of opting out, and the delivery of opt-out notices. Finally, the proposal provided guidance on the effect of the limited duration of the opt-out and the requirement to provide an extension notice upon expiration of the opt-out period.

III. Overview of Comments Received

Each agency received the following number of comment letters: OCC—30, Board—42, FDIC—29, OTS—20, NCUA—18. Many commenters sent copies of the same letter to more than one Agency. The Agencies received comments from a variety of banks, thrifts, credit unions, credit card companies, mortgage lenders, other non-bank creditors, and industry trade associations. The Agencies also received comments from consumer groups, the National Association of Attorneys General (''NAAG''), and individual consumers. In addition, the Agencies considered comments submitted to the FTC and the SEC.

Most industry commenters objected to several key aspects of the proposal. The most significant areas of concern raised by industry commenters related to which affiliate would be responsible for providing the notice, the scope of certain exceptions to the notice and opt-out requirement, and the content or the inclusion of definitions for terms such as ''clear and conspicuous'' and ''pre-existing business relationship.'' Consumer groups and NAAG generally supported the proposal, although these commenters believed that the proposal could be strengthened in certain respects. A more detailed discussion of the comments is contained in the Section-by-Section Analysis below.

IV. Section-by-Section Analysis

Section __.1 Purpose, Scope, and Effective Dates

Section __.1 of the proposal set forth the purpose and scope of each Agency's regulations. The Agencies received few comments on this section. Some of the Agencies have revised this section in the final rules for clarity and to reflect the fact that the institutions subject to the FCRA regulation will vary in different subparts of the Agencies' FCRA rules. The coverage provision for

[2] The FTC published its proposed affiliate marketing rule in the **Federal Register** on June 15, 2004 (69 FR 33324). The SEC published its proposed affiliate marketing rule in the **Federal Register** on July 14, 2004 (69 FR 42301).

[3] Under section 603(d)(1) of the FCRA, a ''consumer report'' means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for credit or insurance to be used primarily for personal, family, or household purposes, employment purposes, or any other purpose authorized in section 604 of the FCRA. 15 U.S.C. 1681a(d).

each Agency's affiliate marketing rule is set forth in Subpart C, § __.20(a).

Section __.2 Examples

Proposed § ____.2 described the scope and effect of the examples included in the proposed rule. Most commenters supported the proposed use of non-exclusive examples to illustrate the operation of the rules. One commenter, concerned that the use of examples would increase the risk of litigation, urged the Agencies to delete all examples.

The Agencies adopted § __.2 as part of the final medical information rules. *See* 70 FR 70664 (Nov. 22, 2005). The comments received in this rulemaking do not warrant any revisions to § __.2. The Agencies do not believe the use of illustrative examples will materially increase the risk of litigation, but rather will provide useful guidance for compliance purposes, which may alleviate litigation risks for institutions. Therefore, it is unnecessary to re-publish § __.2 in these final rules.

As § __.2 states, examples in a paragraph illustrate only the issue described in the paragraph and do not illustrate any other issue that may arise in the part. Similarly, the examples do not illustrate any issues that may arise under other laws or regulations.[4]

Section __.3 Definitions

Section __.3 of the proposal contained definitions for the following terms: ''Act,'' ''affiliate'' (as well as the related terms ''company'' and ''control''); ''clear and conspicuous''; ''consumer''; ''eligibility information''; ''person''; ''pre-existing business relationship''; ''solicitation''; and, except for the OCC's proposal, ''you.''

The Agencies have previously defined the terms ''Act,'' ''affiliate,'' ''company,'' ''consumer,'' and ''person,'' along with a definition of ''common ownership or common corporate control'' as a substitute for the definition of ''control,'' as part of the final medical information rules. *See* 70 FR 70664 (Nov. 22, 2005). Those definitions that elicited comment are discussed below. However, it is unnecessary to re-publish § __.3 in these final rules because the Agencies have not revised these definitions.

The Agencies have moved the definitions of ''clear and conspicuous,'' ''eligibility information,'' ''pre-existing business relationship,'' ''solicitation,'' and ''you'' or ''bank'' to Subpart C, § __.20(b). Three of these terms relate solely to the affiliate marketing provisions and, thus, are more appropriately defined in Subpart C. For the reasons discussed below, the Agencies also believe that it is more appropriate to define ''clear and conspicuous'' for the limited purpose of the affiliate marketing rules. Each of these definitions is discussed in detail below.

Affiliate, Common Ownership or Common Corporate Control, and Company

Several FCRA provisions apply to information sharing with persons ''related by common ownership or affiliated by corporate control,'' ''related by common ownership or affiliated by common corporate control,'' or ''affiliated by common ownership or common corporate control.'' *E.g.*, FCRA, sections 603(d)(2), 615(b)(2), and 625(b)(2). Each of these provisions was enacted as part of the 1996 amendments to the FCRA. Similarly, section 2 of the FACT Act defines the term ''affiliate'' to mean ''persons that are related by common ownership or affiliated by corporate control.'' In contrast, the GLBA defines ''affiliate'' to mean ''any company that controls, is controlled by, or is under common control with another company.'' *See* 15 U.S.C. 6809(6).

In the proposal, the Agencies sought to harmonize the various FCRA and FACT Act formulations by defining ''affiliate'' to mean ''any person that is related by common ownership or common corporate control with another person.'' Industry commenters generally supported the Agencies' goal of harmonizing the various FCRA definitions of ''affiliate'' for consistency. Many of these commenters, however, believed that the most effective way to do this was for the Agencies to incorporate into the FCRA the definition of ''affiliate'' used in the GLBA privacy regulations. In addition, a few industry commenters urged the Agencies to incorporate into the definition of ''affiliate'' certain concepts from California's Financial Information Privacy Act so as to exempt certain classes of corporate affiliates from the restrictions on affiliate sharing or marketing.[5]

In the final medical information rules, the Agencies defined the term ''affiliate'' to mean a company that is related by common ownership or common corporate control with another company. *See* 70 FR 70,664 (Nov. 22, 2005).[6] The Agencies substituted the term ''company'' for ''person'' in the definition because they did not believe that certain types of persons, such as individuals, could be related by common ownership or common corporate control.

The Agencies do not believe there is a substantive difference between the FACT Act definition of ''affiliate'' and the definition of ''affiliate'' in section 509 of the GLBA. The Agencies are not aware of any circumstances in which two entities would be affiliates for purposes of the FCRA but not for purposes of the GLBA privacy rules, or vice versa. Also, even though affiliated entities have had to comply with different FCRA and GLBA formulations of the ''affiliate'' definition since 1999, commenters did not identify any specific compliance difficulties or uncertainty resulting from the fact that the two statutes use somewhat different wording to describe what constitutes an affiliate.

As explained in the supplementary information to the final medical information rules, the Agencies declined to incorporate into the definition of ''affiliate'' exceptions for entities regulated by the same or similar functional regulators, entities in the same line of business, or entities that share a common brand or identity. *See* 70 FR 70,665 (Nov. 22, 2005). These exceptions were incorporated into the California Financial Information Privacy Act in August 2003.[7] Congress, however, did not incorporate these exceptions from California law into the definition of ''affiliate'' when it enacted the FACT Act at the end of 2003. Accordingly, the Agencies believe that the approach followed in the final medical information rules best effectuates the intent of Congress.

Under the GLBA privacy rules, the definition of ''control'' determines whether two or more entities meet the definition of ''affiliate.''[8] The Agencies included the same definition of ''control'' in the proposal and received no comments on the proposed definition. The Agencies interpret the phrase ''related by common ownership or common corporate control'' used in the FACT Act to have the same meaning

[4] NCUA has modified examples in its final rule text where the original example referenced products or services impermissible for federal credit unions.

[5] These commenters noted that the California law places no restriction on information sharing among affiliates if they: (1) Are regulated by the same or similar functional regulators; (2) are involved in the same broad line of business, such as banking, insurance, or securities; and (3) share a common brand identity.

[6] For purposes of the regulation, an ''affiliate'' includes an operating subsidiary of a bank or savings association, and a credit union service organization that is controlled by a federal credit union.

[7] See Cal. Financial Code § 4053(c).

[8] See 12 CFR 40.3(g), 216.3(g), 332.3(g), 573.3(g), and 716(g).

as ''control'' in the GLBA privacy rules. For example, if an individual owns 25 percent of two companies, the companies would be affiliates under both the GLBA and FCRA definitions. However, the individual would not be considered an affiliate of the companies because the definition of ''affiliate'' is limited to companies. For purposes of clarity, the final medical information rules defined the term ''control'' to mean ''common ownership or common corporate control'' in order to track more closely the terminology used in the FACT Act. *See* 70 FR 70,664 (Nov. 22, 2005).[9]

The proposal also defined the term ''company'' to mean any corporation, limited liability company, business trust, general or limited partnership, association, or similar organization. The proposed definition of ''company'' excluded some entities that are ''persons'' under the FCRA, including estates, cooperatives, and governments or governmental subdivisions or agencies, as well as individuals. The Agencies received no comments on the proposed definition of ''company,'' which was adopted in the final medical information rules.

The Agencies adopted definitions of ''affiliate,'' ''common ownership and common corporate control,'' and ''company'' in the final FCRA medical information rules. *See* 70 FR 70,664 (Nov. 22, 2005). It is unnecessary to re-publish those definitions in these rules.

Consumer

Proposed paragraph (e) defined the term ''consumer'' to mean an individual. This definition is identical to the definition of ''consumer'' in section 603(c) of the FCRA.

Several commenters asked the Agencies to narrow the proposed definition to apply only to individuals who obtain financial products or services primarily for personal, family, or household purposes, in part to achieve consistency with the definition of ''consumer'' in the GLBA. The FCRA's definition of ''consumer,'' however, differs from, and is broader than, the definition of that term in the GLBA. The Agencies believe that the use of distinct definitions of ''consumer'' in the two statutes reflects differences in the scope and objectives of each statute. Therefore, the Agencies adopted the FCRA's statutory definition of ''consumer'' in the final medical information rules. *See* 70 FR 70,664 (Nov. 22, 2005). It is unnecessary to re-publish the definition in these rules. For purposes of this definition, an individual acting through a legal representative would qualify as a consumer.

Person

Proposed paragraph (l) defined the term ''person'' to mean any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity. This definition is identical to the definition of ''person'' in section 603(b) of the FCRA.

One commenter requested clarification of how the proposed definition of ''person'' would affect other provisions of the affiliate marketing rules. Specifically, this commenter asked how the supplementary information's discussion of agents might affect the scope provisions of the rule.

The supplementary information to the proposal stated that a person may act through an agent, including but not limited to a licensed agent (in the case of an insurance company) or a trustee. The supplementary information also provided that actions taken by an agent on behalf of a person that are within the scope of the agency relationship would be treated as actions of that person. The Agencies included these statements to address comprehensively the status of agents and to eliminate the need to refer specifically to licensed agents in the proposed definition of ''pre-existing business relationship.'' As discussed below, many commenters believed that licensed agents should be expressly included in the definition of ''pre-existing business relationship.'' The Agencies have revised the final rules in response to those comments. By specifically addressing licensed agents, the final rules do not alter the general principles of principal-agent relationships that apply to all agents, not just licensed agents. The Agencies will treat actions taken by an agent on behalf of a person that are within the scope of the agency relationship as actions of that person, regardless of whether the agent is a licensed agent or not.

The Agencies adopted the FCRA's statutory definition of ''person'' in the final medical information rules. *See* 70 FR 70664 (Nov. 22, 2005). Therefore, it is unnecessary to re-publish the definition in these rules.

Section __.20 Coverage and definitions

Coverage

Section __.20(a) of the final rules identifies the persons covered by Subpart C of each Agency's rule. Section __.20(a) thus describes the scope of each Agency's rule.

Definitions

Section __.20(b) of the final rules contains the definitions of six terms for purposes of Subpart C.

Clear and Conspicuous

Proposed § __.3(c) defined the term ''clear and conspicuous'' to mean reasonably understandable and designed to call attention to the nature and significance of the information presented. Under this definition, institutions would retain flexibility in determining how best to meet the clear and conspicuous standard. The supplementary information to the proposal provided guidance regarding a number of practices that institutions might wish to consider in making their notices clear and conspicuous. These practices were derived largely from guidance included in the GLBA privacy rules.

Industry commenters urged the Agencies not to define ''clear and conspicuous'' in the final rules. The principal objection these commenters raised was that this definition would significantly increase the risk of litigation and civil liability. Although these commenters recognized that the proposed definition was derived from the GLBA privacy regulations, they noted that compliance with the GLBA privacy regulations is enforced exclusively through administrative action, not through private litigation. These commenters also stated that the Board had withdrawn a similar proposal to define ''clear and conspicuous'' for purposes of Regulations B, E, M, Z, and DD, in part because of concerns about civil liability. Some industry commenters believed that it was not necessary to define the term in order for consumers to receive clear and conspicuous disclosures based on industry's experience in providing clear and conspicuous affiliate sharing opt-out notices. Consumer groups believed that incorporation of the standard and examples from the GLBA privacy regulations was not adequate because they did not believe that the existing standard has proven sufficient to ensure effective privacy notices.

In the final rules, the Agencies have relocated the definition of ''clear and conspicuous'' to § __.20(b)(1) in order to limit its applicability to the affiliate

[9] For purposes of the regulation, NCUA presumes that a federal credit union has a controlling influence over the management or policies of a credit union service organization if it is 67 percent owned by credit unions.

marketing opt-out notice and renewal notice. Except for certain non-substantive changes made for purposes of clarity, the definition of ''clear and conspicuous'' is the same as in the proposal and is substantively the same as the definition used in the GLBA privacy rules. The Agencies believe that the clear and conspicuous standard for the affiliate marketing opt-out notices should be substantially similar to the standard that applies to GLBA privacy notices because the affiliate marketing opt-out notice may be provided on or with the GLBA privacy notice.

In defining ''clear and conspicuous,'' the Agencies believe it is more appropriate to focus on the affiliate marketing opt-out notices that are the subject of this rulemaking, rather than adopting a generally applicable definition governing all consumer disclosures under the FCRA. This approach gives the Agencies the flexibility to refine or clarify the clear and conspicuous requirement for different disclosures, if necessary. In addition, this approach is consistent with the approach the Board indicated it would take when it withdrew its proposed clear and conspicuous rules. The Board noted that it intended ''to focus on individual disclosures and to consider ways to make specific improvements to the effectiveness of each disclosure.'' *See* 69 FR 35541, 35543 (June 25, 2004).

The statute directs the Agencies to provide specific guidance regarding how to comply with the clear and conspicuous standard. *See* 15 U.S.C. 1681s–3(a)(2)(B). For that reason, the Agencies do not agree with commenters that requested the elimination of the definition of ''clear and conspicuous'' and related guidance. Rather, the Agencies believe it is necessary to define ''clear and conspicuous'' in the final rules and provide specific guidance for how to satisfy that standard in connection with this notice.

Accordingly, the final rules contain two types of specific guidance on satisfying the requirement to provide a clear and conspicuous opt-out notice. First, as in the proposal, the supplementary information to the final rules describes certain techniques that may be used to make notices clear and conspicuous. These techniques are described below. Second, the Agencies have adopted model forms that may, but are not required to, be used to facilitate compliance with the affiliate marketing notice requirements. The requirement for clear and conspicuous notices would be satisfied by the appropriate use of one of the model forms.

As noted in the supplementary information to the proposal, institutions may wish to consider a number of methods to make their notices clear and conspicuous. The various methods described below for making a notice clear and conspicuous are suggestions that institutions may wish to consider in designing their notices. Use of any of these methods alone or in combination is voluntary. Institutions are not required to use any particular method or combination of methods to make their disclosures clear and conspicuous. Rather, the particular facts and circumstances will determine whether a disclosure is clear and conspicuous.

A notice or disclosure may be made reasonably understandable through various methods that include: Using clear and concise sentences, paragraphs, and sections; using short explanatory sentences; using bullet lists; using definite, concrete, everyday words; using active voice; avoiding multiple negatives; avoiding legal and highly technical business terminology; and avoiding explanations that are imprecise and are readily subject to different interpretations. In addition, a notice or disclosure may be designed to call attention to the nature and significance of the information in it through various methods that include: Using a plain-language heading; using a typeface and type size that are easy to read; using wide margins and ample line spacing; and using boldface or italics for key words. Further, institutions that provide the notice on a Web page may use text or visual cues to encourage scrolling down the page, if necessary, to view the entire notice and may take steps to ensure that other elements on the Web site (such as text, graphics, hyperlinks, or sound) do not distract attention from the notice. When a notice or disclosure is combined with other information, methods for designing the notice or disclosure to call attention to the nature and significance of the information in it may include using distinctive type sizes, styles, fonts, paragraphs, headings, graphic devices, and appropriate groupings of information. However, there is no need to use distinctive features, such as distinctive type sizes, styles, or fonts, to differentiate an affiliate marketing opt-out notice from other components of a required disclosure, for example, where a GLBA privacy notice combines several opt-out disclosures in a single notice. Moreover, nothing in the clear and conspicuous standard requires segregation of the affiliate marketing opt-out notice when it is combined with a GLBA privacy notice or other required disclosures.

The Agencies recognize that it will not be feasible or appropriate to incorporate all of the methods described above all the time. The Agencies recommend, but do not require, that institutions consider the methods described above in designing their opt-out notices. The Agencies also encourage the use of consumer or other readability testing to devise notices that are understandable to consumers.

Finally, although the Agencies understand the concerns of some industry commenters about the potential for civil liability, the Agencies believe that these concerns are mitigated by the safe harbors afforded by the model forms in Appendix C. The Agencies note that the affiliate sharing opt-out notice under section 603(d)(2)(A)(iii) of the FCRA, which may be enforced through private rights of action, must be included in the GLBA privacy notice. Therefore, the affiliate sharing opt-out notice generally is disclosed in a manner consistent with the clear and conspicuous standard set forth in the GLBA privacy regulations. Commenters did not identify any litigation that has resulted from the requirement to provide a clear and conspicuous affiliate sharing opt-out notice. The Agencies believe that compliance with the examples and use of the model forms, although optional, should minimize the risk of litigation.

Concise

Proposed § __.21(b) defined the term ''concise'' to mean a reasonably brief expression or statement. The proposal also provided that a notice required by Subpart C may be concise even if it is combined with other disclosures required or authorized by federal or state law. Such disclosures include, but are not limited to, a GLBA privacy notice, an affiliate-sharing notice under section 603(d)(2)(A)(iii) of the FCRA, and other consumer disclosures. Finally, the proposal clarified that the requirement for a concise notice would be satisfied by the appropriate use of one of the model forms contained in proposed Appendix C to each Agency's FCRA rule, although use of the model forms is not required. The Agencies received no comments on the proposed definition of ''concise.'' The final rules renumber the definition of ''concise'' as § __.20(b)(2). The reference to the model forms has been moved to Appendix C, but otherwise the definition is adopted as proposed.

Eligibility Information

Proposed § __.3(j) defined the term ''eligibility information'' to mean any information the communication of which would be a consumer report if the exclusions from the definition of ''consumer report'' in section 603(d)(2)(A) of the FCRA did not apply. As proposed, eligibility information would include a person's own transaction or experience information, such as information about a consumer's account history with that person, and ''other'' information under section 603(d)(2)(A)(iii), such as information from consumer reports or applications.

Most commenters generally supported the proposed definition of ''eligibility information'' as an appropriate means of simplifying the statutory terminology without changing the scope of the information covered by the rule. A number of commenters requested that the Agencies clarify that certain types of information do not constitute eligibility information, such as name, address, telephone number, Social Security number, and other identifying information. One commenter requested the exclusion of publicly available information from the definition. Another commenter requested additional clarification regarding the term ''transaction or experience information.'' A few commenters suggested that the Agencies include examples of what is and is not included within ''eligibility information.'' Finally, one commenter urged the Agencies to revise the definition to restate much of the statutory definition of ''consumer report'' to eliminate the need for cross-references.

The final rules renumber the definition of ''eligibility information'' as __.20(b)(3). The Agencies have revised the definition to clarify that the term ''eligibility information'' does not include aggregate or blind data that does not contain personal identifiers. Examples of personal identifiers include account numbers, names, or addresses, as indicated in the definition, as well as Social Security numbers, driver's license numbers, telephone numbers, or other types of information that, depending on the circumstances or when used in combination, could identify the individual.

The Agencies also believe that further clarification of, or exclusions from, the term ''eligibility information,'' such as the categorical exclusion of names, addresses, telephone numbers, other identifying information, or publicly available information, would directly implicate the definitions of ''consumer report'' and ''consumer reporting agency'' in sections 603(d) and (f), respectively, of the FCRA. The Agencies decided not to define the terms ''consumer report'' and ''consumer reporting agency'' in this rulemaking and not to interpret the meaning of terms used in those definitions, such as ''transaction or experience'' information. The Agencies anticipate addressing the definitions of ''consumer report'' and ''consumer reporting agency'' in a separate rulemaking after the required FACT Act rules have been completed. The Agencies also note that financial institutions have relied on these statutory definitions for many years.

Pre-Existing Business Relationship

Proposed § __.3(m) defined the term ''pre-existing business relationship'' to mean a relationship between a person and a consumer based on the following:

(1) A financial contract between the person and the consumer that is in force;

(2) The purchase, rental, or lease by the consumer of that person's goods or services, or a financial transaction (including holding an active account or a policy in force or having another continuing relationship) between the consumer and that person, during the 18-month period immediately preceding the date on which a solicitation covered by Subpart C is sent to the consumer; or

(3) An inquiry or application by the consumer regarding a product or service offered by that person during the three-month period immediately preceding the date on which a solicitation covered by Subpart C is sent to the consumer.

The proposed definition generally tracked the statutory definition contained in section 624 of the FCRA, with certain revisions for clarity. Although the statute gave the Agencies the authority to identify by regulation other circumstances that qualify as a pre-existing business relationship, the Agencies did not propose to exercise this authority. In the final rules, the definition of ''pre-existing business relationship'' has been renumbered as § __.20(b)(4).

Industry commenters suggested certain revisions to the proposed definition of ''pre-existing business relationship.'' Many industry commenters asked the Agencies to include in the definition statutory language relating to ''a person's licensed agent.'' A number of these commenters noted that this concept was particularly important to the insurance industry where independent, licensed agents frequently act as the main point of contact between the consumer and the insurance company.

In the final rules, the phrase ''or a person's licensed agent'' has been added to the definition of ''pre-existing business relationship'' to track the statutory language. For example, assume that a person is a licensed agent for the affiliated ABC life, auto, and homeowners' insurance companies. A consumer purchases an ABC auto insurance policy through the licensed agent. The licensed agent may use eligibility information about the consumer obtained in connection with the ABC auto policy it sold to the consumer to market ABC life and homeowner's insurance policies to the consumer for the duration of the pre-existing business relationship without offering the consumer the opportunity to opt out of that use.

Regarding the first basis for a pre-existing business relationship (a financial contract in force), several industry commenters asked the Agencies to clarify that a financial contract includes any in-force contract that relates to a financial product or service covered by title V of the GLBA. One commenter objected to the requirement that the contract be in force on the date of the solicitation. This commenter believed that the Agencies should interpret the statute to permit the exception to apply if a contract is in force at the time the affiliate uses the information, rather than when the solicitation is sent, noting that there may be a delay between the use and the solicitation.

The Agencies have revised the first prong of the definition of ''pre-existing business relationship'' to reflect the definition's relocation to Subpart C, but have otherwise adopted it as proposed. Although a comprehensive definition of the term ''financial contract'' has not been included in the final rules, the Agencies construe the statutory term ''financial contract'' at least to include a contract that relates to a consumer's purchase or lease of a financial product or service that a financial holding company could offer under section 4(k) of the Bank Holding Company Act of 1956 (12 U.S.C. 1843(k)). In addition, a financial contract which is in force will, in virtually all instances, qualify as a ''financial transaction,'' as that term is used in the second prong of the definition of ''pre-existing business relationship.'' The Agencies do not agree with the suggestion that the financial contract should be in force on the date of use rather than on the date the solicitation is sent. The approach taken in the proposed and final rules is consistent with the approach used in the other two prongs of the statutory definition.

Industry commenters also suggested certain clarifications to the second basis for a pre-existing business relationship—a purchase, rental, or lease by the consumer of the person's goods or services, or a financial transaction between the consumer and the person during the preceding 18 months. Several industry commenters noted that, notwithstanding the example in the proposal regarding a lapsed insurance policy, it was not clear from what point in time the 18-month period begins to run in the case of many purchase, rental, lease, or financial transactions. These commenters asked the Agencies to clarify that the 18-month period begins to run at the time all contractual responsibilities of either party under the purchase, rental, lease, or financial transaction expire. In addition, some commenters indicated that the term ''active account'' should be clarified to mean any account with outstanding contractual responsibilities on either side of an account relationship, regardless of whether specific transactions do or do not occur on that account.

The Agencies have revised the second prong of the definition of ''pre-existing business relationship'' to reflect the definition's relocation to Subpart C, but have otherwise adopted it as proposed. The Agencies decline to interpret the term ''active account'' as requested by some commenters. The Agencies note that section 603(r) of the FCRA defines the term ''account'' to have the same meaning as in section 903 of the Electronic Fund Transfer Act (EFTA). Under the EFTA, the term ''account'' means a demand deposit, savings deposit, or other asset account established primarily for personal, family, or household purposes. Some commenters, however, apparently believed that the term ''active account'' included extensions of credit. Credit extensions presumably would qualify as ''another continuing relationship,'' as used in the definition of ''pre-existing business relationship.''

More generally, however, even though a ''financial transaction'' would include in virtually all cases a financial contract which is in force, as noted above, the Agencies do not believe it is appropriate to state that the 18-month period begins to run when all outstanding contractual responsibilities of both parties expire, regardless of whether specific transactions occur. Such a clarification would not appropriately address circumstances such as charge-offs, bankruptcies, early terminations, or extended periods of credit inactivity that could trigger commencement of the 18 month period. In addition, some contract provisions, such as arbitration clauses and choice of law provisions, may continue to have legal effect after all contractual performance has ended. The Agencies do not believe that the continued effectiveness of such provisions should delay commencement of the 18-month period.

Nevertheless, the Agencies believe that a few examples may provide useful guidance to facilitate compliance. For example, in the case of a closed-end mortgage or auto loan, the 18-month period generally would begin to run when the consumer pays off the outstanding balance on the loan. In a lease or rental transaction, the 18-month period generally would begin to run when the lease or rental agreement expires or is terminated by mutual agreement. In the case of general purpose credit cards that are issued with an expiration date, the 18-month period generally would begin to run when the consumer pays off the outstanding balance on the card and the card is either cancelled or expires without being renewed.

Commenters also made certain suggestions regarding the third basis for a pre-existing business relationship—an inquiry or application by the consumer regarding a product or service offered by the person during the preceding three months. Consumer groups urged the Agencies to clarify that an inquiry must be made of the specific affiliate, rather than a general inquiry about a product or service. Industry commenters expressed concern about certain statements in the supplementary information that explained the meaning of an inquiry.

The Agencies do not agree that an inquiry must be made of a specific affiliate. Many affiliated institutions use a central call center to handle consumer inquiries. The clarification urged by consumer groups could preclude the establishment of a pre-existing business relationship based on a consumer's call to a central call center about a specific product or service offered by an affiliate.

In the supplementary information to the proposal, the Agencies noted that certain elements of the definition of ''pre-existing business relationship'' were substantially similar to the definition of ''established business relationship'' under the amended Telemarketing Sales Rule (TSR) (16 CFR 310.2(n)). The TSR definition was informed by Congress's intent that the ''established business relationship'' exemption to the ''do not call'' provisions of the Telephone Consumer Protection Act (47 U.S.C. 227 *et seq.*) should be grounded on the reasonable expectations of the consumer.[10] The Agencies observed that Congress's incorporation of similar language in the definition of ''pre-existing business relationship'' [11] suggested that it would be appropriate to consider the reasonable expectations of the consumer in determining the scope of this exception. Thus, the Agencies explained that, for purposes of this regulation, an inquiry would include any affirmative request by a consumer for information after which the consumer would reasonably expect to receive information from the affiliate about its products or services.[12] Moreover, a consumer would not reasonably expect to receive information from the affiliate if the consumer did not request information or did not provide contact information to the affiliate.

Industry commenters objected to the discussion in the supplementary information. Some of these commenters believed that looking to the reasonable expectations of the consumer would narrow the scope of the exception and impose on institutions a subjective standard that depended upon the consumer's state of mind. These commenters also maintained that the availability of the exception should not depend upon the consumer both requesting information and providing contact information to the affiliate. Some commenters noted that either requesting information or providing contact information should suffice to establish an expectation of receiving solicitations. Other commenters noted that consumers would not provide contact information if they believed that the affiliate would already have the consumer's contact information or would obtain it from the consumer's financial institution. Some commenters believed that the consumer should not have to make an affirmative request for information in order to have an inquiry. Commenters also expressed concern that the discussion in the supplementary information would require consumers to use specific words to trigger the exception.

The Agencies have revised the third prong of the definition of ''pre-existing business relationship'' to reflect the definition's relocation to Subpart C, but have otherwise adopted it as proposed. The Agencies continue to believe that it

[10] H.R. Rep. No. 102–317, at 14–15 (1991). *See also* 68 FR 4,580, 4,591–94 (Jan. 29, 2003).

[11] 149 Cong. Rec. S13,980 (daily ed. Nov. 5, 2003) (statement of Senator Feinstein) (noting that the ''pre-existing business relationship'' definition ''is the same definition developed by the Federal Trade Commission in creating a national 'Do Not Call' registry for telemarketers'').

[12] *See* 68 FR at 4,594.

is appropriate to consider what the consumer says in determining whether the consumer has made an inquiry about a product or service. It may not be necessary, however, for the consumer to provide contact information in all cases. As discussed below, the Agencies have revised the examples of inquiries to illustrate different circumstances.

Consumer groups and NAAG urged the Agencies not to expand the definition of ''pre-existing business relationship'' to include any additional types of relationships. Industry commenters suggested a number of additional bases for establishing a pre-existing business relationship. Several industry commenters believed that the term ''pre-existing business relationship'' should be defined to include relationships arising out of the ownership of servicing rights, a participation interest in lending transactions, and similar relationships. These commenters provided no further explanation for why such an expansion was necessary. One commenter urged the Agencies to expand the definition of ''pre-existing business relationship'' to apply to affiliates that share a common trade name, share the same employees or representatives, operate out of the same physical location or locations, and offer similar products.

In addition, a number of industry commenters requested clarification of the term ''pre-existing business relationship'' as applied to manufacturers that make sales through dealers. These commenters explained that automobile manufacturers do not sell vehicles directly to consumers, but through franchised dealers. Vehicle financing may be arranged through a manufacturer's captive finance company or independent sources of financing. These commenters noted that manufacturers often provide consumers with information about warranty coverage, recall notices, and other product information. According to these commenters, manufacturers also send solicitations to consumers about their products and services, drawing in part on transaction or experience information from the captive finance company. These commenters asked the Agencies to clarify that the relationship between a manufacturer and a consumer qualifies as a pre-existing business relationship based on the purchase, rental, or lease of the manufacturer's goods, or, alternatively, to exercise their authority to add this relationship as an additional basis for a pre-existing business relationship. One commenter asked the Agencies to clarify that a pre-existing business relationship could be established even if the person provides a product or service to the consumer without charging a fee.

The Agencies do not believe it is necessary to add any additional bases for a pre-existing business relationship. The Agencies acknowledge that a pre-existing business relationship exists where a person owns the servicing rights to a consumer's loan and such person collects payments from, or otherwise deals directly with, the consumer. In the Agencies' view, however, that situation qualifies as a financial transaction and thus falls within the second prong of the definition of ''pre-existing business relationship.'' The Agencies have included an example, discussed below, to illustrate how the ownership of servicing rights can create a pre-existing business relationship.

A pre-existing business relationship does not arise, however, solely from a participation interest in a lending transaction because such an interest does not result in a financial contract or a financial transaction between the consumer and the participating party. The Agencies decline to add a specific provision for franchised dealers. The statute contains no special provision addressing franchised dealers, as it does for licensed agents. Moreover, a franchised dealer and a manufacturer generally are not affiliates and thus are subject to the GLBA privacy rules relating to information sharing with non-affiliated third parties. The Agencies also find no basis for including within the meaning of ''pre-existing business relationship'' any affiliate that shares a common trade name or representatives, or that operates from the same location or offers similar products. Finally, the Agencies decline to add a provision that would create a pre-existing business relationship when a consumer obtains a product or service without charge from a person. Such a provision would be overly broad, is not necessary given the breadth of the statutory definition of ''pre-existing business relationship,'' and could result in circumvention of the notice requirement.

Proposed §__.20(d)(1) provided four examples of the pre-existing business relationship exception. In the final rules, these examples have been renumbered as §__.20(b)(4)(ii) and (iii), and revised to illustrate the definition of ''pre-existing business relationship,'' rather than the corresponding exception.

The two examples relating to the first and second prongs of the definition of ''pre-existing business relationship'' have been revised in §__.20(b)(4)(ii)(A) and (B) to focus on a depository institution as the person with the pre-existing business relationship, but are otherwise substantively similar to the proposal. One commenter recommended expanding the example now contained in §__.20(b)(4)(ii)(A) to refer to the licensed agent that wrote the policy or services the relationship. The Agencies believe that adding the term ''licensed agent'' to the definition is sufficient and see no reason to further complicate this example to illustrate how the definition applies to licensed agents.

Section __.20(b)(4)(ii)(C) is new and illustrates when a pre-existing business relationship is created in the context of a mortgage loan. This example specifically addresses circumstances where either the loan or ownership of the servicing rights to the loan is sold to a third party. As this example illustrates, sale of the entire loan by the original lender terminates the financial transaction between the consumer and that lender and creates a new financial transaction between the consumer and the purchaser of the loan. However, the original lender's sale of a fractional interest in the loan to an investor does not create a new financial transaction between the consumer and the investor. When the original lender sells a fractional interest in the consumer's loan to an investor but also retains an ownership interest in the loan, however, the original lender continues to have a pre-existing business relationship with the consumer because the consumer obtained a loan from the lender and the lender continues to own an interest in the loan. In addition, the ownership of servicing rights coupled with direct dealings with the consumer results in a financial transaction between the consumer and the owner of the servicing rights, thereby creating a pre-existing business relationship between the consumer and the owner of the servicing rights. The Agencies note that a financial institution that owns servicing rights generally has a customer relationship with the consumer and an obligation to provide a GLBA privacy notice to the consumer.

The example in proposed §__.20(d)(1)(iii) regarding applications and inquiries elicited comment. Some industry commenters urged the Agencies to revise this example so that it does not depend upon the consumer's expectations or the consumer providing contact information. These commenters noted, for example, that the contact information would be self-evident if the consumer makes an e-mail request or provides a return address on an envelope. These commenters also believed that in the case of a telephone

call initiated by a consumer, a captured telephone number should be sufficient to create an inquiry if the consumer requests information about products or services.

In the final rules, the Agencies have crafted three separate examples from proposed § __.20(d)(1)(iii). Section __.20(b)(4)(ii)(D) provides an example where a consumer applies for a product or service, but does not obtain the product or service for which she applied. Contact information is not mentioned in this example because the consumer presumably would have supplied it on the application.

Section __.20(b)(4)(ii)(E) provides an example where a consumer makes a telephone inquiry about a product or service offered by a depository institution and provides contact information to the institution, but does not obtain a product or service from or enter into a financial transaction with the institution. The Agencies do not believe that an institution's capture of a consumer's telephone number during a telephone conversation with the consumer about the institution's products or services is sufficient to create an inquiry. In that circumstance, to ensure that an inquiry has been made, the institution should ask the consumer to provide his or her contact information, or confirm with the consumer that the consumer has a pre-existing business relationship with an affiliate.

Section __.20(b)(4)(ii)(F) provides an example where the consumer makes an e-mail inquiry about a product or service offered by a depository institution, but does not separately provide contact information. In that case, the consumer provides the financial institution with contact information in the form of the consumer's e-mail address. In addition, e-mail communications, unlike telephone communications, do not provide institutions with the same opportunity to ask for the consumer's contact information.

Industry commenters recommended deleting the example in proposed § __.20(d)(1)(iv) illustrating a call center scenario where a consumer would not reasonably expect to receive information from an affiliate. In the final rules, the Agencies have included a positive example of an inquiry made by a consumer through a call center in § __.20(b)(4)(ii)(G), while retaining the negative example from the proposal in § __.20(b)(4)(iii)(A). In addition, the Agencies have included in § __.20(b)(4)(iii)(B) an example of a consumer call to ask about retail locations and hours, which does not create a pre-existing business relationship. This example is substantively similar to the example from proposed § __.20(d)(2)(iii).

A new example in § __.20(b)(4)(iii)(C) illustrates a case where a consumer responds to an advertisement that offers a free promotional item, but the advertisement does not indicate that an affiliate's products or services will be marketed to consumers who respond to the advertisement. The example illustrates that the consumer's response does not create a pre-existing business relationship because the consumer has not made an inquiry about a product or service, but has merely responded to an offer for a free promotional item. Similarly, if a consumer is directed by a company with which the consumer has a pre-existing business relationship to contact the company's affiliate to receive a promotional item but the company does not mention the affiliate's products or services, the consumer's contact with the affiliate about the promotional item does not create a pre-existing business relationship between the consumer and the affiliate.

Solicitation

Proposed § __.3(n) defined the term ''solicitation'' to mean marketing initiated by a person to a particular consumer that is based on eligibility information communicated to that person by its affiliate and is intended to encourage the consumer to purchase a product or service. The proposed definition further clarified that a communication, such as a telemarketing solicitation, direct mail, or e-mail, would be a solicitation if it is directed to a specific consumer based on eligibility information. The proposed definition did not, however, include communications that were directed at the general public without regard to eligibility information, even if those communications were intended to encourage consumers to purchase products and services from the person initiating the communications.

Congress gave the Agencies the authority to determine by regulation that other communications do not constitute a solicitation. The Agencies did not propose to exercise this authority. The Agencies solicited comment on whether, and to what extent, various tools used in Internet marketing, such as pop-up ads, may constitute solicitations as opposed to communications directed at the general public, and whether further guidance was needed to address Internet marketing.

Most commenters believed that the proposed definition tracked the statutory definition contained in section 624 of the FCRA. A number of industry commenters, however, believed that the proposed definition misstated the types of marketing that would not qualify as a solicitation. Specifically, the first sentence of proposed § __.3(n)(2) provided that ''[a] solicitation does not include communications that are directed at the general public and distributed without the use of eligibility information communicated by an affiliate.'' These commenters believed that a solicitation should not include *either* marketing directed at the general public *or* marketing distributed without the use of eligibility information communicated by an affiliate. Several industry commenters also requested that the Agencies include the phrase ''of a product or service'' in the introductory language for consistency with the statutory definition. Some industry commenters sought clarification that certain types of communications would not constitute solicitations, for example, marketing announcements delivered via pre-recorded call center messages, automated teller machine screens, or Internet sites, or product information provided at or through educational seminars, customer appreciation events, or newsletters.

NAAG urged the Agencies to clarify the portion of the definition that refers to ''a particular consumer.'' NAAG believed that mass mailings of the same or similar marketing materials to a large group of consumers could fall within the definition of ''solicitation,'' so long as the marketing is based on eligibility information received from an affiliate. NAAG expressed concern that some might construe the term ''particular'' to narrow the meaning of a ''solicitation.''

With regard to Internet marketing, industry commenters urged the Agencies not to address such practices in this rulemaking. These commenters believed that the definition of ''solicitation'' should provide specific guidance that ''pop-up'' ads and other forms of Internet marketing generally were directed to the general public and not based on eligibility information received from an affiliate, or that such marketing would fall within an exception. NAAG believed that such advertisements should be treated as solicitations if they were based on any eligibility information received from an affiliate. Consumer groups believed that if an affiliate's pop-up ads and other Internet marketing were the result of specific actions by the consumer or information collected based upon a consumer's experience on the Internet,

then such marketing should be considered solicitations. These commenters also believed that pop-up ads and other Internet marketing targeted to all customers of a company should be treated as solicitations if based on the consumer's experience on the Internet.

Section __.20(b)(5) of the final rules contains the definition of ''solicitation.'' The definition has been revised to track the statutory language more closely. The phrase ''of a product or service'' has been added to the definition, as requested by some commenters. To ensure consistency with the definition of ''pre-existing business relationship,'' the phrase ''or obtain'' has been retained so that the definition of ''solicitation'' will include marketing for the rental or lease of goods or services, financial transactions, and financial contracts. The Agencies have also deleted as unnecessary the reference to communications ''distributed without the use of eligibility information communicated by an affiliate.'' Marketing that is undertaken without the use of eligibility information received from an affiliate is not covered by the affiliate marketing rules. Moreover, there is no restriction on using eligibility information received from an affiliate in marketing directed at the general public, such as radio, television, or billboard advertisements. The phrase ''to a particular consumer'' has been retained because it is part of the statutory definition. The Agencies do not believe that the phrase ''to a particular consumer'' excludes large-scale marketing campaigns from the definition of ''solicitation'' because, within such campaigns, eligibility information received from an affiliate may be used to target individual consumers.

The definition of ''solicitation'' does not distinguish between different mediums. A determination of whether a marketing communication constitutes a solicitation depends upon the facts and circumstances. The Agencies have decided not to make those determinations in this rulemaking. Thus, the Agencies are not adopting special rules or guidance regarding Internet-based marketing; whether Internet-based marketing is a solicitation in a particular case will be determined according to the same criteria that apply to other means of marketing. The Agencies also decline to exclude categorically from the definition of ''solicitation'' marketing messages on voice response units, ATM screens, or other forms of media. Marketing delivered via such media may be solicitations if such marketing is targeted to a particular consumer based on eligibility information received from an affiliate. For example, a marketing message on an ATM screen would be a solicitation if it is targeted to a particular consumer based on eligibility information received from an affiliate, but would not be a solicitation if it is delivered to all consumers that use the ATM.

Similarly, the Agencies decline to exclude educational seminars, customer appreciation events, focus group invitations, and similar forms of communication from the definition of ''solicitation.'' The Agencies believe that such activities must be evaluated according to the facts and circumstances and some of those activities may be coupled with, or a prelude to, a solicitation. For example, an invitation to a financial educational seminar where the invitees are selected based on eligibility information received from an affiliate may be a solicitation if the seminar is used to solicit the consumer to purchase investment products or services.

You or Bank

Section __.20(b)(6) of each Agency's rule defines either ''you'' or ''bank'' to include persons covered by Subpart C of the Agency's rule, as described in § __.20(a).

Section __.21 Affiliate Marketing Opt-out and Exceptions

Initial Notice and Opt-out Requirement

The Agencies proposed to establish certain rules relating to the requirement to provide the consumer with notice and a reasonable opportunity and a simple method to opt out of a person's use of eligibility information that it obtained from an affiliate for the purpose of making or sending solicitations to the consumer. The Agencies noted that the statute is ambiguous because it does not specify which affiliate must provide the opt-out notice to the consumer. The Agencies addressed this ambiguity by proposing to place certain responsibilities on the communicating affiliate and other responsibilities on the receiving affiliate.

Proposed § __.20(a) set forth the duties of a communicating affiliate. That section required the communicating affiliate to provide a notice to the consumer before a receiving affiliate could use eligibility information to make or send solicitations to the consumer. Under the proposal, the opt-out notice would state that eligibility information may be communicated to and used by the receiving affiliate to make or send solicitations to the consumer regarding the affiliate's products and services, and would give the consumer a reasonable opportunity and a simple method to opt out.

Proposed § __.20(a) also contained two rules of construction relating to the communicating affiliate's duty to provide the notice. The first rule of construction would have allowed the notice to be provided either in the name of a person with which the consumer currently does or previously has done business or in one or more common corporate names shared by members of an affiliated group of companies that includes the common corporate name used by that person. The rule of construction also would have provided alternatives regarding the manner in which the notice could be given, such as by allowing the communicating affiliate to provide the notice either directly to the consumer, through an agent, or through a joint notice with one or more of its affiliates. The second rule of construction would have clarified that, to avoid duplicate notices, it would not be necessary for each affiliate that communicates the same eligibility information to provide an opt-out notice to the consumer, so long as the notice provided by the affiliate that initially communicated the information was broad enough to cover use of that information by each affiliate that received and used it to make solicitations. The proposal included examples to illustrate how each of these rules of construction would work.

Proposed § __.20(b) set forth the general duties of a receiving affiliate. That section would have prohibited the receiving affiliate from using eligibility information it received from an affiliate to make solicitations to the consumer unless, prior to such use, the consumer was provided an opt-out notice that applied to that affiliate's use of eligibility information to make solicitations and a reasonable opportunity and simple method to opt out, and the consumer did not opt out of that use.

Most industry commenters maintained that the final rules should not require any specific entity to provide the opt-out notice, but should only require that the consumer be provided an opt-out notice covering an affiliate's use of eligibility information before a solicitation is made to the consumer. These commenters believed the final rules should provide flexibility and allow either the receiving affiliate, the communicating affiliate, or any other affiliate to provide the opt-out notice. These commenters maintained that the statute is not ambiguous and

does not impose any obligations on a specific entity, such as the communicating affiliate, to provide the opt-out notice. Some of these commenters acknowledged, however, that the communicating affiliate would, as a practical matter, most likely give the opt-out notice.

A number of industry commenters expressed concern that the proposed rules would create a basis for civil liability against the communicating affiliate under section 624 because that section is covered by the FCRA's private right of action provisions in sections 616 and 617. Some commenters noted that, to avoid exposure to civil liability, a communicating affiliate would have to require receiving affiliates to commit to not using the information to make solicitations, give an opt-out notice whenever they share eligibility information with affiliates, or never share eligibility information with affiliates. These commenters maintained that, in many cases, none of these solutions would be practical, for example, where a receiving affiliate negligently failed to comply with a commitment not to make solicitations unless notice has been given to the consumer.

Several industry commenters noted that the language in section 624(a)(1)(A) that ''information may be communicated'' could be included in an opt-out notice provided by the receiving affiliate. These commenters also believed that the statutory requirement that the Agencies consider existing affiliate sharing notification practices and permit coordinated and consolidated notices did not imply that the communicating affiliate should be responsible for providing the opt-out notice.

Industry commenters made several suggestions for revising the language of the proposal. Some suggested revising proposed § __.20(a) to omit any reference to the communicating affiliate and to incorporate the passive voice used in the statute. Others suggested various ways of merging proposed § __.20(b) into proposed § __.20(a) to focus exclusively on the responsibilities of the receiving affiliate. One commenter identified certain drafting problems it believed arose from the fact that the proposal focused alternately on the communicating affiliate and the receiving affiliate and that those two entities may be regulated by different regulatory agencies.

A few industry commenters acknowledged that the Agencies had raised legitimate concerns in the supplementary information to the proposal about how meaningful a notice could be when provided by a receiving affiliate that the consumer may not recognize. These commenters believed that this concern could be addressed through other means. One commenter, for example, suggested the following introductory language in paragraph (a)(2): ''The notice required by this paragraph (a) may be provided either in the name of the bank receiving the information (provided that such bank also identifies the affiliate which provided such information), in the name of the affiliate which provided such information, or in one or more common corporate names shared by such bank and the affiliate which provided the information, and may be provided in the following manner * * * '' Another industry commenter expressed support for the rules of construction with revisions to allow the use of brand names and trade names, as well as the actual ''corporate'' name, and to allow an agent or affiliate to send a common notice that uses more than one common name in a non-deceptive manner.

Consumer group commenters supported making the communicating affiliate responsible for providing the notice and opportunity to opt out. These commenters believed that allowing the receiving affiliate to send the opt-out notice would invite consumer confusion as to whether or not the opt-out notice itself is a solicitation. These commenters also believed that the Agencies should require the names of the receiving affiliates to be clearly disclosed to the consumer. Consumer groups also believed that the proposed rules of construction struck a reasonable balance by allowing commonly named affiliates to share a notice while making clear that a notice from an affiliate with whom the consumer is not familiar will not be effective. They also suggested that the company with the pre-existing business relationship should be clearly marked on the opt-out notice.

NAAG believed that a receiving affiliate should not be permitted to give the opt-out notice solely on its own behalf because a receiving affiliate is unlikely to be an entity from which the consumer would expect to receive important communications. NAAG also requested that the Agencies revise certain portions of the proposed rules of construction, for example, by deleting from proposed § __.20(a)(2)(i) the phrase ''or previously has done business'' based on concerns that it would render the notice partially ineffective because, even without this phrase, the notice would not be required for 18 months after a customer relationship ends. NAAG also requested that the Agencies revise proposed §§ __.20(a)(2)(B)(2) and (a)(2)(C) to clarify that the common name used must be one that includes the name used by the person providing the opt-out notice.

In the proposal, the Agencies did not require the opt-out notice to be provided in writing. The Agencies noted, however, that they contemplated that the opt-out notice would be provided to the consumer in writing or, if the consumer agrees, electronically. The proposal solicited comment on whether there were circumstances in which it would be necessary and appropriate to allow oral notice and opt out and how an oral notice could satisfy the clear and conspicuous standard in the statute.

Industry commenters believed that the final rules should permit oral notices. These commenters identified circumstances in which a relationship is established by telephone as an example of when oral notice would be appropriate. Some industry commenters also noted that an oral notice should be permitted because the affiliate sharing opt-out notice under section 603(d)(2)(A)(iii) may be given orally, as well as in writing or electronically. Several industry commenters noted that the FTC in the Telemarketing Sales Rule and the OCC in regulations relating to debt cancellation contracts and debt suspension agreements have permitted clear and conspicuous oral notices. These commenters did not believe that allowing oral notice in these circumstances had created any enforcement difficulties for the FTC or OCC. Other industry commenters noted that institutions could demonstrate compliance through the use of scripts or by monitoring or recording calls.

Consumer groups believed that a written opt-out notice should be required in all cases. These commenters believed that, with an oral notice, it is impossible to ensure that a consumer receives the appropriate notice or information on the right to opt out. They believed that allowing oral notices would create enforcement barriers for regulators. Consumer groups also believed that institutions have strong economic incentives to prevent consumers from opting out and would engage in misrepresentations or otherwise use language in their scripts that is designed to discourage consumers from opting out. NAAG believed that oral notices would not meet the statutory requirement for a clear, conspicuous, and concise notice, that consumers would be less likely to comprehend oral notices, and enforcement would be more difficult if oral opt-out notices were allowed.

Section __.21(a) of the final rules contains the revised provisions

regarding the initial notice and opt out requirement. Although the language of this section has been revised and simplified, the substance of this provision is substantially similar to the proposal.

Section __.21(a)(1) sets forth the general rule. This section contains the three conditions that must be met before a person may use eligibility information about a consumer that it receives from an affiliate to make a solicitation for marketing purposes to the consumer. First, it must be clearly and conspicuously disclosed to the consumer in writing or, if the consumer agrees, electronically, in a concise notice that the person may use shared eligibility information to make solicitations to the consumer. Second, the consumer must be provided a reasonable opportunity and a reasonable and simple method to opt out of the use of that eligibility information to make solicitations to the consumer. Third, the consumer must not have opted out. Section __.21(a)(2) of the final rules provides an example of the general rule.

The Agencies have concluded that the opt-out notice may not be provided orally, but must be provided in writing or, if the consumer agrees, electronically. The statute requires the Agencies to consider the affiliate sharing notification practices employed on the date of enactment and to ensure that notices and disclosures may be coordinated and consolidated in promulgating regulations. The affiliate sharing notice under section 603(d)(2)(A)(iii) of the FCRA generally must be included in the GLBA privacy notice, which must be provided in writing, or if the consumer agrees, electronically. Requiring the affiliate marketing opt-out notice to be provided in writing, or if the consumer agrees, electronically, is thus consistent with existing affiliate sharing notification practices and promotes coordination and consolidation of the three privacy-related opt-out notices. The Agencies are not persuaded that there are any circumstances where it would be necessary to provide an oral opt-out notice. A number of key exceptions to the initial notice and opt-out requirement, such as the pre-existing business relationship exception, consumer-initiated communication exception, and consumer authorization or request exception, may be triggered by an oral communication with the consumer. It also could be more difficult for the Agencies to monitor and enforce compliance with the final rules if oral opt-out notices were allowed. Accordingly, the final rules require the opt-out notice to be provided in writing or, if the consumer agrees, electronically.

Section __.21(a)(3) identifies those affiliates who may provide the initial opt-out notice. This section provides that the initial opt-out notice must be provided either by an affiliate that has or has previously had a pre-existing business relationship with the consumer, or as part of a joint notice from two or more members of an affiliated group of companies, provided that at least one of the affiliates on the joint notice has or has previously had a pre-existing business relationship with the consumer. The final rules follow the general approach taken in the proposal to ensure that the notice is provided by an entity known to the consumer, while eliminating potentially ambiguous and confusing terms like ''communicating affiliate'' and ''receiving affiliate.''

The Agencies also have eliminated as unnecessary the rules of construction. Joint notices are now addressed directly in § __.21(a)(3). The Agencies also have concluded that the provisions from the proposal relating to notice provided by an agent are unnecessary. General agency principles, however, continue to apply. An affiliate that has or has previously had a pre-existing business relationship with the consumer may direct its agent to provide the opt-out notice on its behalf.

The Agencies have concluded that the statute's silence with regard to which affiliates may provide the opt-out notice makes the statute ambiguous on this point, despite industry comments to the contrary. The Agencies also continue to believe that consumers are more likely to pay attention to a notice provided by a person known to the consumer. The Agencies remain concerned that a notice provided by an entity unknown to the consumer may not provide meaningful or effective notice, and that consumers may ignore or discard notices provided by unknown entities. Industry comments on the proposal did little to address those concerns. For practical reasons, the Agencies believe that affiliate marketing opt-out notices typically would be provided by an affiliate that has or has previously had a pre-existing business relationship with the consumer, or as part of a joint notice, whether or not required by the rule.

The Agencies appreciate industry concerns about civil liability and have revised the final rules to address those concerns. Specifically, in contrast to the proposal, the final rules do not impose duties on any affiliate other than the affiliate that intends to use shared eligibility information to make solicitations to the consumer. Although an opt-out notice must be provided by an affiliate that has or has previously had a pre-existing business relationship with the consumer (or as part of a joint notice), that affiliate has no duty to provide such a notice. Instead, the final rule provides that absent such a notice, an affiliate must not use shared eligibility information to make solicitations to the consumer. Industry concerns about civil liability also may be mitigated to some extent by the Supreme Court's recent decision in *Safeco Ins. Co. of America* v. *Burr*, 127 S. Ct. 2201 (June 4, 2007).

Finally, many institutions currently require consumers to provide their Social Security numbers when exercising their existing GLBA and FCRA opt-out rights. The Agencies believe that institutions likely would follow their existing practice with regard to affiliate marketing opt-outs. To combat identity theft and prevent ''phishing,'' however, the Agencies, along with many institutions, have been educating consumers *not* to provide their Social Security numbers to unknown entities. Furthermore, as participants in the President's Identity Theft Task Force, the Agencies have made a commitment to examine and recommend ways to limit the private sector's use of Social Security numbers.

The approach recommended by industry commenters would allow an unknown entity not only to provide an affiliate marketing opt-out notice to the consumer, but also to require the consumer to reveal his or her Social Security number to that unknown entity in order to exercise the opt-out right. Such an approach would send conflicting messages to consumers about providing Social Security numbers to unknown entities. This approach also would be inconsistent with the Agencies' current efforts to develop a comprehensive record on the uses of the Social Security number in the private sector and evaluate their necessity, as recommended by the President's Identity Theft Task Force.[13]

Making Solicitations

The proposal repeatedly referred to ''making or sending'' solicitations. Several commenters suggested revising the regulations to eliminate all references to ''sending'' solicitations. These commenters believed that the statute only concerns the use of eligibility information to ''make'' solicitations and does not address ''sending'' solicitations. Commenters expressed concern that by referring to

[13] *See Combating Identity Theft: A Strategic Plan* at 26–27 (April 2007) (available at *www.idtheft.gov*).

''sending'' solicitations, the proposal would apply the notice and opt-out requirements to servicers that send solicitations on behalf of another entity.

The Agencies have revised the final rules to eliminate all combined references to ''making or sending'' solicitations. The general rule in section 624(a)(1), along with the duration provisions in section 624(a)(3) and the pre-existing business relationship exception in section 624(a)(4)(A), refer to ''making'' or ''to make'' a solicitation. Other provisions of the statute, such as the consumer choice provision in section 624(a)(2)(A), the service provider exception in section 624(a)(4)(C), the non-retroactivity provision in section 624(a)(5), and the definition of ''pre-existing business relationship'' in section 624(d)(1), refer to ''sending'' or ''to send'' a solicitation. The verb ''to send,'' as used in the statute, refers to a ministerial act that a service provider, such as a mail house, performs for the person making the solicitation, (*see* 15 U.S.C. 1681s–3(a)(4)(C)), or indicates the point in time after which solicitations are no longer permitted. *See* 15 U.S.C. 1681s–3(d)(1)(B) and (C).

The Agencies conclude that ''making'' and ''sending'' solicitations are different activities and that the focus of the statute is primarily on the ''making'' of solicitations. For example, a service provider may send a solicitation on behalf of another entity, but it is the entity on whose behalf the solicitation is sent that is making the solicitation and thus is subject to the general prohibition on making a solicitation, unless the consumer is given notice and an opportunity to opt out. Accordingly, the Agencies have revised the final rules to refer to ''making'' a solicitation, except where the statute specifically refers to ''sending'' solicitations.

The statute, however, does not describe what a person must do in order ''to make'' a solicitation. Similarly, the legislative history does not contain guidance as to the meaning of ''making'' a solicitation. Nevertheless, the Agencies believe it is important to provide clear guidance regarding what activities result in making a solicitation.

One commenter suggested that the test for making a solicitation should turn on whether an affiliate having a pre-existing business relationship with the consumer retains the discretion to determine whether or not to send the solicitation. This commenter provided an example where a financial institution obtains a list of an affiliate's customers from a common shared database, applies its own criteria to this list, and then requests the affiliate with an existing business relationship to solicit the affiliate's own customers to purchase the financial institution's products or services. (Thus, the financial institution would be using eligibility information to select a list of its affiliate's customers to receive the financial institution's marketing materials.) This commenter believed that section 624 should not apply so long as the affiliate with the existing business relationship has discretion to determine whether or not to send the solicitations. This commenter also maintained that the applicability of section 624's notice and opt-out requirement should depend on who markets the product and not on what the product is or whose product it is.

Nothing in the statute indicates that the discretion of the affiliate providing the eligibility information to determine whether or not to send a solicitation on behalf of a person who has received eligibility information from that affiliate is the test for what constitutes making a solicitation. Rather, the statute focuses on whether the person receiving eligibility information from an affiliate uses that information to market its products or services to consumers. A ''discretion to send'' test would also inappropriately link the terms ''making'' and ''sending'' in a manner that would promote confusion and undercut arguments made by commenters urging the Agencies to disassociate the two terms. Finally, a ''discretion to send'' test could foster circumvention of the notice and opt-out requirement, restrict the ability of consumers to prohibit solicitations in a manner not contemplated by the statute, and make it difficult for the Agencies to administer and enforce the statute.

Section __.21(b) of the final rules clarifies what constitutes ''making'' a solicitation for purposes of Subpart C. Section __.21(b)(1) provides that a person makes a solicitation for marketing purposes to a consumer if: (a) The person receives eligibility information from an affiliate; (b) the person uses that eligibility information to do one of the following—identify the consumer or type of consumer to receive a solicitation, establish the criteria used to select the consumer to receive a solicitation, or decide which of its products or services to market to the consumer or tailor its solicitation to that consumer; and (c) as a result of the person's use of the eligibility information, the consumer is provided a solicitation about the person's products or services.

The Agencies recognize that several common industry practices may complicate application of the rule outlined in § __.21(b)(1). First, affiliated groups often use a common database as the repository for eligibility information obtained by various affiliates, and information in that database may be accessible to multiple affiliates. Second, affiliated companies often use service providers to perform marketing activities, and some of those service providers may provide services for a number of different affiliates. Third, an affiliate may use its own eligibility information to market the products or services of another affiliate. Sections __.21(b)(2)–(5) address these issues.

Section __.21(b)(2) clarifies that a person may receive eligibility information from an affiliate in various ways, including when the affiliate places that information into a common database that the person may access. Of course, receipt of eligibility information from an affiliate is only one element of the rule outlined in § __.21(b)(1). In the case of a common database, *use* of the eligibility information will be the key element in determining whether a person has made a solicitation.

Section __.21(b)(3) provides that a person receives or uses an affiliate's eligibility information if a service provider acting on behalf of the person receives or uses that information in the manner described in §§ __.21(b)(1)(i) or (b)(1)(ii), except as provided in § __.21(b)(5), which is discussed below. Section __.21(b)(3) also provides that all relevant facts and circumstances will determine whether a service provider is acting on behalf of a person when it receives or uses an affiliate's eligibility information in connection with marketing that person's products or services.

Section __.21(b)(4) addresses constructive sharing. In the supplementary information to the proposal, the Agencies solicited comment on whether the notice and opt-out requirements of these rules should apply to circumstances that involve a ''constructive sharing'' of eligibility information to conduct marketing, given the policy objectives of section 214 of the FACT Act. By way of example, in a ''constructive sharing'' scenario, a consumer has a relationship with a financial institution, and the financial institution is affiliated with an insurance company. The insurance company develops specific eligibility criteria, such as consumers having combined deposit balances in excess of $50,000 or average monthly demand account deposits in excess of $10,000, without the use of eligibility information received from the financial institution. The insurance company provides its criteria to the financial

institution and asks the institution to identify financial institution consumers that meet the eligibility criteria and send insurance company marketing materials to those consumers. The financial institution sends the marketing materials to those consumers who meet the insurance company's eligibility criteria. A consumer who meets the eligibility criteria contacts the insurance company after receiving the insurance company marketing materials in the manner specified in those materials. The consumer's response provides the insurance company with discernible eligibility information, such as through a response form that is coded to identify the consumer as an individual who meets the specific eligibility criteria.[14]

Industry commenters urged the Agencies not to apply the notice and opt-out requirement to ''constructive sharing'' situations. The principal arguments made by these commenters in support of their position were as follows. First, in a constructive sharing scenario, there is no sharing of eligibility information among affiliates. Rather, the consumer provides information to an affiliate when responding. Second, section 624 applies when a person *uses* eligibility information furnished by its affiliate to make a solicitation for its own products or services to the consumer. In constructive sharing, however, the person does not use eligibility information and does not make a solicitation as defined in the statute. Third, the affiliate that sends the marketing material has a pre-existing business relationship with the consumer and is thus exempt from the notice and opt-out requirements. Fourth, if the consumer responds to the marketing materials, for example, by returning a response card to an affiliate, one or more of the exceptions to the notice and opt-out requirement would apply, such as the consumer-initiated communication exception, the pre-existing business relationship exception, or both.

Consumer groups believed that constructive sharing contravenes the intent of Congress and amounts to a loophole that should be fixed. Similarly, NAAG believed that the letter and spirit of section 624 required subjecting constructive sharing to the notice and opt-out requirements and that to find otherwise would create a significant and unwarranted exception.

After considering the constructive sharing issue, the Agencies conclude that the statute only covers situations where a person *uses* eligibility information that it received from an affiliate to make a solicitation to the consumer about its products or services. In a ''constructive sharing'' scenario like that described above, a pre-existing business relationship is established between the consumer and the insurance company when the consumer contacts the insurance company to inquire about or apply for insurance products as a result of the consumer's receipt of the insurance marketing materials. This pre-existing business relationship is established before the insurance company uses any shared eligibility information to make solicitations to the consumer. Because the insurance company does not use shared eligibility information to make solicitations to the consumer before it establishes a pre-existing business relationship with the consumer, the statute does not apply.

The Agencies acknowledge the concerns expressed by consumer groups and NAAG regarding the decision not to apply the notice and opt-out requirements to constructive sharing situations. The statute's affiliate marketing provisions, however, only limit the use of eligibility information received from an affiliate to make solicitations to a consumer. A separate provision of the FCRA, section 603(d)(2)(A)(iii), regulates the sharing of eligibility information among affiliates and prohibits the sharing of non-transaction or experience information, such as credit scores from a consumer report or income from an application, among affiliates, unless the consumer is given notice and an opportunity to opt out of such sharing. The FCRA does not restrict the sharing of transaction or experience information among affiliates unless that information is medical information. Section 603(d)(2)(A)(iii) operates independent of the affiliate marketing rules. Thus, the existence of a pre-existing business relationship between a consumer and an affiliate that seeks to use shared eligibility information, such as credit scores or income, to market to that consumer (or the applicability of another exception to these affiliate marketing rules) does not relieve the entity sharing the credit score or income information of the requirement to comply with the affiliate sharing notice and opt-out provisions of section 603(d)(2)(A)(iii) of the FCRA before it shares that non-transaction or experience information with its affiliate.[15]

Section __.21(b)(4) describes two situations where a person is deemed *not* to have made a solicitation subject to Subpart C. Both situations assume that the person has not used eligibility information received from an affiliate in the manner described in § __.21(b)(1)(ii). First, a person does not make a solicitation subject to Subpart C if that person's affiliate uses its own eligibility information that it obtained in connection with a pre-existing business relationship it has or had with the consumer to market the person's products or services to the consumer. Second, if, in the situation just described, the person's affiliate directs its service provider to use the affiliate's own eligibility information to market the person's products or services to the consumer, and the person does not communicate directly with the service provider regarding that use of the eligibility information, then the person has not made a solicitation subject to Subpart C.

The core concept underlying the second prong of this provision is that the affiliate that obtained the eligibility information in connection with a pre-existing business relationship with the consumer controls the actions of the service provider using that information. Therefore, the service provider's use of the eligibility information should not be attributed to the person whose products or services will be marketed to consumers. In such circumstances, the service provider is acting on behalf of the affiliate that obtained the eligibility information in connection with a pre-existing business relationship with the consumer, and not on behalf of the person whose products or services will be marketed to that affiliate's consumers.

The Agencies also recognize that there may be situations where the person whose products or services are being marketed *does* communicate with the affiliate's service provider. This may be the case, for example, where the service provider performs services for various affiliates relying on information maintained in and accessed from a common database. In certain circumstances, the person whose products or services are being marketed may communicate with the affiliate's service provider, yet the service provider is still acting on behalf of the affiliate when it uses the affiliate's

[14] The supplementary information to the proposal noted that the notice and opt-out requirement would not apply if, for example, an insurance company asked its affiliated financial institution to include insurance company marketing material in periodic statements sent to consumers by the financial institution without regard to eligibility information.

[15] A sharing of information occurs if a reference code included in marketing materials reveals one affiliate's information about a consumer to another affiliate upon receipt of a consumer's response.

eligibility information in connection with marketing the person's products or services. Section __.21(b)(5) describes the conditions under which a service provider would be deemed to be acting on behalf of the affiliate with the pre-existing business relationship, rather than the person whose products or services are being marketed, notwithstanding direct communications between the person and the service provider.

Section __.21(b)(5) builds upon the concept of control of a service provider and thus is a natural outgrowth of § __.21(b)(4). Under the conditions set out in § __.21(b)(5), the service provider is acting on behalf of an affiliate that obtained the eligibility information in connection with a pre-existing business relationship with the consumer because, among other things, the affiliate controls the actions of the service provider in connection with the service provider's receipt and use of the eligibility information. This provision is designed to minimize uncertainty that may arise from application of the facts and circumstances test in § __.21(b)(3) to cases that involve direct communications between a service provider and a person whose products and services will be marketed to consumers.

Section __.21(b)(5) provides that a person does not make a solicitation subject to Subpart C if a service provider (including an affiliated or third-party service provider that maintains or accesses a common database that the person may access) receives eligibility information from the person's affiliate that the person's affiliate obtained in connection with a pre-existing business relationship it has or had with the consumer and uses that eligibility information to market the person's products or services to the consumer, so long as the following five conditions are met.

First, the person's affiliate controls access to and use of its eligibility information by the service provider (including the right to establish specific terms and conditions under which the service provider may use such information to market the person's products or services). This requirement must be set forth in a written agreement between the person's affiliate and the service provider. The person's affiliate may demonstrate control by, for example, establishing and implementing reasonable policies and procedures applicable to the service provider's access to and use of its eligibility information.

Second, the person's affiliate establishes specific terms and conditions under which the service provider may access and use that eligibility information to market the person's products or services (or those of affiliates generally) to the consumer, and periodically evaluates the service provider's compliance with those terms and conditions. These terms and conditions may include the identity of the affiliated companies whose products or services may be marketed to the consumer by the service provider, the types of products or services of affiliated companies that may be marketed, and the number of times the consumer may receive marketing materials. The specific terms and conditions established by the person's affiliate must be set forth in writing, but need not be set forth in a written agreement between the person's affiliate and the service provider. If a periodic evaluation by the person's affiliate reveals that the service provider is not complying with those terms and conditions, the Agencies expect the person's affiliate to take appropriate corrective action.

Third, the person's affiliate requires the service provider to implement reasonable policies and procedures designed to ensure that the service provider uses the affiliate's eligibility information in accordance with the terms and conditions established by the affiliate relating to the marketing of the person's products or services. This requirement must be set forth in a written agreement between the person's affiliate and the service provider.

Fourth, the person's affiliate is identified on or with the marketing materials provided to the consumer. This requirement will be construed flexibly. For example, the person's affiliate may be identified directly on the marketing materials, on an introductory cover letter, on other documents included with the marketing materials, such as a periodic statement, or on the envelope which contains the marketing materials.

Fifth, the person does not directly use the affiliate's eligibility information in the manner described in § __.21(b)(1)(ii).

These five conditions together ensure that the service provider is acting on behalf of the affiliate that obtained the eligibility information in connection with a pre-existing business relationship with the consumer because that affiliate controls the service provider's receipt and use of that affiliate's eligibility information.

Section __.21(b)(6) provides six illustrative examples of the rules relating to making solicitations as set forth in §§ __.21(b)(1)–(5).

Exceptions

Proposed § __.20(c) contained exceptions to the requirements of Subpart C and incorporated each of the statutory exceptions to the affiliate marketing notice and opt-out requirements that are set forth in section 624(a)(4) of the FCRA. The Agencies have revised the preface to the exceptions for clarity to provide that the provisions of Subpart C do not apply to ''you'' or ''the bank'' if a person uses eligibility information that it receives from an affiliate in certain circumstances. In addition, each of the exceptions has been moved to § __.21(c) in the final rules and is discussed below.

Pre-Existing Business Relationship Exception

Proposed § __.20(c)(1) provided that the provisions of Subpart C would not apply to an affiliate using eligibility information to make a solicitation to a consumer with whom the affiliate has a pre-existing business relationship. As noted above, a pre-existing business relationship exists when: (1) There is a financial contract in force between the affiliate and the consumer; (2) the consumer and the affiliate have engaged in a financial transaction (including holding an active account or a policy in force or having another continuing relationship) during the 18 months immediately preceding the date of the solicitation; (3) the consumer has purchased, rented, or leased the affiliate's goods or services during the 18 months immediately preceding the date of the solicitation; or (4) the consumer has inquired about or applied for a product or service offered by the affiliate during the 3-month period immediately preceding the date of the solicitation. Proposed § __.20(d)(1) provided examples of the pre-existing business relationship exception. As explained above, the Agencies have revised the examples from proposed § __.20(d)(1) in the final rules and included them as examples of the definition of ''pre-existing business relationship'' rather than as examples of the pre-existing business relationship exception.

Section __.21(c)(1) of the final rules revises the pre-existing business relationship exception to delete the word ''send'' and to eliminate as unnecessary the cross-reference to the location of the definition of ''pre-existing business relationship.'' As discussed above, commenters made a number of suggestions regarding the definition of ''pre-existing business relationship.'' The Agencies have

addressed those comments elsewhere. Most commenters supported the proposed text of the pre-existing business relationship exception, which generally tracks the statutory language.

Some commenters, however, apparently believed that the pre-existing business relationship exception is broader than it actually is. For example, assume that an insurance company has a pre-existing business relationship with a consumer and shares eligibility information about the consumer with its affiliates by putting that information into a common database that is accessible by all affiliates. The insurance company's depository institution affiliate accesses the database, reviews the data on the insurance company's consumers and, based on its review, decides to market to some of the insurance company's consumers. Rather than sending the solicitations itself, the depository institution asks the insurance company with the pre-existing business relationship to send solicitations on its behalf to the insurance company's consumers. As noted above, one commenter believed that in this circumstance the pre-existing business relationship exception would apply so long as the insurance company retained the discretion to decide whether or not to send the solicitations on behalf of the depository institution. However, the Agencies conclude that this situation does not fall within the pre-existing business relationship exception. Instead, the depository institution makes the solicitation because it used eligibility information received from an affiliate to select the consumer to receive a solicitation about its products or services and, as a result, the consumer is provided a solicitation. To eliminate any confusion and clarify the scope of the exception, the Agencies have added an example in § __.21(d)(1) of the final rules to illustrate a situation where the pre-existing business relationship exception would apply.

Employee Benefit Plan Exception

Proposed § __.20(c)(2) provided that the provisions of Subpart C would not apply to an affiliate using the information to facilitate communications to an individual for whose benefit the affiliate provides employee benefit or other services under a contract with an employer related to and arising out of a current employment relationship or an individual's status as a participant or beneficiary of an employee benefit plan. One commenter believed that the exception should be revised to permit communications ''to an affiliate about an individual for whose benefit an entity provides employee benefit or other services pursuant to a contract with an employer related to and arising out of the current employment relationship or status of the individual as a participant or beneficiary of an employee benefit plan.'' This commenter also suggested deleting the phrase ''you receive from an affiliate'' in the introduction to proposed § __.20(c). This commenter believed that this exception should permit an employer or plan sponsor to share information with its affiliates in order to offer other financial services, such as brokerage accounts or IRAs, to its employees. This commenter further requested clarification on whether the exception applies only if related to products offered as an employee benefit.

Section __.21(c)(2) of the final rules adopts the employee benefit exception as proposed. The Agencies decline to adopt the changes suggested by the one commenter. First, the suggestion to make the exception applicable to communications ''to an affiliate about an individual for whose benefit an entity provides employee benefit or other services'' differs from the language of the statute. The language of the proposed and final rules focuses on facilitating communications ''to an individual for whose benefit the person provides employee benefit or other services,'' which tracks the statutory language better than the alternative language proposed by the commenter.

Second, the only person to whom section 624 might apply is a person that receives eligibility information from an affiliate. Specifically, the statutory preface to the exceptions provides that ''[t]his section shall not apply to a person'' using information to do certain things. The language of the statute thus makes clear that the exceptions in section 624(a)(4) of the FCRA were meant to apply to persons that otherwise would be subject to section 624. In the case of the employee benefit exception, the person using the information is also ''the person provid[ing] employee benefit or other services pursuant to a contract with an employer.'' Therefore, the Agencies conclude that this exception, like the other provisions of Subpart C, should apply only to a person that uses eligibility information it receives from an affiliate to make solicitations to consumers about its products or services.

Service Provider Exception

Proposed § __.20(c)(3) provided that the provisions of Subpart C would not apply to an affiliate using the information to perform services for another affiliate, unless the services involve making or sending solicitations on its own behalf or on behalf of an affiliate and the service provider or such affiliate is not permitted to make or send such solicitations as a result of the consumer's election to opt out. Thus, under the proposal, when the notice has been provided to a consumer and the consumer has opted out, an affiliate subject to the consumer's opt-out election may not circumvent the opt-out by instructing the person with the consumer relationship or another affiliate to send solicitations to the consumer on its behalf.

Several industry commenters urged the Agencies to revise the proposed exception to conform to the statutory language. Specifically, with respect to the exclusion from the service provider exception, these commenters recommended that the Agencies delete the references to solicitations on behalf of the service provider. Some of these commenters maintained that the references to solicitations on behalf of the service provider itself would impose additional burdens and costs on companies that use a single affiliate to provide various administrative services to other affiliates and would make it more difficult to provide general educational materials to consumers. Some of these commenters also asked the Agencies to clarify that the limitation in the service provider exception has no applicability to any other exception.

Section __.21(c)(3) of the final rules revises the service provider exception to delete as surplusage the references to solicitations by a service provider on its own behalf. The Agencies note that the general rule in § __.21(a)(1) prohibits a service provider from using eligibility information it received from an affiliate to make solicitations to the consumer about its own products or services unless the consumer is given notice and an opportunity to opt out or unless one of the other exceptions applies. The service provider exception simply allows a service provider to do what the affiliate on whose behalf it is acting may do, such as using shared eligibility information to make solicitations to consumers to whom the affiliate is permitted to make such solicitations. The final rules also delete the word ''make'' from the exception to the service provider exception because, as discussed above, ''making'' and ''sending'' solicitations are distinct activities and this provision of the statute uses the verb ''to send.'' The Agencies note that, although the statute contains separate service provider and

pre-existing business relationship exceptions, nothing in those exceptions prevents an affiliate that has a pre-existing business relationship with the consumer from relying upon the service provider exception, where appropriate. Section __.21(d)(2) of the final rules provides examples of the service provider exception.

Consumer-Initiated Communication Exception

Proposed § __.20(c)(4) provided that the provisions of Subpart C would not apply to an affiliate using the information to make solicitations in response to a communication initiated by the consumer. The proposed rule further clarified that this exception may be triggered by an oral, electronic, or written communication initiated by the consumer.

The supplementary information noted that to be covered by the proposed exception, the use of eligibility information must be responsive to the communication initiated by the consumer. The supplementary information also explained that the time period during which solicitations remain responsive to the consumer's communication would depend on the facts and circumstances. As illustrated in the example in proposed § __.20(d)(2)(iii), if a consumer were to call an affiliate to ask about retail locations and hours, the affiliate could not use eligibility information to make solicitations to the consumer about specific products because those solicitations would not be responsive to the consumer's communication. Conversely, the example in proposed § __.20(d)(2)(i) illustrated that if the consumer calls an affiliate to ask about its products or services and provides contact information, solicitations related to those products or services would be responsive to the communication and thus permitted under the exception. Finally, as illustrated by the example in proposed § __.20(d)(2)(ii), the Agencies also contemplated that a consumer would not initiate a communication if an affiliate made the initial call and left a message for the consumer to call back, and the consumer responded.

Commenters generally supported the text of the proposed consumer-initiated communication exception. Several commenters, however, urged the Agencies to either delete the phrase ''orally, electronically, or in writing'' from the regulation or modify the language to read ''whether orally, electronically, or in writing.'' These commenters maintained that other means of communication may be used by consumers in the future and should not be precluded by the regulations. Another commenter welcomed the reference to oral communications and requested that the Agencies clarify that electronic communications refers to both e-mail and facsimile transmissions.

Many industry commenters objected to the statement in the supplementary information that to qualify for this exception, the use of eligibility information ''must be responsive'' to the communication initiated by the consumer. These commenters believed that the concept of ''responsiveness'' creates a vague, subjective, and narrow standard that could subject institutions to compliance risk. These commenters noted that the Agencies did not and could not provide a clear definition of what would be ''responsive.'' Some of these commenters noted that consumers may not be familiar with the various types of products or services available to them and the different affiliates that offer those products or services and may rely on the institution to inform them about available options. For this reason, most of these commenters maintained that the exception should not limit an affiliate from responding with solicitations about any product or service. Some of these commenters believed that it would be difficult to monitor compliance with or to develop scripts for a ''responsiveness'' standard by customer service representatives. One commenter noted that the Senate bill used more restrictive language in this exception than the final bill passed by Congress. Some commenters also objected to the statement that the time period during which solicitations remain responsive would depend on the facts and circumstances.

NAAG supported the statement in the supplementary information that, to qualify for this exception, the use of eligibility information ''must be responsive'' to the communication initiated by the consumer. NAAG believed this clarification was so important that it should be incorporated into the rule itself. NAAG also suggested imposing a specific time limit to allow solicitations to be made for no more than 30 days after the consumer-initiated communication under this exception.

Industry commenters also objected to some of the examples. In particular, industry commenters objected to the example in proposed § __.20(d)(2)(i) on two grounds. First, these commenters believed that the consumer should not have to supply contact information in order to trigger the exception. These commenters noted that such a requirement would seem to preclude solicitations over the phone during the same call by presuming that a solicitation would be made by mail or e-mail. Some of these commenters also believed that consumers would expect an affiliated company, especially a company with a common brand, to have their contact information already and would not want to provide it again. Second, as noted above, some commenters maintained that the affiliate should be able to respond by making solicitations about any product or service, not just those mentioned by the consumer.

Many industry commenters objected to the example in proposed § __.20(d)(2)(ii) about the consumer responding to a call back message. These commenters believed that such a call back should qualify as a consumer-initiated communication, noting that the consumer has the option of not returning the call. Moreover, these commenters noted that the customer service representative receiving the call would not know what prompted the consumer's call. Several commenters acknowledged that there may be concerns about calls made under false pretenses to prompt consumers to return the call but suggested that those concerns should be addressed by other means, such as enforcement of the laws dealing with unfair or deceptive acts or practices.

Finally, some industry commenters expressed concerns about the example in proposed § __.20(d)(2)(iii) regarding the consumer who calls to ask for retail locations and hours. These commenters noted that it is impossible to know what will transpire on a particular telephone call. One commenter noted, for example, that if a consumer called to ask for directions to an office, the customer service representative might ask why the consumer needed to go to that office. This, in turn, could prompt the consumer to mention a product or service that the consumer hoped to obtain and lead to a discussion of specific products or services that might be appropriate for the consumer.

Section __.21(c)(4) of the final rules revises the consumer-initiated communications exception to delete the reference to oral, electronic, or written communications. The Agencies believe that any form of communication may come within the exception as long as the consumer initiates the communication, whether in-person or by mail, e-mail, telephone, facsimile, or through other means. New forms of communication that may develop in the future could also come within the exception.

Section __.21(c)(4) of the final rules also provides that the communications

covered by the exception are consumer-initiated communications about a person's products or services. For the exception to apply, the statute requires that a person use eligibility information ''in response to'' a communication initiated by a consumer. The Agencies believe this statutory language contemplates that the consumer-initiated communications will relate to a person's products or services and that the solicitations covered by the exception will be those made in response to that communication.

The Agencies also believe the exceptions should be construed narrowly to avoid undermining the general rule requiring notice and opt out. Thus, consistent with the purposes of the statute, the Agencies do not believe that a consumer-initiated communication that is unrelated to a product or service should trigger the exception. A rule that allowed any consumer-initiated communication, no matter how unrelated to a product or service, to trigger the exception would not to give meaning to the phrase ''in response to'' and could produce incongruous results. For example, if a consumer calls an affiliate solely to obtain retail hours and directions or solely to opt out, the exception is not triggered because the communication does not relate to the affiliate's products or services and making a solicitation about products or services to the consumer in those circumstances would not be a reasonable response to that communication.

The Agencies recognize, however, that if the conversation shifts to a discussion of products or services that the consumer may need, solicitations may be responsive depending upon the facts and circumstances. Likewise, if a consumer who has opted out of an affiliate's use of eligibility information to make solicitations calls the affiliate for information about a particular product or service, for example, life insurance, solicitations regarding life insurance could be made in response to that call, but solicitations regarding other products or services would not be responsive. Finally, the Agencies do not believe it is appropriate to adopt a specific time limit for making solicitations following a consumer-initiated communication about products or services because solicitations will likely be made quickly and any time limit would be arbitrary.

In the final rules, the Agencies have renumbered the example in proposed § __.20(d)(2)(i) as § __.21(d)(3)(i), and revised it to delete the references to a telephone call as the specific form of communication and the reference to providing contact information. As discussed above and illustrated in the examples in §§ __.20(b)(4)(ii)(E) and (F), the need to provide contact information may vary depending on the form of communication used by the consumer. The new example in § __.21(d)(3)(ii) responds to commenters' concerns by illustrating a circumstance involving a consumer-initiated communication in which a consumer does not know exactly what products or services he or she wants, but initiates a communication to obtain information about investing for a child's college education.

The Agencies have renumbered the call-back example in proposed § __.20(d)(2)(iii) as § __.21(d)(3)(iii) and revised it. The revised example provides that where the financial institution makes an initial marketing call without using eligibility information received from an affiliate and leaves a message that invites the consumer to apply for the credit card by calling a toll-free number, the consumer's response qualifies as a consumer-initiated communication about a product or service. The revised example balances commenters' concerns about tracking which calls are call backs and the Agencies' concerns that consumers may be induced into triggering the consumer-initiated communication exception as a result of inaccurate, incomplete, or deceptive telephone messages. Moreover, the revised example is similar to a provision in the Board's Regulation Z commentary, 12 CFR part 226, supplement I, § 226.5a(a)(3)-2.

For the reasons discussed above, the Agencies have renumbered the retail hours example in proposed § __.20(d)(2)(iv) as § __.21(d)(3)(iv), but otherwise adopted it as proposed. In addition, the new example in § __.21(d)(3)(v) responds to commenters' concerns by illustrating a case where a consumer calls to ask about retail locations and hours and the call center representative, after eliciting information about the reason why the consumer wants to visit a retail location, offers to provide information about products of interest to the consumer by telephone and mail, thus demonstrating how the conversation may develop to the point where making solicitations would be responsive to the consumer's call.

Consumer Authorization or Request Exception

Proposed § __.20(c)(5) clarified that the provisions of Subpart C would not apply to an affiliate using the information to make solicitations affirmatively authorized or requested by the consumer. The proposal further provided that this exception may be triggered by an oral, electronic, or written authorization or request by the consumer. However, a pre-selected check box or boilerplate language in a disclosure or contract would not constitute an affirmative authorization or request under the proposal.

The proposal noted that the consumer authorization or request exception could be triggered, for example, if a consumer obtains a mortgage from a mortgage lender and authorizes or requests to receive solicitations about homeowner's insurance from an insurance affiliate of the mortgage lender. The consumer could provide the authorization or make the request either through the person with whom the consumer has a business relationship or directly to the affiliate that will make the solicitation. Proposed § __.20(d)(3) provided an example of the affirmative authorization or request exception.

Most industry commenters argued that the proposed exception did not track the language of the statute because the Agencies included the word ''affirmative'' in the proposed exception. These commenters believed that including the word ''affirmative'' in the proposed rules narrowed the exception in a manner not intended by Congress. Several of these commenters noted that the Agencies had declined to specify what constitutes consumer consent under the GLBA privacy rules and indicated that they were not aware of any policy considerations or compliance issues that would warrant a departure from the Agencies' prior position.

Some industry commenters believed that a pre-selected check box should be sufficient to evidence a consumer's authorization or request for solicitations. In other words, a consumer's decision not to deselect a pre-selected check box should constitute a knowing act of the consumer to authorize or request solicitations. Other industry commenters believed that preprinted language in a disclosure or contract should be sufficient to evidence a consumer's authorization or request for solicitations. One commenter cited case law and FTC informal staff opinion letters relating to a consumer's written instructions to obtain a consumer report pursuant to section 604(a)(2) of the FCRA as support for allowing boilerplate language to constitute authorization or request.

A few industry commenters requested that the Agencies clarify that a consumer's authorization or request does not have to refer to a specific

product or service or to a specific provider of products or services in order for the exception to apply. As discussed above, industry commenters had differing views regarding the reference to oral, written, or electronic means of triggering the exception.

NAAG suggested imposing a specific time limit to allow solicitations to be made for no more than 30 days after the consumer's authorization or request under this exception.

Section __.21(c)(5) of the final rules revises the consumer authorization or request exception to delete the word ''affirmative'' as surplusage. The deletion of the word ''affirmative'' does not change the meaning of the exception however. The consumer still must take affirmative steps to ''authorize'' or ''request'' solicitations.

The Agencies construe this exception, like the other exceptions, narrowly and in a manner that does not undermine the general notice and opt-out requirement. For that reason, the Agencies believe that affiliated companies cannot avoid use of the statute's notice and opt-out provisions by including preprinted boilerplate language in the disclosures or contracts they provide to consumers, such as language stating that by applying to open an account, the consumer authorizes or requests to receive solicitations from affiliates. Such an interpretation would permit the exception to swallow the rule, a result that cannot be squared with the intent of Congress to give consumers notice and an opportunity to opt out of solicitations.

The comparison made by some commenters to the GLBA privacy rules is misplaced. The GLBA and the privacy rules create an exception to permit the disclosure of nonpublic personal information ''with the consent or at the direction of the consumer.'' Section 624 of the FCRA creates an exception to permit the use of shared eligibility information ''in response to solicitations authorized or requested by the consumer.'' The Agencies interpret the ''authorized or requested'' language in the FCRA exception to require the consumer to take affirmative steps in order to trigger the exception.

The Agencies have made conforming changes to the example in proposed § __.20(d)(3), which has been renumbered as § __.21(d)(4)(i) in the final rules. In addition, the Agencies have added three additional examples. The example in § __.21(d)(4)(ii) illustrates how a consumer can authorize or request solicitations by checking a blank check box. The examples in §§ __.21(d)(4)(iii) and (iv) illustrate that preprinted boilerplate language and a pre-selected check box would not meet the authorization or request exception.

The Agencies do not believe it is appropriate to set a fixed time period for an authorization or request. As noted in the proposal, the duration of the authorization or request depends on what is reasonable under the facts and circumstances. In addition, an authorization to make solicitations to the consumer terminates if the consumer revokes the authorization.

For the same reasons discussed above, the Agencies have deleted the reference to oral, electronic, or written communications from this exception to track the language of the statute. Further, the Agencies do not believe it is necessary to clarify the elements of an authorization or request. The statute clearly refers to ''solicitations authorized or requested by the consumer.'' The facts and circumstances will determine what solicitations have been authorized or requested by the consumer.

Compliance With Applicable Laws Exception

Proposed § __.20(c)(6) clarified that the provisions of Subpart C would not apply to an affiliate if compliance with the requirements of section 624 by the affiliate would prevent that affiliate from complying with any provision of state insurance laws pertaining to unfair discrimination in a state where the affiliate is lawfully doing business. See FCRA, section 624(a)(4). The Agencies received no comments on this provision. Section __.21(c)(6) of the final rules adopts the state insurance law compliance exception as proposed.

One commenter requested the creation of an additional exception to permit the sharing of eligibility information among affiliates that are aligned under one line of business within an organization and that share common management, branding, and regulatory oversight (*i.e.*, banking, securities, and insurance companies). This commenter was focused on private banking enterprises. As discussed above, the Agencies find no statutory basis for creating such an exception to the notice and opt-out requirement.

Relation to Affiliate-Sharing Notice and Opt-Out

Proposed § __.20(f) clarified the relationship between the affiliate sharing notice and opt-out under section 603(d)(2)(A)(iii) of the FCRA and the affiliate marketing notice and opt out in new section 624 of the FCRA. Specifically, the proposal provided that nothing in the affiliate marketing rules limits the responsibility of a company to comply with the notice and opt-out provisions of section 603(d)(2)(A)(iii) of the FCRA before it shares information other than transaction or experience information among affiliates to avoid becoming a consumer reporting agency.

One commenter urged the Agencies to delete this provision as unnecessary. In the alternative, this commenter requested that the Agencies clarify that section 603(d)(2)(A)(iii) applies to the sharing of information that would otherwise meet the definition of a ''consumer report,'' and that the sharing affiliate does not automatically become a consumer reporting agency, but risks becoming a consumer reporting agency.

This provision has been renumbered as § __.21(e) in the final rules. Section __.21(e) has been revised to delete the clause that referred to becoming a consumer reporting agency and to substitute in its place the neutral phrase ''where applicable.''

Section __.22 Scope and Duration of Opt-Out

Scope of the Opt-Out

The Agencies addressed issues relating to the scope of the opt-out in various sections of the proposal. In the supplementary information to the proposal, the Agencies stated that the opt-out would be tied to the consumer, rather than to the information. Some industry commenters supported the approach of tying the opt-out to the consumer, rather than to the information. Other industry commenters, however, believed it was inappropriate to tie the opt-out to the consumer and requested that institutions have the flexibility to implement the consumer's opt-out at the account level, rather than at the consumer level. These commenters believed that an account-by-account approach would be consistent with the menu of opt-out choices provided in this rule and the GLBA privacy rules. These commenters also noted that an account-based approach would provide the consumer with a new notice and opportunity to opt out when a former customer decides to re-establish a new relationship with the institution.

Proposed § __.21(c) provided that the notice could be designed to allow a consumer to choose from a menu of alternatives when opting out, such as by selecting certain types of affiliates, certain types of information, or certain modes of delivery from which to opt out, so long as one of the alternatives gave the consumer the opportunity to opt out with respect to all affiliates, all

eligibility information, and all methods of delivering solicitations. Several industry commenters objected to the requirement that the institution provide a single universal opt-out option that would allow consumers to opt out completely of all solicitations. In addition, one commenter found the reference to all types of eligibility information confusing, while another commenter noted that some institutions may want to implement the opt-out on an account-by-account basis.

Section __.25(d) of the proposal provided that if a consumer's relationship with an institution terminated for any reason when a consumer's opt-out election was in force, the opt-out would continue to apply indefinitely, unless revoked by the consumer. Most industry commenters objected to having the opt-out period continue to apply indefinitely upon termination of the consumer's relationship with the institution. These commenters believed that this approach was not supported by the statute, would prove costly and difficult to administer, and would require the indefinite tracking of opt-outs. These commenters also believed that the five-year opt-out period would provide sufficient protection to consumers that terminate their relationship. One commenter noted that the proposed rule would impose particular hardships on mortgage lenders because those lenders often have consumer relationships of very short duration on account of selling the loans they originate into the secondary market. Consumer groups supported the proposed treatment of opt-outs for terminated consumer relationships.

Upon further examination, the Agencies believe that the scope of the opt-out should be addressed comprehensively in a single section of the final rules. The Agencies also conclude that tying the opt-out to the consumer could have had unintended consequences. For example, if the opt-out were tied to the consumer, an institution would have to track the consumer indefinitely, even if the consumer's relationship with the institution terminated and a new relationship were subsequently established with that institution years later. The Agencies do not believe that institutions should be required to track consumers indefinitely following termination. In addition, an opt-out tied to the consumer could apply to the use of all eligibility information, not just to eligibility information about the consumer, received from an affiliate and used to make solicitations to the consumer. It is not clear from the statute or the legislative history that Congress intended the opt-out provisions of section 624 to apply to eligibility information about consumers other than the consumer to whom a solicitation is made. Finally, the Agencies do not believe it is necessary to make the opt-out effective in perpetuity upon termination of the relationship.

Section __.22(a) of the final rules brings together these different scope considerations to address comprehensively the scope of the opt-out. Under the revised approach, the scope of the opt-out is derived from language of section 624(a)(2)(A) of the FCRA and generally depends upon the content of the opt-out notice. Section __.22(a)(1) provides that, except as otherwise provided in that section, a consumer's election to opt out prohibits any affiliate covered by the opt-out notice from using the eligibility information received from another affiliate as described in the notice to make solicitations for marketing purposes to the consumer.

Section __.22(a)(2)(i) clarifies that, in the context of a continuing relationship, an opt-out notice may apply to eligibility information obtained in connection with a single continuing relationship, multiple continuing relationships, continuing relationships established subsequent to delivery of the opt-out notice, or any other transaction with the consumer. Section __.22(a)(2)(ii) provides examples of continuing relationships. These examples are substantially similar to the examples used in the GLBA privacy rules with added references to relationships between the consumer and an affiliate.

Section __.22(a)(3)(i) limits the scope of an opt-out notice that is not connected with a continuing relationship. This section provides that if there is no continuing relationship between the consumer and a person or its affiliate, and if the person or its affiliate provides an opt-out notice to a consumer that relates to eligibility information obtained in connection with a transaction with the consumer, such as an isolated transaction or a credit application that is denied, the opt-out notice only applies to eligibility information obtained in connection with that transaction. The notice cannot apply to eligibility information that may be obtained in connection with subsequent transactions or a continuing relationship that may be subsequently established by the consumer with the person or its affiliate. Section __.22(a)(3)(ii) provides examples of isolated transactions.

Section __.22(a)(4) provides that a consumer may be given the opportunity to choose from a menu of alternatives when electing to prohibit solicitations. An opt-out notice may give the consumer the opportunity to elect to prohibit solicitations from certain types of affiliates covered by the opt-out notice but not other types of affiliates covered by the notice, solicitations based on certain types of eligibility information but not other types of eligibility information, or solicitations by certain methods of delivery but not other methods of delivery, so long as one of the alternatives is the opportunity to prohibit all solicitations from all of the affiliates that are covered by the notice. The Agencies continue to believe that the language of section 624(a)(2)(A) of the FCRA requires the opt-out notice to contain a single opt-out option for all solicitations within the scope of the notice.

The Agencies recognize that consumers could receive a number of different opt-out notices, even from the same affiliate. The Agencies will monitor industry notice practices and evaluate whether further action is needed.

Section __.22(a)(5) contains a special rule for notice following termination of a continuing relationship. This rule provides that a consumer must be given a new opt-out notice if, after all continuing relationships with a person or its affiliate have been terminated, the consumer subsequently establishes a new continuing relationship with that person or the same or a different affiliate and the consumer's eligibility information is to be used to make a solicitation. This special rule affords the consumer and the company a fresh start following termination of all continuing relationships by requiring a new opt-out notice if a new continuing relationship is subsequently established.

The new opt-out notice must apply, at a minimum, to eligibility information obtained in connection with the new continuing relationship. The new opt-out notice may apply more broadly to information obtained in connection with a terminated relationship and give the consumer the opportunity to opt out with respect to eligibility information obtained in connection with both the terminated and the new continuing relationships. Further, the consumer's failure to opt out does not override a prior opt-out election by the consumer applicable to eligibility information obtained in connection with a terminated relationship that is still in effect, regardless of whether the new opt-out notice applies to eligibility information obtained in connection

with the terminated relationship. The final rules also contain an example of this special rule. The Agencies note, however, that where a consumer was not given an opt-out notice in connection with the initial continuing relationship because eligibility information obtained in connection with that continuing relationship was not shared with affiliates for use in making solicitations, an opt-out notice provided in connection with a new continuing relationship would have to apply to any eligibility information obtained in connection with the terminated relationship that is to be shared with affiliates for use in making future solicitations.

Duration and Timing of Opt-Out

Proposed § __.25 addressed the duration and effect of the consumer's opt-out election. Proposed § __.25(a) provided that the consumer's election to opt out would be effective for the opt-out period, which is a period of at least five years beginning as soon as reasonably practicable after the consumer's opt-out election is received. The supplementary information noted that if a consumer elected to opt out every year, a new opt-out period of at least five years would begin upon receipt of each successive opt-out election.

Some industry commenters believed that the proposal was inconsistent with the statute because it provided that the opt-out period would begin as soon as reasonably practicable after the consumer's opt-out election is received. These commenters believed that the opt-out period should begin on the date the consumer's opt-out is received and that the final rules also should allow institutions a reasonable period of time to implement a consumer's initial or renewal opt-out election before it becomes effective. Consumer groups believed that the requirement to honor an opt-out ''beginning as soon as reasonably practicable'' was too vague. These commenters believed that a consumer's opt-out should be honored within a specific length of time not to exceed 30 days after the consumer responds to the opt-out notice.

A few industry commenters urged the Agencies to allow consumers to revoke an opt-out election orally. Other industry commenters requested that the final rules include a clear statement that an opt-out period may be shortened to a period of less than five years by the consumer's revocation of an opt-out election. Consumer groups approved of the Agencies' statement that if a consumer opts out again during the five-year opt-out period, then a new five-year period begins. Consumer groups also supported allowing institutions to make the opt-out period effective in perpetuity so long as this is clearly disclosed to the consumer in the original notice.

The general provision regarding the duration of the opt-out has been renumbered as § __.22(b) in the final rules, consistent with the Agencies' decision to address all scope issues in the same section. The Agencies have revised the duration provision to clarify that the opt-out period expires if the consumer revokes the opt-out in writing, or if the consumer agrees, electronically. The requirement for a written or electronic revocation is retained and is consistent with the approach taken in the GLBA privacy rules. The Agencies do not believe it is necessary or appropriate to permit oral revocation. The Agencies note that many of the exceptions to the notice and opt-out requirements may be triggered by oral communications, as discussed above, which would enable the use of shared eligibility information to make solicitations pending receipt of a written or electronic revocation. Also, as noted in the proposal, nothing prohibits setting an opt-out period longer than five years, including an opt-out period that does not expire unless revoked by the consumer.

The Agencies do not agree that the opt-out period should begin on the date the consumer's election to opt out is received. Commenters generally recognized that institutions cannot instantaneously implement a consumer's opt-out election but need time to do so. The Agencies interpret the statutory language to mean that the consumer's opt-out election must be honored for a period of at least five years from the date such election is implemented. The Agencies believe that Congress did not intend for the opt-out period to be shortened to a period of less than the five years specified in the statute to reflect the time between the date the consumer's opt-out election is received and the date the consumer's opt-out election is implemented.

The Agencies also believe it is neither necessary nor desirable to set a mandatory deadline for implementing the consumer's opt-out election. A general standard is preferable because the time it will reasonably take to implement a consumer's opt-out election may vary.

Consistent with the special rule for a notice following termination of a continuing relationship, the duration of the opt-out is not affected by the termination of a continuing relationship. When a consumer opts out in the course of a continuing relationship and that relationship is terminated during the opt-out period, the opt-out remains in effect for the rest of the opt-out period. If the consumer subsequently establishes a new continuing relationship while the opt-out period remains in effect, the opt-out period may not be shortened with respect to information obtained in connection with the terminated relationship by sending a new opt-out notice to the consumer when the new continuing relationship is established, even if the consumer does not opt out upon receipt of the new opt-out notice. A person may track the eligibility information obtained in connection with the terminated relationship and provide a renewal notice to the consumer, or may choose not to use eligibility information obtained in connection with the terminated relationship to make solicitations to the consumer.

Proposed § __.25(c) clarified that a consumer may opt out at any time. As explained in the supplementary information to the proposal, even if the consumer did not opt out in response to the initial opt-out notice or if the consumer's election to opt out was not prompted by an opt-out notice, a consumer may still opt out. Regardless of when the consumer opts out, the opt-out must be effective for a period of at least five years.

The Agencies received few comments on this provision. Consumer groups urged the Agencies to reinforce the continuing nature of the right to opt out by requiring institutions to give the opt-out notice annually along with the annual GLBA privacy notice. These commenters acknowledged that the FCRA does not specifically state that the notice is required annually, but noted that the statute also does not say that the consumer has only one opportunity to opt out.

The Agencies have renumbered the provision giving the consumer the right to opt out at any time as § __.22(c) in the final rules, but otherwise adopted the provision as proposed. The Agencies find no statutory basis for requiring the provision of an annual opt-out notice to consumers along with the GLBA privacy notice.

Section __.23 Contents of Opt-Out Notice; Consolidated and Equivalent Notices

Contents in General

Section __.21 of the proposal addressed the contents of the opt-out notice. Proposed § __.21(a) would have required that the opt-out notice be clear,

conspicuous, and concise, and accurately disclose: (1) That the consumer may elect to limit a person's affiliate from using eligibility information about the consumer that it obtains from that person to make or send solicitations to the consumer; (2) if applicable, that the consumer's election will apply for a specified period of time and that the consumer will be allowed to extend the election once that period expires; and (3) a reasonable and simple method for the consumer to opt out.

Some commenters expressed concern about requiring the notice to specify the applicable time period and the consumer's right to extend the election once the opt-out expires. One commenter believed this would require institutions to determine in advance the length of the opt-out period. Another commenter urged the Agencies to clarify that institutions could subsequently increase the duration of the opt-out or make it permanent without providing another notice to the consumer.

The Agencies have renumbered the provisions addressing the contents of the opt-out notice as § __.23(a) in the final rules and revised them. Section __.23(a)(1) of the final rules requires additional information in opt-out notices. Section __.23(a)(1)(i) provides that all opt-out notices must identify, by name, the affiliate(s) that is providing the notice. A group of affiliates may jointly provide the notice. If the notice is provided jointly by multiple affiliates and each affiliate shares a common name, such as ''ABC,'' then the notice may indicate that it is being provided by multiple companies with the ABC name or multiple companies in the ABC group or family of companies. Acceptable ways of identifying the multiple affiliates providing the notice include stating that the notice is provided by ''all of the ABC companies,'' ''the ABC banking, credit card, insurance, and securities companies,'' or by listing the name of each affiliate providing the notice. A representation that the notice is provided by ''the ABC banking, credit card, insurance, and securities companies'' applies to all companies in those categories, not just some of those companies. But if the affiliates providing the notice do not all share a common name, then the notice must either separately identify each affiliate by name or identify each of the common names used by those affiliates. For example, if the affiliates providing the notice do business under both the ABC name and the XYZ name, then the notice could list each affiliate by name or indicate that the notice is being provided by ''all of the ABC and XYZ companies'' or by ''the ABC bank and credit card companies and the XYZ insurance companies.''

Section __.23(a)(1)(ii) provides that an opt-out notice must contain a list of the affiliates or types of affiliates covered by the notice. The notice may apply to multiple affiliates and to companies that become affiliates after the notice is provided to the consumer. The rules for identifying the affiliates covered by the notice are substantially similar to the rules for identifying the affiliates providing the notice in § __.23(a)(1)(i), as described in the previous paragraph.

Sections __.23(a)(1)(iii)–(vii) respectively require the opt-out notice to include the following: A general description of the types of eligibility information that may be used to make solicitations to the consumer; a statement that the consumer may elect to limit the use of eligibility information to make solicitations to the consumer; a statement that the consumer's election will apply for the specified period of time stated in the notice and, if applicable, that the consumer will be allowed to renew the election once that period expires; if the notice is provided to consumers who may have previously opted out, such as if a notice is provided to consumers annually, a statement that the consumer who has chosen to limit marketing offers does not need to act again until the consumer receives a renewal notice; and a reasonable and simple method for the consumer to opt out. The statement described in § __.23(a)(1)(vi) regarding consumers who may have previously opted out does not apply to the model privacy form that the Agencies are developing in a separate rulemaking. Appropriate use of the model forms in Appendix C will satisfy these content requirements.

The Agencies continue to believe that the opt-out notice must specify the length of the opt-out period, if one is provided. However, an institution that subsequently chooses to increase the duration of the opt-out period that it previously disclosed or honor the opt-out in perpetuity has no obligation to provide a revised notice to the consumer. In that case, the result is the same as if the institution established a five-year opt-out period and then did not send a renewal notice at the end of that period. A person receiving eligibility information from an affiliate would be prohibited from using that information to make solicitations to a consumer unless a renewal notice is first provided to the consumer and the consumer does not renew the opt-out. So long as no solicitations are made using eligibility information received from an affiliate, there would be no violation of the statute or regulation for failing to send a renewal notice in this situation.

Joint Notice

Proposed § __.24(c) permitted a person subject to this rule to provide a joint opt-out notice with one or more of its affiliates that are identified in the notice, so long as the notice was accurate with respect to each affiliate jointly issuing the notice. Under the proposal, a joint notice would not have to list each affiliate participating in the joint notice by its name, but could state that it applies to ''all institutions with the ABC name'' or ''all affiliates in the ABC family of companies.''

One commenter believed that individually listing each company could result in long and confusing notices. This commenter suggested revising the rule to permit the generic identification of the types of affiliates by whom eligibility information may be used to make solicitations and to allow the notice to apply to entities that become affiliates after the notice is sent.

In the final rules, the separate joint notice provision has been eliminated. Instead, the final rules incorporate the joint notice option into the provisions that address which affiliates may provide the opt-out notice and the contents of the notice.

Joint Relationships

The proposal addressed joint relationships in the section dealing with delivery of opt-out notices. Proposed § __.24(d) set out rules that would apply when two or more consumers jointly obtain a product or service from a person subject to the rule (referred to in the proposed regulation as ''joint consumers''), such as a joint checking account. It also provided several examples. Under the proposal, a person subject to this rule could provide a single opt-out notice to joint accountholders. The notice would have had to indicate whether the person would consider an opt-out by a joint accountholder as an opt-out by all of the associated accountholders, or whether each accountholder would have to opt out separately. The person could not require all accountholders to opt out before honoring an opt-out direction by one of the joint accountholders. Because section 624 of the FCRA deals with the use of information for marketing by affiliates, rather than the sharing of information among affiliates, comment was requested on whether information about a joint account should be allowed to be used for making solicitations to a joint consumer who has not opted out.

Some commenters supported the flexible approach proposed by the

Agencies for dealing with joint accounts and notice to joint accountholders. One commenter suggested providing additional flexibility to enable consumers to opt out in certain circumstances, such as when eligibility information from a joint account is involved, but not in others, such as when eligibility information from an individual account is involved. Another commenter, however, believed that the provisions regarding joint relationships may not be appropriate for the affiliate marketing rule because section 624 relates to the use of information for marketing to a particular consumer, not to the sharing of information among affiliates. Consumer groups urged the Agencies to prohibit the use of eligibility information about a joint account for making solicitations to a consumer who has not opted out if the other joint consumer on the account has opted out.

The Agencies have renumbered the provision addressing joint relationships as § __.23(a)(2) in the final rules. The Agencies have deleted the example of joint relationships from the final rules because it addressed, in part, the sharing of information, rather than the use of information. The Agencies have made other revisions to enhance the readability of this provision. The revised provision is substantively similar to the joint relationships provision of the GLBA privacy rules, except to the extent those rules refer to the sharing of information among affiliates.

The Agencies believe that different issues may arise with regard to providing a single opt-out notice to joint consumers in the context of this rule, which focuses on the use of information, compared to issues that may arise with regard to providing such a notice in the context of other privacy rules that focus on the sharing of information. For example, a consumer may opt out with respect to affiliate marketing in connection with an individually-held account, but not opt out with respect to affiliate marketing in connection with a joint relationship. In that case, it could be challenging to identify which consumer information may and may not be used by affiliates to make solicitations to the consumer. Nevertheless, the final rules permit persons providing opt-out notices to consumers to provide a single opt-out notice to joint consumers.

Alternative Contents

Proposed § __.21(d) provided that, where an institution elects to give consumers a broader right to opt out of marketing than is required by this subpart, the institution would have the ability to modify the contents of the opt-out notice to reflect accurately the scope of the opt-out right it provides to consumers. This section also noted that proposed Appendix C provided a model form that may be helpful for institutions that wish to allow consumers to opt out of all marketing from the institution and its affiliates, but use of the model form is not required. Commenters generally favored the flexibility afforded by this provision. The Agencies have renumbered the provision addressing alternative contents as § __.23(a)(3) in the final rules, but otherwise adopted it as proposed.

Model Notices

Section __.23(a)(4) states that model notices are provided in Appendix C. The Agencies have provided these model notices to facilitate compliance with the rule. However, the final rules do not require use of the model notices.

Consolidated and Equivalent Notices

Proposed § __.27 provided that an opt-out notice required by Subpart C could be coordinated and consolidated with any other notice or disclosure required to be issued under any other provision of law, including but not limited to the notice described in section 603(d)(2)(A)(iii) of the FCRA and the notice required by title V of the GLBA. In addition, a notice or other disclosure that was equivalent to the notice required by this subpart, and that was provided to a consumer together with disclosures required by any other provision of law, would satisfy the requirements of Subpart C. The proposal specifically requested comment on the consolidation of the affiliate marketing notice with the GLBA privacy notice and the affiliate sharing opt-out notice under section 603(d)(2)(A)(iii) of the FCRA.

Commenters generally supported the proposed provision. Several commenters believed it was probable that most institutions would want to provide the affiliate marketing opt-out notice with their existing GLBA privacy notice to reduce compliance costs and minimize consumer confusion. One commenter believed that institutions would be less likely to include the opt-out notice as part of their annual GLBA privacy notice because section 214 does not have an annual notice requirement.

The Agencies have moved the provisions addressing consolidated and equivalent notices to the section addressing the contents of the notice and renumbered those provisions as §§ __.23(b) and (c) respectively in the final rules. Otherwise, those provisions have been adopted as proposed with one exception. The provision on equivalent notices clarifies that an equivalent notice satisfies the requirements of § __.23—not the entire subpart—because the subpart addresses many issues besides the content of the notice, such as delivery and renewal of opt-outs. The Agencies believe that these provisions are related to the contents of the notice and should therefore be included in this section.

The Agencies encourage consolidation of the affiliate marketing opt-out notice with the GLBA privacy notice, including the affiliate sharing opt-out notice under section 603(d)(2)(A)(iii) of the FCRA, so that consumers receive a single notice they can use to review and exercise all privacy opt-outs. Consolidation of these notices, however, presents special issues. For example, the affiliate marketing opt-out may be limited to a period of at least five years, subject to renewal, whereas the GLBA privacy and FCRA section 603(d)(2)(A)(iii) opt-out notices are not time-limited. This difference, if applicable, must be made clear to the consumer. Thus, if a consolidated notice is used and the affiliate marketing opt-out is limited in duration, the notice must inform consumers that if they previously opted out, they do not need to opt out again until they receive a renewal notice when the opt-out expires or is about to expire. In addition, as discussed more fully below, the Agencies have developed a model privacy form that includes the affiliate marketing opt-out. The Agencies expect that once published in final form, use of the model privacy form will satisfy the requirement to provide an affiliate marketing opt-out notice.

Section __.24 Reasonable Opportunity To Opt Out

Section __.22(a) of the proposal provided that before a receiving affiliate could use eligibility information to make or send solicitations to the consumer, the communicating affiliate would have to provide the consumer with a reasonable opportunity to opt out following delivery of the opt-out notice. Given the variety of circumstances in which institutions must provide a reasonable opportunity to opt out, the proposal construed the requirement for a reasonable opportunity to opt out as a general test that would avoid setting a mandatory waiting period in all cases.

The proposed rules would not have required institutions subject to the rule to disclose how long a consumer would have to respond to the opt-out notice before eligibility information

communicated to affiliates could be used to make or send solicitations to the consumer, although institutions would have the flexibility to include such disclosures in their notices. In this respect, the proposed rules were consistent with the GLBA privacy rules.

Industry commenters generally supported the Agencies' approach of treating the requirement for a reasonable opportunity to opt out as a general test that would avoid setting a mandatory waiting period. NAAG, on the other hand, believed that the Agencies should set a mandatory waiting period of at least 45 days from the date of mailing or other transmission of the notice because consumers may be ill, away from home, or otherwise unable to respond to correspondence promptly.

Industry commenters generally supported the Agencies' decision not to require the disclosure of how long a consumer would have to respond to the opt-out notice before eligibility information could be used to make or send solicitations to the consumer. Consumer groups believed that consumers should be told how long they have to respond to the notice before eligibility information could be used by affiliates to make or send solicitations and that they may exercise their right to opt out at any time.

The Agencies have renumbered the section addressing a reasonable opportunity to opt out as § __.24 in the final rules, and revised it. Section __.24(a) of the final rules retains the approach of construing the requirement for a reasonable opportunity to opt out as a general test that avoids setting a mandatory waiting period in all cases. Given the variety of circumstances in which a reasonable opportunity to opt out must be provided, the Agencies believe that the appropriate time to permit solicitations may vary depending upon the circumstances. A general standard provides flexibility to allow a person to use eligibility information it receives from an affiliate to make solicitations at an appropriate point in time that may vary depending upon the circumstances, while assuring that the consumer is given a realistic opportunity to prevent such use of this information. In the final rules, the Agencies have retained the approach of not requiring affiliate marketing opt-out notices to disclose how long a consumer has to respond before eligibility information may be used to make solicitations to the consumer or that consumers may exercise their right to opt out at any time. However, an institution may, at its option, add this information to its opt-out notice.

Section __.22(b) of the proposal provided examples to illustrate what would constitute a reasonable opportunity to opt out. The proposed examples would have provided a generally applicable safe harbor for opt-out periods of 30 days. As explained in the supplementary information to the proposal, although 30 days would be a safe harbor, a person subject to this requirement could decide, at its option, to give consumers more than 30 days in which to decide whether or not to opt out. A shorter waiting period could be adequate in certain situations depending on the circumstances.

Proposed § __.22(b)(1) contained an example of a reasonable opportunity to opt out when the notice was provided by mail. Proposed § __.22(b)(2) contained an example of a reasonable opportunity to opt out when the notice was provided by electronic means. The proposed examples were consistent with examples used in the GLBA privacy rules.

Proposed § __.22(b)(3) contained an example of a reasonable opportunity to opt out where, in a transaction conducted electronically, the consumer was required to decide, as a necessary part of proceeding with the transaction, whether or not to opt out before completing the transaction, so long as the institution provided a simple process at the Internet Web site that the consumer could use at that time to opt out. In this example, the opt-out notice would automatically be provided to the consumer, such as through a non-bypassable link to an intermediate Web page, or ''speedbump.'' The consumer would be given a choice of either opting out or not opting out at that time through a simple process conducted at the Web site. For example, the consumer could be required to check a box right at the Internet Web site in order to opt out or decline to opt out before continuing with the transaction. However, this example would not cover a situation where the consumer was required to send a separate e-mail or visit a different Internet Web site in order to opt out.

Proposed § __.22(b)(4) illustrated that including the affiliate marketing opt-out notice in a notice under the GLBA would satisfy the reasonable opportunity standard. In such cases, the consumer would be allowed to exercise the opt-out in the same manner and would be given the same amount of time to exercise the opt-out as is provided for any other opt-out provided in the GLBA privacy notice.

Proposed § __.22(b)(5) illustrated how an ''opt-in'' could meet the requirement to provide a reasonable opportunity to opt out. Specifically, if an institution has a policy of not allowing its affiliates to use eligibility information to market to consumers without the consumer's affirmative consent, providing the consumer with an opportunity to ''opt in'' or affirmatively consent to such use would constitute a reasonable opportunity to opt out. The supplementary information clarified that the consumer's affirmative consent must be documented and that a pre-selected check box would not evidence the consumer's affirmative consent.

Some industry commenters supported the proposed 30-day safe harbor and the examples illustrating the safe harbor. Other industry commenters, however, expressed concern that the 30-day safe harbor would become the mandatory minimum waiting period in virtually all cases, particularly because of the risk of civil liability. For this reason, some industry commenters objected to the use of examples altogether and urged that the Agencies delete the proposed examples. Other industry commenters asked the Agencies to include only the examples from the GLBA.

Consumer groups believed that the safe harbor should be 45 days, rather than 30 days. These commenters believed that 45 days was necessary in part to account for the time consumed in mail deliveries and in part to avoid penalizing consumers who are away from home for vacation or illness.

Regarding the specific examples, a few commenters objected to the example in proposed § __.22(b)(2), stating that the acknowledgement of receipt requirement would be inconsistent with the Electronic Signatures in Global and National Commerce Act (E-Sign Act). One of these commenters believed this requirement amounted to an opt in for electronic notices. Several commenters believed that the example in proposed § __.22(b)(3) for requesting the consumer to opt out as a necessary step in proceeding with an electronic transaction should not be limited to electronic transactions, but should be expanded to apply to all transaction methods. A number of commenters believed that the example in proposed § __.22(b)(5) should either be deleted or, alternatively, should not refer to ''affirmative'' consent. These commenters noted that the example in proposed § __.22(b)(4) allowed a person to satisfy the reasonable opportunity standard by permitting the consumer to exercise the opt-out in the same manner and giving the consumer the same amount of time to exercise the opt-out as provided in the GLBA privacy notice

and that the GLBA rules did not require ''affirmative'' consent.

The Agencies have renumbered the examples of a reasonable opportunity to opt out as § __.24(b) in the final rules, and revised them as discussed below. The Agencies believe the examples are helpful in illustrating what constitutes a reasonable opportunity to opt out.

The generally applicable 30-day safe harbor is retained in the final rules. The Agencies believe that providing a generally applicable safe harbor of 30 days is helpful because it affords certainty to entities that choose to follow the 30-day waiting period. Although 30 days is a safe harbor in all cases, a person providing an opt-out notice may decide, at its option, to give consumers more than 30 days in which to decide whether or not to opt out. A shorter waiting period could be adequate in certain situations, depending on the circumstances, in accordance with the general test for a reasonable opportunity to opt out. The use of examples and a 30-day safe harbor is consistent with the approach followed in the GLBA privacy rules. However, the Agencies believe that the examples in these rules should differ to some extent from the examples in the GLBA privacy rules because the affiliate marketing opt-out requires a one-time, not an annual, notice. Further, the affiliate marketing notice may, but need not, be included in the GLBA privacy notice.

In the final rules, the Agencies have retained the example of a reasonable opportunity to opt out by mail with revisions for clarity. Commenters had no specific objections to this example.

The Agencies have revised the example of a reasonable opportunity to opt out by electronic means and divided it into two subparts in the final rules to illustrate the different means of delivering an electronic notice. The example illustrates that for notices provided electronically, such as by posting the notice at an Internet Web site at which the consumer has obtained a product or service, a reasonable opportunity to opt out would include giving the consumer 30 days after the consumer acknowledges receipt of the electronic notice to opt out by any reasonable means. The acknowledgement of receipt aspect of this example is consistent with an example in the GLBA privacy regulations. The example also illustrates that for notices provided by e-mail to a consumer who had agreed to receive disclosures by e-mail from the person sending the notice, a reasonable opportunity to opt out would include giving the consumer 30 days after the e-mail is sent to elect to opt out by any reasonable means. The Agencies do not believe that consumer acknowledgement is necessary where the consumer has agreed to receive disclosures by e-mail.

The Agencies have determined that the electronic delivery of affiliate marketing opt-out notices does not require consumer consent in accordance with the E-Sign Act because neither section 624 of the FCRA nor these final rules require that the notice be provided in writing. Thus, the Agencies do not believe that the acknowledgement of receipt trigger is beyond the scope of their interpretive authority. Persons that provide affiliate marketing opt-out notices under this Subpart C electronically may do so pursuant to the agreement of the consumer, as specified in these rules, or in accordance with the requirements of the E-Sign Act.

The Agencies believe that the example of a consumer who is required to opt out as a necessary part of proceeding with the transaction should not be limited to electronic transactions. However, rather than revising the electronic transactions example, the Agencies have retained the electronic transactions example in § __.24(b)(3) and added a new example for in-person transactions in § __.24(b)(4). Together, these examples illustrate that an abbreviated opt-out period is appropriate when the consumer is given a ''yes'' or ''no'' choice and is not permitted to proceed with the transaction unless the consumer makes a choice. For in-person transactions, consumers could be provided a form with a question that requires the consumer to write a ''yes'' or ''no'' to indicate their opt-out preference or a form that contains two blank check boxes: One that allows consumers to indicate that they want to opt out and one that allows consumers to indicate that they do not want to opt out.

In the final rules, the Agencies have retained the example of including the opt-out notice in a privacy notice in § __.24(b)(5) as consistent with the statutory requirement that the Agencies consider methods for coordinating and combining notices. The Agencies have deleted the example of providing an opt-in as a form of opting out as unnecessary and confusing.

Section __.25 Reasonable and Simple Methods of Opting Out

Section __.23 of the proposal set forth reasonable and simple methods of opting out. This section generally tracked the examples of reasonable opt-out means from § __.7(a)(2)(ii) of the GLBA privacy regulations with certain revisions to give effect to Congress's mandate that methods of opting out be simple. For instance, proposed § __.23(a)(2) referred to including a self-addressed envelope with the reply form and opt-out notice. The Agencies also contemplated that a toll-free telephone number would be adequately designed and staffed to enable consumers to opt out in a single phone call.

Proposed § __.23(b) set forth methods of opting out that are not reasonable and simple, such as requiring the consumer to write a letter to the institution or to call or write to obtain an opt-out form rather than including it with the notice. This section generally tracked the examples of unreasonable opt-out means from § __.7(a)(2)(iii) of the GLBA privacy rules. In addition, the proposal contained an example of a consumer who agrees to receive the opt-out notice in electronic form only, such as by electronic mail or by using a process at a Web site. Such a consumer should not be required to opt out solely by telephone or paper mail.

Many industry commenters asked the Agencies to clarify that the examples are not the only ways to comply with the rules. These commenters believed that, as drafted, the proposal could be interpreted as exclusive rules, rather than as examples. These commenters asked the Agencies to make clear in the final rules that the methods set out in the rules are examples and do not exclude other reasonable and simple methods of opting out. A few industry commenters believed that the final rules should not include any examples of methods of opting out because of the potential for civil liability.

Many industry commenters also urged the Agencies to use the same examples used in the GLBA privacy rules. These commenters did not believe that Congress would allow coordinated and consolidated notices, but require different methods of opting out. For instance, these commenters recommended deleting the reference to a self-addressed envelope because there is no such reference in the GLBA privacy rules. One commenter noted that its experience with self-addressed envelopes was negative because consumers often used the envelopes for other purposes resulting in misdirected communications. Industry commenters also objected to requiring institutions to provide an electronic opt-out mechanism to a consumer who agrees to receive an opt-out notice in electronic form. These commenters believed this example was unjustified and inconsistent with the GLBA privacy rules. Commenters also indicated that some institutions may not have the

technical capabilities to accept electronic opt-outs. Several commenters recommended that the Agencies clarify that an institution is not obligated to honor opt-outs submitted through means other than those designated by the institution.

Consumer groups generally believed that the proposal appropriately tracked the examples in the GLBA privacy regulations with revisions to give effect to Congress's mandate that methods of opting out be simple. These commenters believed, however, that the proposal was inadequate because it provided examples instead of requiring the use of certain methods. These commenters believed that the final rule should require self-addressed envelopes and require that toll-free numbers be adequately designed and staffed to enable consumers to opt out in a single phone call. According to these commenters, inadequate and poorly trained staff has been a shortcoming of the GLBA opt-out procedures. These commenters also recommended that consumers be given the opportunity to opt out by a simple check box on payment coupons. Finally, these commenters asked the Agencies to clarify that the federal standard is a floor and that if the notice is combined with other choices made available under other federal and state laws, the most consumer-friendly means for opting out should apply.

The Agencies have renumbered the section addressing reasonable and simple methods of opting out as § __.25 in the final rules, and revised it as discussed below. The Agencies have restructured this section to include a general rule and examples in separate paragraphs (a) and (b) respectively. This revision clarifies that the specific methods identified in the rule are examples, not an exhaustive list of permissible methods.

The Agencies believe that including examples in § __.25(b) is helpful. However, the Agencies decline to adopt the GLBA examples without change. Section 624 of the FCRA requires the Agencies to ensure that the consumer is given reasonable and *simple* methods of opting out. The GLBA did not require simple methods of opting out. The Agencies believe that the methods of opting out can, in some instances, be simpler than some of the reasonable methods illustrated in the GLBA privacy rules. To effectuate the statutory mandate that consumers have simple methods of opting out, the Agencies have modified, for purposes of this rulemaking, some of the examples of reasonable methods of opting out that were used in the GLBA privacy regulations.

Most of the examples in the final rules are substantially similar to those in § __.23(a) and (b) of the proposal with revisions for clarity. The example in § __.25(b)(1)(ii) has been revised to reflect the Agencies' understanding that the reply form and self-addressed envelope would be included together with the opt-out notice. As in the proposal, the Agencies contemplate that a toll-free telephone number that consumers may call to opt out, as illustrated by the example in § __.25(b)(1)(iv), would be adequately designed and staffed to enable consumers to opt out in a single phone call. In setting up a toll-free telephone number that consumers may use to exercise their opt-out rights, institutions should minimize extraneous messages directed to consumers who are in the process of opting out.

One new example in § __.25(b)(1)(v) illustrates that reasonable and simple methods include allowing consumers to exercise all of their opt-out rights described in a consolidated opt-out notice that includes the GLBA privacy, FCRA affiliate sharing, and FCRA affiliate marketing opt-outs, by a single method, such as by calling a single toll-free telephone number. This example furthers the statutory directive to the Agencies to ensure that notices and disclosures may be coordinated and consolidated. The final rules also clarify the example renumbered as § __.25(b)(2)(iii) to illustrate that it is not reasonable or simple to require a consumer who receives the opt-out notice in electronic form, such as through posting at an Internet Web site, to opt out solely by paper mail or by visiting a different Web site without providing a link to that site.

Section .25(c) has been added to clarify that each consumer may be required to opt out through a specific means, as long as that means is reasonable and simple for that consumer. This new section corresponds to a provision in the GLBA privacy rules, § __.7(a)(2)(iv).

Section __.26 Delivery of Opt-Out Notices

General Rule and Examples

Section __.24 of the proposal addressed the delivery of opt-out notices. Proposed § __.24(a) provided that an institution would have to deliver an opt-out notice so that each consumer could reasonably be expected to receive actual notice. This standard would not have required actual notice. The supplementary information to the proposal also clarified that, for opt-out notices delivered electronically, the notices could be delivered either in accordance with the electronic disclosure provisions in Subpart C or in accordance with the E-Sign Act. For example, the institution could e-mail its notice to a consumer who agreed to the electronic delivery of information or provide the notice on its Internet Web site for a consumer who obtained a product or service electronically from that Web site. Commenters generally supported the reasonable expectation of actual notice standard.

Proposed § __.24(b) provided examples to illustrate what would constitute delivery of an opt-out notice. Commenters expressed concern about the electronic notice example in proposed paragraph (b)(1)(iii). Consumer groups objected to this example by pointing to a growing trend in which companies require consumers to agree to electronic notices if they conduct business on an Internet Web site. These commenters believed that there was nothing to ensure that the notice would be clearly accessible to consumers on the Web site. These commenters believed that, at a minimum, the Agencies should require the notice to be sent to the consumer's e-mail address, rather than posted to an Internet Web site, where the consumer has expressly opted in to the electronic delivery of notices. Some industry commenters objected to the acknowledgement of receipt requirement in this example as inconsistent with the E-Sign Act. One of these commenters urged the Agencies to explicitly incorporate the E-Sign Act into the requirements for delivering opt-out notices.

The Agencies have renumbered the general rule regarding delivery of opt-out notices as § __.26(a) in the final rules and divided the examples into positive and negative examples in §§ __.26(b) and (c) respectively. In the final rules, the Agencies have retained the reasonable expectation of actual notice standard, which does not require the institution to determine if the consumer actually received the opt-out notice. For example, mailing a printed copy of the opt-out notice to the last known mailing address of a consumer satisfies the requirement to deliver the opt-out notice so that there is a reasonable expectation that the consumer has received actual notice.

The Agencies have revised some of the examples of a reasonable expectation of actual notice for electronic notices. The new example in § __.26(b)(3) illustrates that the reasonable expectation of actual notice

standard would be satisfied by providing notice by e-mail to a consumer who has agreed to receive disclosures by e-mail from the person providing the notice. The Agencies reiterate that an acknowledgement of receipt is not necessary for a notice provided by e-mail to such a consumer. Conversely, the example in § __.26(c)(2) illustrates that the reasonable expectation of actual notice standard would not be satisfied by providing notice by e-mail to a consumer who has not agreed to receive disclosures by e-mail from the person providing the notice.

The revised example in § __.26(b)(4) illustrates that for a consumer who obtains a product or service electronically, the reasonable expectation standard would be satisfied by posting the notice on the Internet Web site at which the consumer obtains such product or services and requiring the consumer to acknowledge receipt of the notice. Conversely, the new example in § __.26(c)(3) illustrates that the reasonable expectation standard would not be satisfied by posting the notice on the Internet Web site without requiring the consumer to acknowledge receipt of the notice. As discussed above, the Agencies have determined that the electronic delivery of opt-out notices does not require consumer consent in accordance with the E-Sign Act because neither section 624 of the FCRA nor the final rules require that the notice be provided in writing. Thus, requiring an acknowledgement of receipt is within the scope of the Agencies' interpretive authority. This example is also consistent with an example in the GLBA privacy rules and seems appropriate where the notice is posted at an Internet Web site.

The Agencies decline to require the delivery of electronic notices by e-mail. Concerns about the security of e-mail, especially phishing, make it inappropriate to require e-mail as the only permissible form of electronic delivery for opt-out notices.

Section __.27 Renewal of Opt-Out

Proposed §__.26 described the procedures for extension of an opt-out. Proposed §__.26(a) provided that a receiving affiliate could not make or send solicitations to the consumer after the expiration of the opt-out period based on eligibility information it receives or has received from an affiliate, unless the person responsible for providing the initial opt-out notice, or its successor, has given the consumer an extension notice and a reasonable opportunity to extend the opt-out, and the consumer does not extend the opt-out. Thus, if an extension notice was not provided to the consumer, the opt-out period would continue indefinitely. Proposed §__.26(b) provided that each opt-out extension would have to be effective for a period of at least five years.

Proposed §__.26(c) addressed the contents of a clear, conspicuous, and concise extension notice and provided flexibility to comply in either of two ways. Under one approach, the notice would disclose the same items required to be disclosed in the initial opt-out notice, along with a statement explaining that the consumer's prior opt-out has expired or is about to expire, as applicable, and that if the consumer wishes to keep the consumer's opt-out election in force, the consumer must opt out again. Under a second approach, the extension notice would provide: (1) That the consumer previously elected to limit an affiliate from using eligibility information about the consumer that it obtains from the communicating affiliate to make or send solicitations to the consumer; (2) that the consumer's election has expired or is about to expire, as applicable; (3) that the consumer may elect to extend the consumer's previous election; and (4) a reasonable and simple method for the consumer to opt out. The supplementary information to the proposal clarified that institutions would not need to provide extension notices if they treated the consumer's opt-out election as valid in perpetuity, unless revoked by the consumer.

Proposed §__.26(d) addressed the timing of the extension notice and provided that an extension notice could be given to the consumer either a reasonable period of time before the expiration of the opt-out period, or any time after the expiration of the opt-out period but before solicitations that would have been prohibited by the expired opt-out are made to the consumer. The Agencies did not propose to set a fixed time for what would constitute a reasonable period of time before the expiration of the opt-out period to send an extension notice because a reasonable period of time may depend upon the amount of time afforded to the consumer for a reasonable opportunity to opt out, the amount of time necessary to process opt-outs, and other factors. Proposed §__.26(e) made clear that sending an extension notice to the consumer before the expiration of the opt-out period does not shorten the five-year opt-out period.

A few industry commenters objected to the fact that the contents of the extension notice would differ from the contents of the initial notice by requiring that the extension notice inform the consumer that the consumer's prior opt-out has expired or is about to expire, as applicable, and that the consumer must opt out again to keep the opt-out election in force. These commenters argued that the added disclosure requirement would be costly and provide little benefit to consumers. One commenter maintained that the added disclosure requirement would make it difficult, if not impossible, to combine the extension notice with the GLBA privacy notice. Commenters also maintained that the language of the statute, particularly section 624(a)(1), contemplates that the same notice would satisfy the requirements for the initial and extension notices. Consumer groups and NAAG recommended that the Agencies define a ''reasonable opportunity'' to extend the opt-out as a period of at least 45 days before shared eligibility information is used to make solicitations to the consumer.

The Agencies have renumbered the provisions addressing the extension or renewal of opt-outs as §__.27 in the final rules and revised them. For purposes of clarity, the final rules refer to a ''renewal'' notice, rather than an ''extension'' notice.

Section__.27(a) contains the general rule, which provides that after the opt-out period expires, a person may not make solicitations based on eligibility information received from an affiliate to a consumer who previously opted out unless the consumer has been given a compliant renewal notice and a reasonable opportunity to opt out, and the consumer does not renew the opt-out. This section also clarifies that a person can make solicitations to a consumer after expiration of the opt-out period if one of the exceptions in §__.21(c) applies.

The Agencies decline to set a fixed minimum time period for a reasonable opportunity to renew the opt-out as unnecessary and inconsistent with the approach taken elsewhere in this rule and in the GLBA privacy rules. The provision regarding the duration of the renewed opt-out elicited no comment, and it has been retained in §__.27(a)(2) of the final rules.

Section__.27(a)(3) identifies the affiliates who may provide the renewal notice. A renewal notice must be provided either by the affiliate that provided the previous opt-out notice or its successor, or as part of a joint renewal notice from two or more members of an affiliated group of companies, or their successors, that jointly provided the previous opt-out notice. This rule balances the Agencies' goal of ensuring that the notice is

provided by an entity known to the consumer with a recognition that flexibility is required to account for changes in the corporate structure that may result from mergers and acquisitions, corporate name changes, and other events.

The Agencies recognize that the content of the extension or renewal notice differs from the content of the initial notice. Nothing in the statute, however, requires identical content in the initial and renewal notices. Moreover, the statute requires the Agencies to provide specific guidance to ensure that opt-out notices are clear, conspicuous, and concise. It is unreasonable to expect consumers, upon receipt of a renewal notice, to remember that they previously opted out five years ago (or longer) or, even if they do remember, to know that they must opt out again in order to renew their opt-out decision. Therefore, to ensure that the renewal notice is meaningful, the Agencies conclude that the renewal notice must remind the consumer that he or she previously opted out, inform the consumer that the opt-out has expired or is about to expire, and advise the consumer that he or she must opt out again to renew the opt-out and continue to limit solicitations from affiliates. Under the final rules, the renewal notice can state that ''the consumer's election has expired or is about to expire.'' The Agencies have deleted the words ''as applicable'' so that the notice does not have to be tailored to differentiate consumers for whom the election ''has expired'' from those for whom the election ''is about to expire.''

The Agencies are not persuaded that the additional content of the renewal notice will have any impact on the ability to combine the opt-out notice with the GLBA privacy notice. Even if the language of the renewal notice were identical to the initial notice, it still could be difficult to avoid honoring a consumer's opt-out in perpetuity if the affiliate marketing opt-out notice is incorporated into the GLBA privacy notice. Privacy notices typically state that if a consumer has previously opted out, it is not necessary for the consumer to opt out again. This statement would be accurate with respect to the affiliate marketing opt-out only if the consumer's opt-out is honored in perpetuity. It would not be accurate, however, if the affiliate marketing opt-out is effective only for a limited period of time, subject to renewal by the consumer at intervals of five years or longer. Thus, if the affiliate marketing opt-out notice was consolidated with GLBA privacy notices and were effective for a limited period of time, the privacy notices would have to be modified to make clear that statements that the consumer does not have to opt out again do not apply to the affiliate marketing renewal notice. Therefore, the Agencies do not believe that requiring a renewal notice to contain information not included in an initial notice will significantly affect the ability to incorporate the affiliate marketing opt-out notices into GLBA privacy notices because consolidation of the notices is most likely to occur when the affiliate marketing opt-out will be honored in perpetuity. Entities that prefer not to provide renewal notices may do so by honoring the consumer's opt-out in perpetuity. The contents of the renewal notice are adopted in §__.27(b) with revisions that incorporate the changes to §__.23, as discussed above. Section__.27(b) of the final rules also omits the alternative contents set forth in the proposal, which the Agencies now believe would be unnecessarily duplicative.

Proposed §__.26(d) addressed the timing of the extension or renewal notice and elicited no comment. The Agencies have renumbered this provision as §__.27(d) in the final rules, and adopted it with technical revisions. As explained in the supplementary information to the proposal, providing the renewal notice a reasonable period of time before the expiration of the opt-out period would enable institutions to begin marketing to consumers who do not renew their opt-out upon expiration of the opt-out period. But giving a renewal notice too far in advance of the expiration of the opt-out period may confuse consumers. The Agencies will deem a renewal notice provided on or with the last annual privacy notice required by the GLBA privacy provisions sent to the consumer before the expiration of the opt-out period to be reasonable in all cases.

Proposed §__.26(e) regarding the effect of an extension or renewal notice on the existing opt-out period elicited no comment. The Agencies have renumbered this provision as §__.27(d) in the final rules, and adopted it with technical changes.

Section __.28 Effective Date, Compliance Date, and Prospective Application

Effective Date and Compliance Date

Consistent with the requirements of section 624 of the FCRA, the proposal indicated that the final rules would become effective six months after the date on which they would be issued in final form. The Agencies requested comment on whether there was any need to delay the mandatory compliance date beyond the effective date specifically to permit institutions to incorporate the affiliate marketing opt-out notice into their next annual GLBA privacy notice.

Most industry commenters believed that the Agencies should delay the mandatory compliance date until some time after the effective date of the final rules. These commenters suggested various periods for delaying the mandatory compliance date ranging from three months to more than 24 months. Common recommendations were for a delayed mandatory compliance date of six, 12, or 18 months.

Some of these commenters suggested a two-part mandatory compliance date consisting of a delayed mandatory compliance date of either three or six months for new accounts or for general application and a special mandatory compliance date for institutions that intend to consolidate their affiliate marketing opt-out notice with their GLBA privacy notice. Under this special mandatory compliance date, institutions would have to comply at the time they provide their next GLBA privacy notice following the effective date of the final rules or a date certain, whichever is earlier.

Industry commenters believed that a delayed mandatory compliance date was necessary in order to make significant changes to business practices and procedures, to implement necessary operational and systems changes, and to design and provide opt-out notices. Industry commenters also noted that many institutions would like to send the affiliate marketing opt-out notice with their initial or annual GLBA privacy notices, both to minimize costs and to avoid consumer confusion. These commenters noted that many large institutions provide GLBA privacy notices on a rolling basis and that a delayed mandatory compliance date was necessary to enable institutions to introduce the affiliate marketing opt-out notice into this cycle. One large institution estimated that its first-year compliance costs would increase by a minimum of $660,000 if it was not able to consolidate the affiliate marketing opt-out notice with its GLBA privacy notice. A few industry commenters believed that Congress knew that an effective date is not necessarily the same as a mandatory compliance date because banking regulations commonly have effective dates and mandatory compliance dates that differ.

Consumer groups and NAAG believed that the effective date of the final rules

should be the mandatory compliance date. These commenters believed that institutions have had time to prepare for compliance since the FACT Act became law in December 2003. Consumer groups believed that if institutions need more time to comply, affiliates should cease using eligibility information to make solicitations until the notice and opportunity to opt out is provided.

The final rules will become effective January 1, 2008. Consistent with the statute's directive that the Agencies ensure that notices may be consolidated and coordinated, the mandatory compliance date is delayed to give institutions a reasonable amount of time to include the affiliate marketing opt-out notice with their initial and annual privacy notices. Accordingly, compliance with Subpart C is required not later than October 1, 2008. The Agencies believe that delaying the mandatory compliance date for approximately one year will give all institutions adequate time to develop and distribute opt-out notices and give most institutions sufficient time to develop and distribute consolidated notices if they choose to do so.

Prospective Application

Proposed §__.20(e) provided that the provisions of Subpart C would not apply to eligibility information that was received by a receiving affiliate prior to the date on which compliance with these regulations would be required. Some industry commenters supported this provision. Other industry commenters, however, believed that the proposed rule did not track the statutory language or reflect the intent of Congress. These commenters believed that the final rules should grandfather all information received by any financial institution or affiliate in a holding company prior to the mandatory compliance date, and not grandfather only that information received prior to the mandatory compliance date by a person that intends to use the information to make solicitations to the consumer. Some of these commenters recommended, in the alternative, that the Agencies clarify that any information placed into a common database by an affiliate should be deemed to have been provided to an affiliated person if the Agencies opt to retain the prospective application provision as proposed. These commenters argued that without such a clarification, affiliated companies would have to undertake the costly deconstruction of existing databases to ensure compliance.

In the final rules, the provision addressing prospective application has been renumbered as §__.28(c), and revised. The Agencies continue to believe that the better interpretation of the non-retroactivity provision is that it is tied to receipt of eligibility information by a person that intends to use the information to make solicitations to the consumer. The final rules clarify, however, that a person is deemed to receive eligibility information from its affiliate when the affiliate places that information in a common database where it is accessible by the person, even if the person has not accessed or used that information as of the compliance date. For example, assume that an affiliate obtains eligibility information about a consumer as a result of having a pre-existing business relationship with that consumer. The affiliate places that information into a common database that is accessible to other affiliates before the mandatory compliance date. The final rules do not apply to that information and other affiliates may use that information for marketing to the consumer. On the other hand, if the affiliate obtains eligibility information about the consumer before the mandatory compliance date, but does not either place that information into a common database that is accessible to other affiliates or otherwise provide that information to another affiliate before the mandatory compliance date, the final rules will apply to that eligibility information. Further, if the database is updated with new eligibility information after the mandatory compliance date, the final rules will apply to the new or updated eligibility information.

Appendix C

Appendix A of the proposal contained model forms to illustrate by way of example how institutions could comply with the notice and opt-out requirements of section 624 and the proposed regulations. Appendix A included three proposed model forms. Model Form A–1 was a proposed form of an initial opt-out notice. Model Form A–2 was a proposed form of an extension notice. Model Form A–3 was a proposed form that institutions may use if they offer consumers a broader right to opt out of marketing than is required by law.

The proposed model forms were designed to convey the necessary information to consumers as simply as possible. The Agencies tested the proposed model forms using two widely available readability tests, the Flesch reading ease test and the Flesch-Kincaid grade level test, each of which generates a readability score.[16] Proposed Model Form A–1 had a Flesch reading ease score of 53.7 and a Flesch-Kincaid grade level score of 9.9. Proposed Model Form A–2 had a Flesch reading ease score of 57.5 and a Flesch-Kincaid grade level score of 9.6. Proposed Model Form A–3 had a Flesch reading ease score of 69.9 and a Flesch-Kincaid grade level score of 6.7.

Commenters generally supported the proposed model forms. As noted above, some commenters had concerns about the content of the initial and renewal notices. Some industry commenters expressed concern about requiring the notice to specify the applicable time period and the consumer's right to renew the election once the opt-out expires. Industry commenters also suggested revising the language of the notice to refer either to ''financial'' information or ''credit eligibility'' information for clarity. One commenter suggested deleting the examples of the types of information shared with affiliates. Another commenter suggested rephrasing the model forms in the passive voice. One commenter encouraged the Agencies to clarify that use of the model forms provides a safe harbor. Another commenter believed that the optional third paragraph of Model Form A–1 should be revised, or an alternate paragraph added, to provide guidance on how to clearly disclose to consumers that the opt-out may not limit the sharing of contact information and other information that does not meet the definition of ''consumer report.''

Consumer groups and NAAG commended the Agencies for reporting the Flesch reading ease score and Flesch-Kincaid grade-level score for each of the model forms. These commenters urged the Agencies to modify the proposed rule to require that any person that does not use the model forms must provide a notice that achieves readability scores at least as good as the scores for the model forms. Consumer groups also suggested adding a sentence about providing the form annually to mitigate consumer confusion. These commenters also urged the Agencies to adopt a short-form notice.

The Agencies have revised and expanded the number of model forms to reflect changes made to the final rules. In addition, for ease of reference, the model forms have been renumbered as

[16] The Flesch reading ease test generates a score between zero and 100, where the higher score correlates with improved readability. The Flesch-Kincaid grade level test generates a numerical assessment of the grade-level at which the text is written.

Appendix C to correspond with Subpart C to which they pertain. The Agencies believe that model forms are helpful for entities that give notices and beneficial for consumers. The model forms are provided as stand-alone documents. However, some persons may choose to combine the opt-out notice with other consumer disclosures, such as the GLBA privacy notice. Creating a consolidated model form is beyond the scope of this rulemaking, but, as discussed above, institutions can combine the affiliate marketing opt-out notice with other disclosures, including the GLBA privacy notice.

On March 31, 2006, the Board, FDIC, FTC, NCUA, OCC, and SEC released a report entitled *Evolution of a Prototype Financial Privacy Notice* prepared by Kleimann Communication Group, Inc., summarizing research that led to the development of a prototype short-form GLBA privacy notice. That prototype included an affiliate marketing opt-out notice. The prototype assumed that the notice would be provided by the affiliate that is sharing eligibility information. The Agencies believe that providing model forms in this rule for stand-alone opt-out notices that may be used in a more diverse set of circumstances than a model privacy form is appropriate and consistent with efforts to develop a model privacy form. On March 29, 2007, the Agencies, the FTC, SEC, and Commodity Futures Trading Commission published for public comment in the **Federal Register** (72 FR 14,940) a model privacy form that includes the affiliate marketing opt-out. Once such a notice is published in final form, use of the model privacy form will satisfy the requirement to provide an initial affiliate marketing opt-out notice.

The final rules include five model forms. Model Form C–1 is the model for an initial notice provided by a single affiliate. Model Form C–2 is the model for an initial notice provided as a joint notice from two or more affiliates. Model Form C–3 is the model for a renewal notice provided by a single affiliate. Model Form C–4 is the model for a renewal notice provided as a joint notice from two or more affiliates. Model Form C–5 is a model for a voluntary ''no marketing'' opt-out.

The Agencies tested each of the model forms using two widely-available readability tests, the Flesch reading ease test and the Flesch-Kincaid grade level test. In conducting these tests, the Agencies eliminated parenthetical text wherever possible, included the optional clauses, and substituted the names of fictional entities, for example, ABC Bank or the ABC group of companies, as the names of the relevant entities to ensure that the test results were not skewed by the inclusion of descriptive text that would not be included in actual opt-out notices. The results of these tests are summarized for each of the model forms in Table 1 below.

Although the Agencies encourage the use of these tests as well as other types of consumer testing in designing opt-out notices, the Agencies decline to adopt a prescriptive approach that requires notices to achieve certain scores under the Flesch reading ease or Flesch-Kincaid grade level tests. Some variation in readability scores is inevitable and may be caused by minor differences in the language of the notice, such as the name of the entity providing the notice or the types of information that may be used for marketing.

TABLE 1

	Flesch reading ease score	Flesch-Kincaid grade level score
Model Form C–1	50.2	11.5
Model Form C–2	51.7	11.5
Model Form C–3	54.6	9.7
Model Form C–4	54.2	9.8
Model Form C–5	81.3	3.8

As noted in the proposal, use of the model forms is not mandatory. However, appropriate use of the model forms provides a safe harbor. There is flexibility to use or not use the model forms, or to modify the forms, so long as the requirements of the regulation are met. For example, although several of the model forms use five years as the duration of the opt-out period, an opt-out period of longer than five years may be used and the longer time period substituted in the opt-out notices. Alternatively, the consumer's opt-out may be treated as effective in perpetuity and, if so, the opt-out notice should omit any reference to the limited duration of the opt-out period or the right to renew the opt-out.

The Agencies have revised the model forms so that the disclosure regarding the duration of the opt-out may state that the opt-out applies either for a fixed number of years or ''at least 5 years.'' This revision permits institutions that use a longer opt-out period or that subsequently extend their opt-out period to rely on the model language. The model form also contains a reference to the consumer's right to revoke an opt-out. In addition, language has been added to the model forms to clarify that, with an opt-out of limited duration, a consumer does not have to opt out again until a renewal notice is sent.

V. Regulatory Analysis

Paperwork Reduction Act

In accordance with the requirements of the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3506; 5 CFR part 1320 Appendix A.1), the Agencies have reviewed the final rules and determined that they contain collections of information subject to the PRA. The Board made this determination under authority delegated to the Board by the Office of Management and Budget (OMB). The collections of information required by these rules are found in 12 CFR 41.21–41.27, 12 CFR 222.21–222.27, 12 CFR 334.21–334.27, 12 CFR 571.21–571.27, and 12 CFR 717.21–717.27. The Agencies may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid OMB control number. This collection is mandatory (15 U.S.C. 1693 *et seq.*). The respondents/recordkeepers are financial institutions that share certain information for marketing purposes, and certain consumers of their services.

The final rules impose disclosure requirements on certain affiliated companies subject to each Agency's jurisdiction. Specifically, the FACT Act and the final rules provide that when a company communicates certain information about the consumer (''eligibility information'') to an affiliate, the affiliate may not use that information to make solicitations for marketing purposes to the consumer unless the consumer is given a notice and an opportunity to opt-out of that use of the information and the consumer does not opt-out.

In the proposal, the Agencies estimated that the average amount of time for a person to prepare an initial notice as required under the proposal and distribute the notice to consumers would be approximately 18 hours. The Agencies recognized that the amount of time needed for any particular person subject to the proposed requirements may be higher or lower, but believed that this average figure was a reasonable estimate. To minimize the compliance costs and burdens for persons, particularly small entities, the proposed rule contained model disclosures and opt-out notices that may be used to satisfy the statutory requirements. The proposed rule gave covered persons flexibility to satisfy the notice and opt-out requirement by sending the consumer a free-standing opt-out notice or by adding the opt-out notice to the

privacy notices already provided to consumers in accordance with the provisions of Title V of the GLBA. For covered persons that choose to prepare a free-standing opt-out notice, the time necessary to prepare a free-standing opt-out notice would be minimal, because those persons could simply copy the model disclosure, making minor adjustments as indicated by the model disclosure. Similarly, for covered persons that choose to incorporate the opt-out notice into their GLBA privacy notices, the time necessary to integrate the model opt-out notice into their privacy notices would be minimal. The Agencies estimated that the average consumer would take approximately five minutes to respond to the notice and opt-out.

The Agencies did not estimate the burden for preparing and distributing extension notices by covered persons that choose to limit the duration of the opt-out time period because the minimum effective time period for the opt-out is five years. The Agencies proposed to estimate the burden for this requirement when they conduct a subsequent review of the information collection.

Information Collection

The Agencies, other than the Board and NCUA, are seeking OMB approval to extend for three years, with revision, the information collections in connection with this final rule. The Board, under its delegated authority from OMB, has approved the implementation of this information collection. The NCUA is seeking OMB approval for this new collection of information.

OCC:

Title: Fair Credit Reporting Affiliate Marketing (12 CFR part 41).

OMB Number: 1557–0230

Frequency of Response: On occasion.

Affected Public: National banks, Federal branches and agencies of foreign banks, and their respective operating subsidiaries that are not functionally regulated within the meaning of section 5(c)(5) of the Bank Holding Company Act of 1956, as amended (12 U.S.C. 1844(c)(5).

Number of Respondents: 770 National banks and 916,895 Consumers.

Estimated Time per Response: 18 hours, Prepare and distribute notice to consumers, and employee training; 5 minutes, Consumer response to opt-out notice.

Total Estimated Annual Burden: 90,265 hours.

Board:

Title: Information Collection Requirements in Connection with Regulation V (Fair Credit Reporting Act) (Affiliate Marketing Disclosures/ Consumer Opt-Out Notices).

OMB Number: 7100–0308.[17]

Frequency of Response: On occasion.

Affected Public: State member banks, branches and agencies of foreign banks (other than federal branches, Federal agencies, and insured State branches of foreign banks), commercial lending companies owned or controlled by foreign banks, Edge and agreement corporations, and bank holding companies and affiliates of such holding companies (other than depository institutions and consumer reporting agencies).

Number of Respondents: 2,619 Financial institutions and 638,380 Consumers.

Estimated Time per Response: 18 hours, Prepare and distribute notice to consumers, and employee training; 5 minutes, Consumer response to opt-out notice.

Total Estimated Annual Burden: 100,423 hours.

FDIC:

Title: Affiliate Marketing Disclosures/ Consumer Opt-Out Notices.

OMB Number: 3064–0149.

Frequency of Response: On occasion.

Affected Public: Insured state nonmember banks.

Number of Respondents: 978 Financial institutions and 198,450 Consumers.

Estimated Time per Response: 18 hours, Prepare and distribute notice to consumers, and employee training; 5 minutes, Consumer response to opt-out notice.

Total Estimated Annual Burden: 34,142 hours.

OTS:

Title: Fair Credit Reporting Affiliate Marketing Regulations.

OMB Number: 1550–0112.

Frequency of Response: On occasion.

Affected Public: Savings associations and Federal savings association operating subsidiaries that are not functionally regulated within the meaning of section 5(c)(5) of the Bank Holding Company Act of 1956, as amended (12 U.S.C. 1844(c)(5)).

Number of Respondents: 609 Financial institutions and 216,783 Consumers.

Estimated Time per Response: 18 hours, Prepare and distribute notice to consumers, and employee training; 5 minutes, Consumer response to opt-out notice.

Total Estimated Annual Burden: 28,955 hours.

NCUA:

Title: Information Collection Requirements in Connection with Fair Credit Reporting Act Regulations.

OMB Number: 3133–New.

Frequency of Response: On occasion.

Affected Public: Federal credit unions with CUSO affiliates.

Number of Respondents: 1,065 Financial institutions and 1,023,693 Consumers.

Estimated Time per Response: 18 hours, Prepare and distribute notice to consumers, and employee training; 5 minutes, Consumer response to opt-out notice.

Total Estimated Annual Burden: 104,137 hours.

The Agencies received one comment, from a trade association, in response to the PRA section of the proposal. The commenter raised concerns that the Agencies' PRA cost estimates conveyed a misleading impression of the cost of complying with the affiliate marketing opt-out rule. The commenter's principal objection was that the cost estimates assume that the major cost is that of sending the disclosures, rather than processing any opt-out requests and ensuring that solicitations are not sent to consumers who have opted-out (or have not yet had a reasonable opportunity to opt-out). The commenter was concerned that the cost estimates did not reflect the costs associated with building compliance systems, such as costs attributed to significant database programming, coordination across business entities, legal and managerial review, employee training, and business process changes. The commenter stated that the PRA analysis did not take into account the significant clerical effort needed to comply with the proposed rule. The commenter also stated that companies that currently provide GLBA privacy and Fair Credit Reporting Act (FCRA) affiliate sharing opt-out notices would still incur significant costs because (1) unlike under the GLBA opt-out right, the new affiliate marketing opt-out right applies to affiliates, and (2) unlike under the FCRA affiliate sharing opt-out, the new affiliate marketing opt-out right applies to transaction or experience information. The commenter objected to the Agencies' use of average figures which take into account the fact that some companies may not need to provide affiliate marketing opt-out notices to consumers, rather than focusing exclusively on the costs to companies that must provide the notice. Finally, the commenter stated that

[17] The information collections (ICs) in this rule will be incorporated with the Board's Disclosure Requirements Associated with Regulation V (OMB No. 7100–0308). The burden estimates provided in this rule pertain only to the ICs associated with this final rulemaking. The current OMB inventory for Regulation V is available at: *http://www.reginfo.gov/public/do/PRAMain.*

compliance with the proposed rule would be particularly difficult because software modifications and employee training would be required to ensure that both bank and affiliate employees have access to consumer's transaction or experience information in order to service their accounts, but are prevented from using that information to solicit business from consumers that have exercised their opt-out rights.

In response, the Agencies continue to believe that 18 hours is a reasonable estimate of the average amount of time to prepare and distribute an initial notice to consumers and for employee training; and five minutes is a reasonable estimate of the average consumer response time. The Agencies continue to believe that institutions should be able to modify existing database systems and employee training programs, used to comply with the GLBA and FCRA notice and opt-out requirements, to meet the requirements held in this final rule. As required by the PRA, the Agencies' annual burden estimates take into account the burden associated with the reporting, recordkeeping, and third-party disclosure requirements of the final rules (see 44 U.S.C. 3502(2); 5 CFR 1320.3(b)). The Agencies also believe that the availability of model disclosures and opt-out notices may significantly reduce the cost of compliance. In addition, the final rules give persons flexibility to provide a joint opt-out notice on behalf of multiple affiliates and to define the scope and the duration of the opt-out. This flexibility may reduce the cost of compliance by allowing covered persons to make choices that are most appropriate for their business. Moreover, since the notice is only required to be given once for a minimum period of at least five years, the Agencies' estimates assume a higher burden will be incurred during the first year of the OMB clearance period with a lesser burden incurred during the subsequent two years.

The Agencies have a continuing interest in the public's opinions of our collections of information. At any time, comments regarding the burden estimate, or any other aspect of this collection of information, including suggestions for reducing the burden, may be sent to the following:

OCC: Communications Division, Office of the Comptroller of the Currency, Public Information Room, Mailstop 1–5, Attention: 1557–0230, 250 E Street, SW., Washington, DC 20219. In addition, comments may be sent by fax to (202) 874–4448, or by electronic mail to *regs.comments@occ.treas.gov*. You can inspect and photocopy comments at the OCC's Public Information Room, 250 E Street, SW., Washington, DC 20219. For security reasons, the OCC requires that visitors make an appointment to inspect comments. You may do so by calling (202) 874–5043. Upon arrival, visitors will be required to present valid government-issued photo identification and submit to security screening in order to inspect and photocopy comments.

Board: You may submit comments, which should refer to ''Information Collection Requirements in Connection with Regulation V (Fair Credit Reporting Act) (Affiliate Marketing Disclosures/Consumer Opt-Out Notices), 7100–0308'' by any of the following methods:

- Agency Web Site: *http://www.federalreserve.gov.* Follow the instructions for submitting comments on the *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm.*
- Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.
- E-mail: *regs.comments@federalreserve.gov.* Include docket number in the subject line of the message.
- Fax: 202–452–3819 or 202–452–3102.
- Mail: Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW., Washington, DC 20551.

All public comments are available from the Board's Web site at *www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm* as submitted, unless modified for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper in Room MP–500 of the Board's Martin Building (20th and C Streets, NW.) between 9 a.m. and 5 p.m. on weekdays.

FDIC: You may submit comments, which should refer to ''Affiliate Marketing Disclosures/Consumer Opt-Out Notices, 3064–0149,'' by any of the following methods:

- *http://www.FDIC.gov/regulations/laws/federal/notices.html.*
- E-mail: *comments@FDIC.gov.* Include ''Affiliate Marketing Disclosures/Consumer Opt-Out Notices, 3064–0149,'' in the subject line of the message.
- Mail: Steven F. Hanft (202–898–3907), Clearance Officer, Attn: Comments, Room MB–2088, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.
- Hand Delivery: Comments may be hand delivered to the guard station at the rear of the 550 17th Street Building (located on F Street) on business days between 7 a.m. and 5 p.m.

Public Inspection: All comments received will be posted without change to *http://www.fdic.gov/regulations/laws/federal/notices.html* including any personal information provided. Comments may be inspected at the FDIC Public Information Center, Room E–1002, 3501 Fairfax Drive, Arlington, VA 22226, between 9 a.m. and 5 p.m. on business days.

OTS: You may submit comments, identified by ''1550–0112 (Fair Credit Reporting Affiliate Marketing Regulations),'' by any of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.
- E-mail address: *infocollection.comments@ots.treas.gov.* Please include ''1550–0112 (Fair Credit Reporting Affiliate Marketing Regulations),'' in the subject line of the message and include your name and telephone number in the message.
- Fax: (202) 906–6518.
- Mail: Information Collection Comments, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW, Washington, DC 20552, Attention: ''1550–0112 (Fair Credit Reporting Affiliate Marketing Regulations).''
- Hand Delivery/Courier: Guard's Desk, East Lobby Entrance, 1700 G Street, NW, from 9 a.m. to 4 p.m. on business days, Attention: Information Collection Comments, Chief Counsel's Office, Attention: ''1550–0112 (Fair Credit Reporting Affiliate Marketing Regulations).''

Instructions: All submissions received must include the agency name and OMB Control Number for this information collection. All comments received will be posted without change to the OTS Internet Site at *http://www.ots.treas.gov/pagehtml.cfm?catNumber=67&an=1*, including any personal information provided.

Docket: For access to the docket to read background documents or comments received, go to *http://www.ots.treas.gov/pagehtml.cfm?catNumber=67&an=1.*

In addition, you may inspect comments at the Public Reading Room, 1700 G Street, NW., by appointment. To make an appointment for access, call (202) 906–5922, send an e-mail to *public.info@ots.treas.gov*, or send a facsimile transmission to (202) 906–7755. (Prior notice identifying the materials you will be requesting will

assist us in serving you.) We schedule appointments on business days between 10 a.m. and 4 p.m. In most cases, appointments will be available the next business day following the date we receive a request.

NCUA: You may submit comments by any of the following methods (please send comments by one method only):

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *NCUA Web Site: http://www.ncua.gov/RegulationsOpinionsLaws/proposedregs/proposedregs.html.* Follow the instructions for submitting comments.
- *E-mail:* Address to *regcomments@ncua.gov.* Include ''[Your name] Comments on Information Collection Requirements in Connection with Fair Credit,'' in the e-mail subject line.
- *Fax:* (703) 518–6319. Use the subject line described above for e-mail.
- *Mail:* Address to Neil McNamara, Deputy Chief Information Officer, National Credit Union Administration, 1775 Duke Street, Alexandria, VA 22314–3428.
- *Hand Delivery/Courier:* Same as mail address.

Additionally, you should send a copy of your comments to [Agency] Desk Officer, [OMB No.], by mail to U.S. Office of Management and Budget, 725 17th Street, NW., #10235, Washington, DC 20503, or by fax to (202) 395–6974.

Regulatory Flexibility Act

OCC: OCC prepared an initial regulatory flexibility analysis as required by the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 et seq.) in connection with the July 15, 2004 proposed rule. OCC received one comment on its regulatory flexibility analysis.

Under Section 605(b) of the RFA, 5 U.S.C. 605(b), the regulatory flexibility analysis otherwise required under Section 604 of the RFA is not required if an agency certifies, along with a statement providing the factual basis for such certification, that the rule will not have a significant economic impact on a substantial number of small entities. For purposes of the RFA and OCC-regulated entities, a ''small entity'' is a national bank with assets of $165 million or less (small national bank). Based on its analysis and for the reasons stated below, OCC certifies that this final rule will not have a significant economic impact on a substantial number of small entities. OCC's final rule will not impact a substantial number of small entities because OCC estimates that the final rule will affect no more than 12 out of 948 small national banks (approximately 1%) with assets of $165 million or less.

1. Statement of the Need for, and Objectives of, the Final Rule

The FACT Act amends the FCRA and was enacted, in part, for the purpose of allowing consumers to limit the use of eligibility information received from an affiliate to make solicitations to the consumer. Section 214 of the FACT Act generally prohibits a person from using certain information received from an affiliate to make a solicitation for marketing purposes to a consumer, unless the consumer is given notice and an opportunity and simple method to opt out of the making of such solicitations. Section 214 requires the OCC, together with the other Agencies, the FTC, and the SEC, to consult and coordinate with each other and to prescribe regulations implementing section 214 that, to the extent possible, are consistent and comparable. OCC is adopting the final rule to implement section 214 of the FACT Act. The **SUPPLEMENTARY INFORMATION** contains information on the objectives of the final rule.

2. Summary of Issues Raised by Comments in Response to the Initial Regulatory Flexibility Analysis

OCC conducted an initial regulatory flexibility analysis in connection with the proposed rule as required by section 3(a) of the RFA (5 U.S.C. 603(a)). One commenter, the Mortgage Bankers Association (MBA), believed that the Agencies had underestimated compliance costs. The issues raised by the MBA are described in the Paperwork Reduction Act section of the **SUPPLEMENTARY INFORMATION.** The MBA's concerns applied equally to small entities and larger entities. The MBA did not raise any issues unique to small entities.

3. Description and Estimate of Small Entities Affected by the Final Rule

The final rule applies to national banks, Federal branches and agencies of foreign banks, and any of their operating subsidiaries that are not functionally regulated within the meaning of section 5(c)(5) of the Bank Holding Company Act of 1956, as amended (12 U.S.C. 1844(c)(5)) (national banks). However, the rule's requirements only affect those entities with affiliates that choose to structure their marketing activities in a manner that triggers the rule's requirements.

OCC estimates that its final rule could apply to as many as 1,806 national banks. The OCC also estimates that 1,036 of these national banks do not have affiliates and, therefore, will not affected by the requirements of the final rule. Of the estimated 770 national banks that would be subject to the final rule's requirements, approximately 12 of these institutions are small national banks with assets of $165 million or less.

In addition, small entities that have affiliates may choose not to engage in activities that would require compliance with the final rule. For example, small entities may choose not to share eligibility information with their affiliates for the purpose of making solicitations. Alternatively, small entities and their affiliates may structure their marketing activities in a way that does not trigger the requirement to comply with the final rule, such as by relying upon the exceptions to the notice requirement contained in the final rule.

4. Recordkeeping, Reporting, and Other Compliance Requirements

The final rule requires all national banks, including small national banks, to provide opt-out notices and renewal notices to consumers in certain circumstances, as discussed in the **SUPPLEMENTARY INFORMATION** section above, and to implement consumers' opt-out elections. The final rule contains no requirement to report information to the Agencies.

Small entities that have affiliates, share eligibility information with those affiliates, and use that information to make solicitations for marketing purposes may be subject to the rule. Small entities that do not have affiliates, do not share eligibility information with their affiliates for marketing purposes, use shared eligibility information for purposes of making solicitations only in accordance with one of the exceptions set forth in the final rule, or structure their marketing activities to eliminate the need to provide an opt-out notice would not be subject to the final rule. The professional skills necessary for preparation of the opt-out notice include compliance and/or privacy specialists and computer programmers.

5. Steps Taken To Minimize the Economic Impact on Small Entities

OCC and the other Agencies have attempted to minimize the economic impact on small entities by adopting consistent rules and by allowing joint notices on behalf of multiple affiliates. In addition, OCC and the other Agencies have provided model forms that small institutions may, but are not required to, use to minimize the cost of compliance.

Board: The Board prepared an initial regulatory flexibility analysis as required by the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) in connection with the July 15, 2004 proposed rule. The Board received one comment on its regulatory flexibility analysis.

Under Section 605(b) of the RFA, 5 U.S.C. 605(b), the regulatory flexibility analysis otherwise required under Section 604 of the RFA is not required if an agency certifies, along with a statement providing the factual basis for such certification, that the rule will not have a significant economic impact on a substantial number of small entities. Based on its analysis and for the reasons stated below, the Board certifies that this final rule will not have a significant economic impact on a substantial number of small entities.

1. Statement of the Need for, and Objectives of, the Final Rule

The FACT Act amends the FCRA and was enacted, in part, for the purpose of allowing consumers to limit the use of eligibility information received from an affiliate to make solicitations to the consumer. Section 214 of the FACT Act generally prohibits a person from using certain information received from an affiliate to make a solicitation for marketing purposes to a consumer, unless the consumer is given notice and an opportunity and simple method to opt out of the making of such solicitations. Section 214 requires the Board, together with the other Agencies, the FTC, and the SEC, to issue regulations implementing the section in consultation and coordination with each other. The Board received no comments on the reasons for the proposed rule. The Board is adopting the final rule to implement § 214 of the FACT Act. The **SUPPLEMENTARY INFORMATION** above contains information on the objectives of the final rule.

2. Summary of Issues Raised by Comments in Response to the Initial Regulatory Flexibility Analysis

In accordance with Section 3(a) of the RFA, the Board conducted an initial regulatory flexibility analysis in connection with the proposed rule. One commenter, the Mortgage Bankers Association (MBA), believed that the Board and the other Agencies had underestimated the costs of compliance. The issues raised by the MBA are described in the Paperwork Reduction Act section above. The MBA's concerns applied equally to small entities and larger entities. The MBA did not raise any issues unique to small entities.

3. Description and Estimate of Small Entities Affected by the Final Rule

The final rule applies to all banks that are members of the Federal Reserve System (other than national banks) and their respective operating subsidiaries, branches and Agencies of foreign banks (other than Federal branches, Federal Agencies, and insured State branches of foreign banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under section 25 or 25A of the Federal Reserve Act (12 U.S.C. 601 *et seq.*, and 611 *et seq.*). The Board's rule will apply to the following institutions (numbers approximate): State member banks (881), operating subsidiaries that are not functionally regulated with in the meaning of section 5(c)(5) of the Bank Holding Company Act of 1956, as amended (877), U.S. branches and agencies of foreign banks (219), commercial lending companies owned or controlled by foreign banks (3), and Edge and agreement corporations (64), for a total of approximately 2,044 institutions. The Board estimates that more than 1,448 of these institutions could be considered small entities with assets of $165 million or less.

All small entities covered by the Board's rule potentially could be subject to the final rule. However, small entities that do not have affiliates would not be subject to the final rule. In addition, small entities that have affiliates may choose not to engage in activities that would require compliance with the final rule. For example, small entities may choose not to share eligibility information with their affiliates for the purpose of making solicitations. Alternatively, small entities and their affiliates may structure their marketing activities in a way that does not trigger the requirement to comply with the final rule, such as by relying upon the exceptions to the notice requirement contained in the final rule.

4. Recordkeeping, Reporting, and Other Compliance Requirements

The final rule requires small entities to provide opt-out notices and renewal notices to consumers in certain circumstances, as discussed in the **SUPPLEMENTARY INFORMATION** above. The final rule also requires small entities to implement consumers' opt-out elections. The final rule contains no requirement to report information to the Agencies.

Small entities that have affiliates and that share eligibility information with those affiliates for purposes of making solicitations may be subject to the rule. Small entities that do not have affiliates, do not share eligibility information with their affiliates for marketing purposes, use shared eligibility information for purposes of making solicitations only in accordance with one of the exceptions set forth in the final rule, or structure their marketing activities to eliminate the need to provide an opt-out notice would not be subject to the final rule. The professional skills necessary for preparation of the opt-out notice include compliance and/or privacy specialists and computer programmers.

5. Steps Taken To Minimize the Economic Impact on Small Entities

The Board and the other Agencies have attempted to minimize the economic impact on small entities by adopting consistent rules and by allowing joint notices on behalf of multiple affiliates. In addition, the Board and the other Agencies have provided model forms that small institutions may, but are not required to, use to minimize the cost of compliance.

FDIC: The FDIC prepared an initial regulatory flexibility analysis as required by the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) in connection with the July 15, 2004 proposed rule. The FDIC received one comment on its regulatory flexibility analysis.

Under Section 605(b) of the RFA, 5 U.S.C. 605(b), the regulatory flexibility analysis otherwise required under Section 604 of the RFA is not required if an agency certifies, along with a statement providing the factual basis for such certification, that the rule will not have a significant economic impact on a substantial number of small entities. Based on its analysis and for the reasons stated below, the FDIC certifies that this final rule will not have a significant economic impact on a substantial number of small entities.

1. Statement of the Need for, and Objectives of, the Final Rule

The FACT Act amends the FCRA and was enacted, in part, for the purpose of allowing consumers to limit the use of eligibility information received from an affiliate to make solicitations to the consumer. Section 214 of the FACT Act generally prohibits a person from using certain information received from an affiliate to make a solicitation for marketing purposes to a consumer, unless the consumer is given notice and an opportunity and simple method to opt out of the making of such solicitations. Section 214 requires the FDIC, together with the other Agencies, the FTC, and the SEC, to issue regulations implementing the section in consultation and coordination with each

other. The FDIC received no comments on the reasons for the proposed rule. The FDIC is adopting the final rule to implement § 214 of the FACT Act. The **SUPPLEMENTARY INFORMATION** above contains information on the objectives of the final rule.

2. Summary of Issues Raised by Comments in Response to the Initial Regulatory Flexibility Analysis

In accordance with Section 3(a) of the RFA, the FDIC conducted an initial regulatory flexibility analysis in connection with the proposed rule. One commenter, the Mortgage Bankers Association (MBA), believed that the FDIC and the other Agencies had underestimated the costs of compliance. The issues raised by the MBA are described in the Paperwork Reduction Act section above. The MBA's concerns applied equally to small entities and larger entities. The MBA did not raise any issues unique to small entities.

3. Description and Estimate of Small Entities Affected by the Final Rule

The final rule applies to insured state nonmember banks, insured state licensed branches of foreign banks, and subsidiaries of such entities (except brokers, dealers, persons providing insurance, investment companies, and investment advisers). The FDIC's rule will apply to a total of approximately 978 institutions. The FDIC estimates that more than 542 of these institutions could be considered small entities with assets of $165 million or less. All small entities covered by the FDIC's rule potentially could be subject to the final rule. However, small entities that do not have affiliates would not be subject to the final rule. In addition, small entities that have affiliates may choose not to engage in activities that would require compliance with the final rule. For example, small entities may choose not to share eligibility information with their affiliates for the purpose of making solicitations. Alternatively, small entities and their affiliates may structure their marketing activities in a way that does not trigger the requirement to comply with the final rule, such as by relying upon the exceptions to the notice requirement contained in the final rule.

4. Recordkeeping, Reporting, and Other Compliance Requirements

The final rule requires small entities to provide opt-out notices and renewal notices to consumers in certain circumstances, as discussed in the **SUPPLEMENTARY INFORMATION** above. The final rule also requires small entities to implement consumers' opt-out elections. The final rule contains no requirement to report information to the Agencies.

Small entities that have affiliates and that share eligibility information with those affiliates for purposes of making solicitations may be subject to the rule. Small entities that do not have affiliates, do not share eligibility information with their affiliates for marketing purposes, use shared eligibility information for purposes of making solicitations only in accordance with one of the exceptions set forth in the final rule, or structure their marketing activities to eliminate the need to provide an opt-out notice would not be subject to the final rule. The professional skills necessary for preparation of the opt-out notice include compliance and/or privacy specialists and computer programmers.

5. Steps Taken To Minimize the Economic Impact on Small Entities

The FDIC and the other Agencies have attempted to minimize the economic impact on small entities by adopting consistent rules and by allowing joint notices on behalf of multiple affiliates. In addition, the FDIC and the other Agencies have provided model forms that small institutions may, but are not required to, use to minimize the cost of compliance.

OTS: OTS prepared an initial regulatory flexibility analysis under the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) in connection with the July 15, 2004 proposed rule. OTS received one comment on its regulatory flexibility analysis.

Under Section 605(b) of the RFA, 5 U.S.C. 605(b), the regulatory flexibility analysis otherwise required under Section 604 of the RFA is not required if an agency certifies, along with a statement providing the factual basis for such certification, that the rule will not have a significant economic impact on a substantial number of small entities. Based on its analysis and for the reasons stated below, OTS certifies that this final rule will not have a significant economic impact on a substantial number of small entities.

1. Statement of the Need for, and Objectives of, the Final Rule

The FACT Act amends the FCRA and was enacted, in part, for the purpose of allowing consumers to limit the use of eligibility information received from an affiliate to make solicitations to the consumer. Section 214 of the FACT Act generally prohibits a person from using certain information received from an affiliate to make a solicitation for marketing purposes to a consumer, unless the consumer is given notice and an opportunity and simple method to opt out of the making of such solicitations. Section 214 requires OTS, together with the other Agencies, the FTC, and the SEC, to consult and coordinate with each other and to prescribe regulations implementing the section that, to the extent possible, are consistent and comparable. OTS is adopting the final rule to implement section 214 of the FACT Act. The **SUPPLEMENTARY INFORMATION** contains information on the objectives of the final rule.

2. Summary of Issues Raised by Comments in Response to the Initial Regulatory Flexibility Analysis

OTS conducted an initial regulatory flexibility analysis in connection with the proposed rule under section 3(a) of the RFA (5 U.S.C. 603(a)). One commenter, the Mortgage Bankers Association (MBA), believed that the Agencies had underestimated compliance costs. The issues raised by the MBA are described in the Paperwork Reduction Act section of the **SUPPLEMENTARY INFORMATION.** The MBA's concerns applied equally to small entities and larger entities. The MBA did not raise any issues unique to small entities.

3. Description and Estimate of Small Entities Affected by the Final Rule

The final rule applies to all savings associations and federal savings associations operating subsidiaries that are not functionally regulated within the meaning of section 5(c)(5) of the Bank Holding Company Act of 1956, as amended (12 U.S.C. 1844(c)(5). However, the rule's requirements only affect those entities with affiliates and that choose to structure their marketing activities in a manner that triggers the rule's requirements.

OTS's estimates that its final rule could apply to as many as 609 savings associations, since that is the number of savings associations with affiliates. OTS estimates that 230 of these savings associations are small entities with assets of $165 million or less.

In addition, small entities that have affiliates may choose not to engage in activities that would require compliance with the final rule. For example, small entities may choose not to share eligibility information with their affiliates for the purpose of making solicitations. Alternatively, small entities and their affiliates may structure their marketing activities in a way that does not trigger the requirement to comply with the final rule, such as by relying upon the exceptions to the

notice requirement contained in the final rule.

4. Recordkeeping, Reporting, and Other Compliance Requirements

The final rule requires all entities, including small savings associations, to provide opt-out notices and renewal notices to consumers in certain circumstances, as discussed in the **SUPPLEMENTARY INFORMATION,** and to implement consumers' opt-out elections. The final rule contains no requirement to report information to the Agencies.

Small entities that have affiliates, share eligibility information with those affiliates, and use that information to make solicitations for marketing purposes may be subject to the rule. Small entities that do not have affiliates, do not share eligibility information with their affiliates for marketing purposes, use shared eligibility information for purposes of making solicitations only in accordance with one of the exceptions set forth in the final rule, or structure their marketing activities to eliminate the need to provide an opt-out notice would not be subject to the final rule. The professional skills necessary for preparation of the opt-out notice include compliance and/or privacy specialists and computer programmers.

5. Steps Taken To Minimize the Economic Impact on Small Entities

OTS and the other Agencies have attempted to minimize the economic impact on small entities by adopting consistent rules and by allowing joint notices on behalf of multiple affiliates. In addition, OTS and the other Agencies have provided model forms that small institutions may, but are not required to, use to minimize the cost of compliance.

NCUA: The Regulatory Flexibility Act (RFA) requires NCUA to prepare an analysis to describe any significant economic impact a proposed regulation may have on a substantial number of small entities. 5 U.S.C. 601–612. NCUA considers credit unions having less than ten million dollars in assets to be small for purposes of RFA. NCUA Interpretive Ruling and Policy Statement (IRPS) 87–2 as amended by IRPS 03–2. In connection with the July 15, 2004 proposed rule, NCUA certified that the proposed rule would not have a significant economic impact on a substantial number of small credit unions and therefore, a regulatory flexibility analysis was not required. Upon further review, the NCUA now certifies that the final rule also will not have a significant economic impact on a substantial number of small credit unions. The rule will apply to all federal credit unions regardless of asset size.

OCC and OTS Executive Order 12866 Determination

The OCC and OTS each has determined that its portion of the rule is not a significant regulatory action under Executive Order 12866.

OCC Executive Order 13132 Determination

The OCC has determined that this rule does not have any Federalism implications, as required by Executive Order 13132.

NCUA Executive Order 13132 Determination

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. In adherence to fundamental federalism principles, the NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the executive order. The final rule applies only to federally chartered credit unions and would not have substantial direct effects on the states, on the connection between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. The NCUA has determined that this rule does not constitute a policy that has federalism implications for purposes of the executive order.

OCC and OTS Unfunded Mandates Reform Act of 1995 Determination

Section 202 of the Unfunded Mandates Reform Act of 1995, Public Law 104–4 (Unfunded Mandates Act) requires that an agency prepare a budgetary impact statement before promulgating a rule that includes a Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. The OCC and OTS each has determined that this rule will not result in expenditures by State, local, and tribal governments, or by the private sector, of $100 million or more. Accordingly, neither the OCC nor the OTS has prepared a budgetary impact statement or specifically addressed the regulatory alternatives considered.

NCUA: The Treasury and General Government Appropriations Act, 1999—Assessment of Federal Regulations and Policies on Families

The NCUA has determined that this rule would not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, 1999, Pub. L. 105–277, 112 Stat. 2681 (1998).

NCUA: Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA)

An SBREFA (Pub. L. 104–121) reporting requirement is triggered in instances where NCUA issues a final rule as defined by section 551 of the Administrative Procedure Act, 5 U.S.C. 551. NCUA is submitting this final rule to the Office of Management and Budget (OMB) for a determination that this rule is not a major rule for purposes of SBREFA.

List of Subjects

12 CFR Part 41

Banks, Banking, Consumer protection, National banks, Reporting and recordkeeping requirements.

12 CFR Part 222

Banks, Banking, Consumer protection, Fair Credit Reporting Act, Holding companies, Privacy, Reporting and recordkeeping requirements, State member banks.

12 CFR Part 334

Administrative practice and procedure, Bank deposit insurance, Banks, Banking, Reporting and recordkeeping requirements, Safety and soundness.

12 CFR Part 571

Consumer protection, Credit, Fair Credit Reporting Act, Privacy, Reporting and recordkeeping requirements, Savings associations.

12 CFR Part 717

Consumer protection, Credit unions, Fair credit reporting, Privacy, Reporting and recordkeeping requirements.

Office of the Comptroller of the Currency

12 CFR Chapter I.

Authority and Issuance

■ For the reasons set forth in the preamble, the OCC amends part 41 of chapter I of title 12 of the Code of Federal Regulations as follows:

PART 41—FAIR CREDIT REPORTING

■ 1. The authority citation for part 41 is revised to read as follows:

Authority: 12 U.S.C. 1 *et seq.*, 24 (Seventh), 93a, 481, 484, and 1818; 15 U.S.C. 1681a, 1681b, 1681c, 1681m, 1681s, 1681s–3, 1681t, 1681w, 6801, and 6805; Sec. 214, Pub. L. 108–159, 117 Stat. 1952.

■ 2. A new Subpart C is added to part 41 to read as follows:

Subpart C—Affiliate Marketing

Sec.

41.20 Scope and definitions.
41.21 Affiliate marketing opt-out and exceptions.
41.22 Scope and duration of opt-out.
41.23 Contents of opt-out notice; consolidated and equivalent notices.
41.24 Reasonable opportunity to opt out.
41.25 Reasonable and simple methods of opting out.
41.26 Delivery of opt-out notices.
41.27 Renewal of opt-out.
41.28 Effective date, compliance date, and prospective application.

Subpart C—Affiliate Marketing

§ 41.20 Scope and definitions.

(a) *Scope.* This subpart applies to national banks, Federal branches and agencies of foreign banks, and any of their operating subsidiaries that are not functionally regulated within the meaning of section 5(c)(5) of the Bank Holding Company Act of 1956, as amended (12 U.S.C. 1844(c)(5)). These entities are referred to in this subpart as ''banks.''

(b) *Definitions.* For purposes of this subpart:

(1) *Clear and conspicuous.* The term ''clear and conspicuous'' means reasonably understandable and designed to call attention to the nature and significance of the information presented.

(2) *Concise.* (i) *In general.* The term ''concise'' means a reasonably brief expression or statement.

(ii) *Combination with other required disclosures.* A notice required by this subpart may be concise even if it is combined with other disclosures required or authorized by federal or state law.

(3) *Eligibility information.* The term ''eligibility information'' means any information the communication of which would be a consumer report if the exclusions from the definition of ''consumer report'' in section 603(d)(2)(A) of the Act did not apply. Eligibility information does not include aggregate or blind data that does not contain personal identifiers such as account numbers, names, or addresses.

(4) *Pre-existing business relationship.* (i) *In general.* The term ''pre-existing business relationship'' means a relationship between a person, or a person's licensed agent, and a consumer based on—

(A) A financial contract between the person and the consumer which is in force on the date on which the consumer is sent a solicitation covered by this subpart;

(B) The purchase, rental, or lease by the consumer of the person's goods or services, or a financial transaction (including holding an active account or a policy in force or having another continuing relationship) between the consumer and the person, during the 18-month period immediately preceding the date on which the consumer is sent a solicitation covered by this subpart; or

(C) An inquiry or application by the consumer regarding a product or service offered by that person during the three-month period immediately preceding the date on which the consumer is sent a solicitation covered by this subpart.

(ii) *Examples of pre-existing business relationships.* (A) If a consumer has a time deposit account, such as a certificate of deposit, at a depository institution that is currently in force, the depository institution has a pre-existing business relationship with the consumer and can use eligibility information it receives from its affiliates to make solicitations to the consumer about its products or services.

(B) If a consumer obtained a certificate of deposit from a depository institution, but did not renew the certificate at maturity, the depository institution has a pre-existing business relationship with the consumer and can use eligibility information it receives from its affiliates to make solicitations to the consumer about its products or services for 18 months after the date of maturity of the certificate of deposit.

(C) If a consumer obtains a mortgage, the mortgage lender has a pre-existing business relationship with the consumer. If the mortgage lender sells the consumer's entire loan to an investor, the mortgage lender has a pre-existing business relationship with the consumer and can use eligibility information it receives from its affiliates to make solicitations to the consumer about its products or services for 18 months after the date it sells the loan, and the investor has a pre-existing business relationship with the consumer upon purchasing the loan. If, however, the mortgage lender sells a fractional interest in the consumer's loan to an investor but also retains an ownership interest in the loan, the mortgage lender continues to have a pre-existing business relationship with the consumer, but the investor does not have a pre-existing business relationship with the consumer. If the mortgage lender retains ownership of the loan, but sells ownership of the servicing rights to the consumer's loan, the mortgage lender continues to have a pre-existing business relationship with the consumer. The purchaser of the servicing rights also has a pre-existing business relationship with the consumer as of the date it purchases ownership of the servicing rights, but only if it collects payments from or otherwise deals directly with the consumer on a continuing basis.

(D) If a consumer applies to a depository institution for a product or service that it offers, but does not obtain a product or service from or enter into a financial contract or transaction with the institution, the depository institution has a pre-existing business relationship with the consumer and can therefore use eligibility information it receives from an affiliate to make solicitations to the consumer about its products or services for three months after the date of the application.

(E) If a consumer makes a telephone inquiry to a depository institution about its products or services and provides contact information to the institution, but does not obtain a product or service from or enter into a financial contract or transaction with the institution, the depository institution has a pre-existing business relationship with the consumer and can therefore use eligibility information it receives from an affiliate to make solicitations to the consumer about its products or services for three months after the date of the inquiry.

(F) If a consumer makes an inquiry to a depository institution by e-mail about its products or services, but does not obtain a product or service from or enter into a financial contract or transaction with the institution, the depository institution has a pre-existing business relationship with the consumer and can therefore use eligibility information it receives from an affiliate to make solicitations to the consumer about its products or services for three months after the date of the inquiry.

(G) If a consumer has an existing relationship with a depository institution that is part of a group of affiliated companies, makes a telephone call to the centralized call center for the group of affiliated companies to inquire about products or services offered by the insurance affiliate, and provides contact information to the call center, the call constitutes an inquiry to the insurance affiliate that offers those products or services. The insurance affiliate has a pre-existing business relationship with the consumer and can therefore use

eligibility information it receives from its affiliated depository institution to make solicitations to the consumer about its products or services for three months after the date of the inquiry.

(iii) *Examples where no pre-existing business relationship is created.* (A) If a consumer makes a telephone call to a centralized call center for a group of affiliated companies to inquire about the consumer's existing account at a depository institution, the call does not constitute an inquiry to any affiliate other than the depository institution that holds the consumer's account and does not establish a pre-existing business relationship between the consumer and any affiliate of the account-holding depository institution.

(B) If a consumer who has a deposit account with a depository institution makes a telephone call to an affiliate of the institution to ask about the affiliate's retail locations and hours, but does not make an inquiry about the affiliate's products or services, the call does not constitute an inquiry and does not establish a pre-existing business relationship between the consumer and the affiliate. Also, the affiliate's capture of the consumer's telephone number does not constitute an inquiry and does not establish a pre-existing business relationship between the consumer and the affiliate.

(C) If a consumer makes a telephone call to a depository institution in response to an advertisement that offers a free promotional item to consumers who call a toll-free number, but the advertisement does not indicate that the depository institution's products or services will be marketed to consumers who call in response, the call does not create a pre-existing business relationship between the consumer and the depository institution because the consumer has not made an inquiry about a product or service offered by the institution, but has merely responded to an offer for a free promotional item.

(5) *Solicitation.* (i) *In general.* The term ''solicitation'' means the marketing of a product or service initiated by a person to a particular consumer that is—

(A) Based on eligibility information communicated to that person by its affiliate as described in this subpart; and

(B) Intended to encourage the consumer to purchase or obtain such product or service.

(ii) *Exclusion of marketing directed at the general public.* A solicitation does not include marketing communications that are directed at the general public. For example, television, general circulation magazine, and billboard advertisements do not constitute solicitations, even if those communications are intended to encourage consumers to purchase products and services from the person initiating the communications.

(iii) *Examples of solicitations.* A solicitation would include, for example, a telemarketing call, direct mail, e-mail, or other form of marketing communication directed to a particular consumer that is based on eligibility information received from an affiliate.

§ 41.21 Affiliate marketing opt-out and exceptions.

(a) *Initial notice and opt-out requirement.* (1) *In general.* A bank may not use eligibility information about a consumer that it receives from an affiliate to make a solicitation for marketing purposes to the consumer, unless—

(i) It is clearly and conspicuously disclosed to the consumer in writing or, if the consumer agrees, electronically, in a concise notice that the bank may use eligibility information about that consumer received from an affiliate to make solicitations for marketing purposes to the consumer;

(ii) The consumer is provided a reasonable opportunity and a reasonable and simple method to ''opt out,'' or prohibit the bank from using eligibility information to make solicitations for marketing purposes to the consumer; and

(iii) The consumer has not opted out.

(2) *Example.* A consumer has a homeowner's insurance policy with an insurance company. The insurance company furnishes eligibility information about the consumer to its affiliated depository institution. Based on that eligibility information, the depository institution wants to make a solicitation to the consumer about its home equity loan products. The depository institution does not have a pre-existing business relationship with the consumer and none of the other exceptions apply. The depository institution is prohibited from using eligibility information received from its insurance affiliate to make solicitations to the consumer about its home equity loan products unless the consumer is given a notice and opportunity to opt out and the consumer does not opt out.

(3) *Affiliates who may provide the notice.* The notice required by this paragraph must be provided:

(i) By an affiliate that has or has previously had a pre-existing business relationship with the consumer; or

(ii) As part of a joint notice from two or more members of an affiliated group of companies, provided that at least one of the affiliates on the joint notice has or has previously had a pre-existing business relationship with the consumer.

(b) *Making solicitations.* (1) *In general.* For purposes of this subpart, a bank makes a solicitation for marketing purposes if—

(i) The bank receives eligibility information from an affiliate;

(ii) The bank uses that eligibility information to do one or more of the following:

(A) Identify the consumer or type of consumer to receive a solicitation;

(B) Establish criteria used to select the consumer to receive a solicitation; or

(C) Decide which of the bank's products or services to market to the consumer or tailor the bank's solicitation to that consumer; and

(iii) As a result of the bank's use of the eligibility information, the consumer is provided a solicitation.

(2) *Receiving eligibility information from an affiliate, including through a common database.* A bank may receive eligibility information from an affiliate in various ways, including when the affiliate places that information into a common database that the bank may access.

(3) *Receipt or use of eligibility information by a bank's service provider.* Except as provided in paragraph (b)(5) of this section, a bank receives or uses an affiliate's eligibility information if a service provider acting on the bank's behalf (whether an affiliate or a nonaffiliated third party) receives or uses that information in the manner described in paragraphs (b)(1)(i) or (b)(1)(ii) of this section. All relevant facts and circumstances will determine whether a person is acting as a bank's service provider when it receives or uses an affiliate's eligibility information in connection with marketing the bank's products and services.

(4) *Use by an affiliate of its own eligibility information.* Unless a bank has used eligibility information that it receives from an affiliate in the manner described in paragraph (b)(1)(ii) of this section, the bank does not make a solicitation subject to this subpart if the bank's affiliate:

(i) Uses its own eligibility information that it obtained in connection with a pre-existing business relationship it has or had with the consumer to market the bank's products or services to the consumer; or

(ii) Directs its service provider to use the affiliate's own eligibility information that it obtained in connection with a pre-existing business relationship it has or had with the consumer to market the bank's products or services to the consumer, and the bank does not

communicate directly with the service provider regarding that use.

(5) *Use of eligibility information by a service provider.* (i) *In general.* A bank does not make a solicitation subject to Subpart C of this part if a service provider (including an affiliated or third-party service provider that maintains or accesses a common database that the bank may access) receives eligibility information from the bank's affiliate that the bank's affiliate obtained in connection with a pre-existing business relationship it has or had with the consumer and uses that eligibility information to market the bank's products or services to the consumer, so long as—

(A) The bank's affiliate controls access to and use of its eligibility information by the service provider (including the right to establish the specific terms and conditions under which the service provider may use such information to market the bank's products or services);

(B) The bank's affiliate establishes specific terms and conditions under which the service provider may access and use the affiliate's eligibility information to market the bank's products and services (or those of affiliates generally) to the consumer, such as the identity of the affiliated companies whose products or services may be marketed to the consumer by the service provider, the types of products or services of affiliated companies that may be marketed, and the number of times the consumer may receive marketing materials, and periodically evaluates the service provider's compliance with those terms and conditions;

(C) The bank's affiliate requires the service provider to implement reasonable policies and procedures designed to ensure that the service provider uses the affiliate's eligibility information in accordance with the terms and conditions established by the bank's affiliate relating to the marketing of the bank's products or services;

(D) The bank's affiliate is identified on or with the marketing materials provided to the consumer; and

(E) The bank does not directly use its affiliate's eligibility information in the manner described in paragraph (b)(1)(ii) of this section.

(ii) *Writing requirements.* (A) The requirements of paragraphs (b)(5)(i)(A) and (C) of this section must be set forth in a written agreement between the bank's affiliate and the service provider; and

(B) The specific terms and conditions established by the bank's affiliate as provided in paragraph (b)(5)(i)(B) of this section must be set forth in writing.

(6) *Examples of making solicitations.* (i) A consumer has a deposit account with a depository institution, which is affiliated with an insurance company. The insurance company receives eligibility information about the consumer from the depository institution. The insurance company uses that eligibility information to identify the consumer to receive a solicitation about insurance products, and, as a result, the insurance company provides a solicitation to the consumer about its insurance products. Pursuant to paragraph (b)(1) of this section, the insurance company has made a solicitation to the consumer.

(ii) The same facts as in the example in paragraph (b)(6)(i) of this section, except that after using the eligibility information to identify the consumer to receive a solicitation about insurance products, the insurance company asks the depository institution to send the solicitation to the consumer and the depository institution does so. Pursuant to paragraph (b)(1) of this section, the insurance company has made a solicitation to the consumer because it used eligibility information about the consumer that it received from an affiliate to identify the consumer to receive a solicitation about its products or services, and, as a result, a solicitation was provided to the consumer about the insurance company's products.

(iii) The same facts as in the example in paragraph (b)(6)(i) of this section, except that eligibility information about consumers that have deposit accounts with the depository institution is placed into a common database that all members of the affiliated group of companies may independently access and use. Without using the depository institution's eligibility information, the insurance company develops selection criteria and provides those criteria, marketing materials, and related instructions to the depository institution. The depository institution reviews eligibility information about its own consumers using the selection criteria provided by the insurance company to determine which consumers should receive the insurance company's marketing materials and sends marketing materials about the insurance company's products to those consumers. Even though the insurance company has received eligibility information through the common database as provided in paragraph (b)(2) of this section, it did not use that information to identify consumers or establish selection criteria; instead, the depository institution used its own eligibility information. Therefore, pursuant to paragraph (b)(4)(i) of this section, the insurance company has not made a solicitation to the consumer.

(iv) The same facts as in the example in paragraph (b)(6)(iii) of this section, except that the depository institution provides the insurance company's criteria to the depository institution's service provider and directs the service provider to use the depository institution's eligibility information to identify depository institution consumers who meet the criteria and to send the insurance company's marketing materials to those consumers. The insurance company does not communicate directly with the service provider regarding the use of the depository institution's information to market its products to the depository institution's consumers. Pursuant to paragraph (b)(4)(ii) of this section, the insurance company has not made a solicitation to the consumer.

(v) An affiliated group of companies includes a depository institution, an insurance company, and a service provider. Each affiliate in the group places information about its consumers into a common database. The service provider has access to all information in the common database. The depository institution controls access to and use of its eligibility information by the service provider. This control is set forth in a written agreement between the depository institution and the service provider. The written agreement also requires the service provider to establish reasonable policies and procedures designed to ensure that the service provider uses the depository institution's eligibility information in accordance with specific terms and conditions established by the depository institution relating to the marketing of the products and services of all affiliates, including the insurance company. In a separate written communication, the depository institution specifies the terms and conditions under which the service provider may use the depository institution's eligibility information to market the insurance company's products and services to the depository institution's consumers. The specific terms and conditions are: A list of affiliated companies (including the insurance company) whose products or services may be marketed to the depository institution's consumers by the service provider; the specific products or types of products that may be marketed to the depository institution's consumers by the service provider; the categories of eligibility information that may be used by the service provider in marketing products

or services to the depository institution's consumers; the types or categories of the depository institution's consumers to whom the service provider may market products or services of depository institution affiliates; the number and/or types of marketing communications that the service provider may send to the depository institution's consumers; and the length of time during which the service provider may market the products or services of the depository institution's affiliates to its consumers. The depository institution periodically evaluates the service provider's compliance with these terms and conditions. The insurance company asks the service provider to market insurance products to certain consumers who have deposit accounts with the depository institution. Without using the depository institution's eligibility information, the insurance company develops selection criteria and provides those criteria, marketing materials, and related instructions to the service provider. The service provider uses the depository institution's eligibility information from the common database to identify the depository institution's consumers to whom insurance products will be marketed. When the insurance company's marketing materials are provided to the identified consumers, the name of the depository institution is displayed on the insurance marketing materials, an introductory letter that accompanies the marketing materials, an account statement that accompanies the marketing materials, or the envelope containing the marketing materials. The requirements of paragraph (b)(5) of this section have been satisfied, and the insurance company has not made a solicitation to the consumer.

(vi) The same facts as in the example in paragraph (b)(6)(v) of this section, except that the terms and conditions permit the service provider to use the depository institution's eligibility information to market the products and services of other affiliates to the depository institution's consumers whenever the service provider deems it appropriate to do so. The service provider uses the depository institution's eligibility information in accordance with the discretion afforded to it by the terms and conditions. Because the terms and conditions are not specific, the requirements of paragraph (b)(5) of this section have not been satisfied.

(c) *Exceptions.* The provisions of this subpart do not apply to a bank if it uses eligibility information that it receives from an affiliate:

(1) To make a solicitation for marketing purposes to a consumer with whom the bank has a pre-existing business relationship;

(2) To facilitate communications to an individual for whose benefit the bank provides employee benefit or other services pursuant to a contract with an employer related to and arising out of the current employment relationship or status of the individual as a participant or beneficiary of an employee benefit plan;

(3) To perform services on behalf of an affiliate, except that this subparagraph shall not be construed as permitting the bank to send solicitations on behalf of an affiliate if the affiliate would not be permitted to send the solicitation as a result of the election of the consumer to opt out under this subpart;

(4) In response to a communication about the bank's products or services initiated by the consumer;

(5) In response to an authorization or request by the consumer to receive solicitations; or

(6) If the bank's compliance with this subpart would prevent it from complying with any provision of State insurance laws pertaining to unfair discrimination in any State in which the bank is lawfully doing business.

(d) *Examples of exceptions.* (1) *Example of the pre-existing business relationship exception.* A consumer has a deposit account with a depository institution. The consumer also has a relationship with the depository institution's securities affiliate for management of the consumer's securities portfolio. The depository institution receives eligibility information about the consumer from its securities affiliate and uses that information to make a solicitation to the consumer about the depository institution's wealth management services. The depository institution may make this solicitation even if the consumer has not been given a notice and opportunity to opt out because the depository institution has a pre-existing business relationship with the consumer.

(2) *Examples of service provider exception.* (i) A consumer has an insurance policy issued by an insurance company. The insurance company furnishes eligibility information about the consumer to its affiliated depository institution. Based on that eligibility information, the depository institution wants to make a solicitation to the consumer about its deposit products. The depository institution does not have a pre-existing business relationship with the consumer and none of the other exceptions in paragraph (c) of this section apply. The consumer has been given an opt-out notice and has elected to opt out of receiving such solicitations. The depository institution asks a service provider to send the solicitation to the consumer on its behalf. The service provider may not send the solicitation on behalf of the depository institution because, as a result of the consumer's opt-out election, the depository institution is not permitted to make the solicitation.

(ii) The same facts as in paragraph (d)(2)(i) of this section, except the consumer has been given an opt-out notice, but has not elected to opt out. The depository institution asks a service provider to send the solicitation to the consumer on its behalf. The service provider may send the solicitation on behalf of the depository institution because, as a result of the consumer's not opting out, the depository institution is permitted to make the solicitation.

(3) *Examples of consumer-initiated communications.* (i) A consumer who has a deposit account with a depository institution initiates a communication with the depository institution's credit card affiliate to request information about a credit card. The credit card affiliate may use eligibility information about the consumer it obtains from the depository institution or any other affiliate to make solicitations regarding credit card products in response to the consumer-initiated communication.

(ii) A consumer who has a deposit account with a depository institution contacts the institution to request information about how to save and invest for a child's college education without specifying the type of product in which the consumer may be interested. Information about a range of different products or services offered by the depository institution and one or more affiliates of the institution may be responsive to that communication. Such products or services may include the following: Mutual funds offered by the institution's mutual fund affiliate; section 529 plans offered by the institution, its mutual fund affiliate, or another securities affiliate; or trust services offered by a different financial institution in the affiliated group. Any affiliate offering investment products or services that would be responsive to the consumer's request for information about saving and investing for a child's college education may use eligibility information to make solicitations to the consumer in response to this communication.

(iii) A credit card issuer makes a marketing call to the consumer without

using eligibility information received from an affiliate. The issuer leaves a voice-mail message that invites the consumer to call a toll-free number to apply for the issuer's credit card. If the consumer calls the toll-free number to inquire about the credit card, the call is a consumer-initiated communication about a product or service and the credit card issuer may now use eligibility information it receives from its affiliates to make solicitations to the consumer.

(iv) A consumer calls a depository institution to ask about retail locations and hours, but does not request information about products or services. The institution may not use eligibility information it receives from an affiliate to make solicitations to the consumer about its products or services because the consumer-initiated communication does not relate to the depository institution's products or services. Thus, the use of eligibility information received from an affiliate would not be responsive to the communication and the exception does not apply.

(v) A consumer calls a depository institution to ask about retail locations and hours. The customer service representative asks the consumer if there is a particular product or service about which the consumer is seeking information. The consumer responds that the consumer wants to stop in and find out about certificates of deposit. The customer service representative offers to provide that information by telephone and mail additional information and application materials to the consumer. The consumer agrees and provides or confirms contact information for receipt of the materials to be mailed. The depository institution may use eligibility information it receives from an affiliate to make solicitations to the consumer about certificates of deposit because such solicitations would respond to the consumer-initiated communication about products or services.

(4) *Examples of consumer authorization or request for solicitations.* (i) A consumer who obtains a mortgage from a mortgage lender authorizes or requests information about homeowner's insurance offered by the mortgage lender's insurance affiliate. Such authorization or request, whether given to the mortgage lender or to the insurance affiliate, would permit the insurance affiliate to use eligibility information about the consumer it obtains from the mortgage lender or any other affiliate to make solicitations to the consumer about homeowner's insurance.

(ii) A consumer completes an online application to apply for a credit card from a credit card issuer. The issuer's online application contains a blank check box that the consumer may check to authorize or request information from the credit card issuer's affiliates. The consumer checks the box. The consumer has authorized or requested solicitations from the card issuer's affiliates.

(iii) A consumer completes an online application to apply for a credit card from a credit card issuer. The issuer's online application contains a pre-selected check box indicating that the consumer authorizes or requests information from the issuer's affiliates. The consumer does not deselect the check box. The consumer has not authorized or requested solicitations from the card issuer's affiliates.

(iv) The terms and conditions of a credit card account agreement contain preprinted boilerplate language stating that by applying to open an account the consumer authorizes or requests to receive solicitations from the credit card issuer's affiliates. The consumer has not authorized or requested solicitations from the card issuer's affiliates.

(e) *Relation to affiliate-sharing notice and opt-out.* Nothing in this subpart limits the responsibility of a person to comply with the notice and opt-out provisions of section 603(d)(2)(A)(iii) of the Act where applicable.

§ 41.22 Scope and duration of opt-out.

(a) *Scope of opt-out.* (1) *In general.* Except as otherwise provided in this section, the consumer's election to opt out prohibits any affiliate covered by the opt-out notice from using eligibility information received from another affiliate as described in the notice to make solicitations to the consumer.

(2) *Continuing relationship.* (i) *In general.* If the consumer establishes a continuing relationship with a bank or its affiliate, an opt-out notice may apply to eligibility information obtained in connection with—

(A) A single continuing relationship or multiple continuing relationships that the consumer establishes with the bank or its affiliates, including continuing relationships established subsequent to delivery of the opt-out notice, so long as the notice adequately describes the continuing relationships covered by the opt-out; or

(B) Any other transaction between the consumer and the bank or its affiliates as described in the notice.

(ii) *Examples of continuing relationships.* A consumer has a continuing relationship with a bank or its affiliate if the consumer—

(A) Opens a deposit or investment account with the bank or its affiliate;

(B) Obtains a loan for which the bank or its affiliate owns the servicing rights;

(C) Purchases an insurance product from the bank or its affiliate;

(D) Holds an investment product through the bank or its affiliate, such as when the bank acts or its affiliate acts as a custodian for securities or for assets in an individual retirement arrangement;

(E) Enters into an agreement or understanding with the bank or its affiliate whereby the bank or its affiliate undertakes to arrange or broker a home mortgage loan for the consumer;

(F) Enters into a lease of personal property with the bank or its affiliate; or

(G) Obtains financial, investment, or economic advisory services from the bank or its affiliate for a fee.

(3) *No continuing relationship.* (i) *In general.* If there is no continuing relationship between a consumer and a bank or its affiliate, and the bank or its affiliate obtains eligibility information about the consumer in connection with a transaction with the consumer, such as an isolated transaction or a credit application that is denied, an opt-out notice provided to the consumer only applies to eligibility information obtained in connection with that transaction.

(ii) *Examples of isolated transactions.* An isolated transaction occurs if—

(A) The consumer uses a bank's or its affiliate's ATM to withdraw cash from an account at another financial institution; or

(B) A bank or its affiliate sells the consumer a cashier's check or money order, airline tickets, travel insurance, or traveler's checks in isolated transactions.

(4) *Menu of alternatives.* A consumer may be given the opportunity to choose from a menu of alternatives when electing to prohibit solicitations, such as by electing to prohibit solicitations from certain types of affiliates covered by the opt-out notice but not other types of affiliates covered by the notice, electing to prohibit solicitations based on certain types of eligibility information but not other types of eligibility information, or electing to prohibit solicitations by certain methods of delivery but not other methods of delivery. However, one of the alternatives must allow the consumer to prohibit all solicitations from all of the affiliates that are covered by the notice.

(5) *Special rule for a notice following termination of all continuing relationships.* (i) *In general.* A consumer must be given a new opt-out notice if, after all continuing relationships with a

bank or its affiliate(s) are terminated, the consumer subsequently establishes another continuing relationship with the bank or its affiliate(s) and the consumer's eligibility information is to be used to make a solicitation. The new opt-out notice must apply, at a minimum, to eligibility information obtained in connection with the new continuing relationship. Consistent with paragraph (b) of this section, the consumer's decision not to opt out after receiving the new opt-out notice would not override a prior opt-out election by the consumer that applies to eligibility information obtained in connection with a terminated relationship, regardless of whether the new opt-out notice applies to eligibility information obtained in connection with the terminated relationship.

(ii) *Example.* A consumer has a checking account with a depository institution that is part of an affiliated group. The consumer closes the checking account. One year after closing the checking account, the consumer opens a savings account with the same depository institution. The consumer must be given a new notice and opportunity to opt out before the depository institution's affiliates may make solicitations to the consumer using eligibility information obtained by the depository institution in connection with the new savings account relationship, regardless of whether the consumer opted out in connection with the checking account.

(b) *Duration of opt-out.* The election of a consumer to opt out must be effective for a period of at least five years (the ''opt-out period'') beginning when the consumer's opt-out election is received and implemented, unless the consumer subsequently revokes the opt-out in writing or, if the consumer agrees, electronically. An opt-out period of more than five years may be established, including an opt-out period that does not expire unless revoked by the consumer.

(c) *Time of opt-out.* A consumer may opt out at any time.

§ 41.23 Contents of opt-out notice; consolidated and equivalent notices.

(a) *Contents of opt-out notice.* (1) *In general.* A notice must be clear, conspicuous, and concise, and must accurately disclose:

(i) The name of the affiliate(s) providing the notice. If the notice is provided jointly by multiple affiliates and each affiliate shares a common name, such as ''ABC,'' then the notice may indicate that it is being provided by multiple companies with the ABC name or multiple companies in the ABC group or family of companies, for example, by stating that the notice is provided by ''all of the ABC companies,'' ''the ABC banking, credit card, insurance, and securities companies,'' or by listing the name of each affiliate providing the notice. But if the affiliates providing the joint notice do not all share a common name, then the notice must either separately identify each affiliate by name or identify each of the common names used by those affiliates, for example, by stating that the notice is provided by ''all of the ABC and XYZ companies'' or by ''the ABC banking and credit card companies and the XYZ insurance companies'';

(ii) A list of the affiliates or types of affiliates whose use of eligibility information is covered by the notice, which may include companies that become affiliates after the notice is provided to the consumer. If each affiliate covered by the notice shares a common name, such as ''ABC,'' then the notice may indicate that it applies to multiple companies with the ABC name or multiple companies in the ABC group or family of companies, for example, by stating that the notice is provided by ''all of the ABC companies,'' ''the ABC banking, credit card, insurance, and securities companies,'' or by listing the name of each affiliate providing the notice. But if the affiliates covered by the notice do not all share a common name, then the notice must either separately identify each covered affiliate by name or identify each of the common names used by those affiliates, for example, by stating that the notice applies to ''all of the ABC and XYZ companies'' or to ''the ABC banking and credit card companies and the XYZ insurance companies'';

(iii) A general description of the types of eligibility information that may be used to make solicitations to the consumer;

(iv) That the consumer may elect to limit the use of eligibility information to make solicitations to the consumer;

(v) That the consumer's election will apply for the specified period of time stated in the notice and, if applicable, that the consumer will be allowed to renew the election once that period expires;

(vi) If the notice is provided to consumers who may have previously opted out, such as if a notice is provided to consumers annually, that the consumer who has chosen to limit solicitations does not need to act again until the consumer receives a renewal notice; and

(vii) A reasonable and simple method for the consumer to opt out.

(2) *Joint relationships.* (i) If two or more consumers jointly obtain a product or service, a single opt-out notice may be provided to the joint consumers. Any of the joint consumers may exercise the right to opt out.

(ii) The opt-out notice must explain how an opt-out direction by a joint consumer will be treated. An opt-out direction by a joint consumer may be treated as applying to all of the associated joint consumers, or each joint consumer may be permitted to opt-out separately. If each joint consumer is permitted to opt out separately, one of the joint consumers must be permitted to opt out on behalf of all of the joint consumers and the joint consumers must be permitted to exercise their separate rights to opt out in a single response.

(iii) It is impermissible to require *all* joint consumers to opt out before implementing *any* opt-out direction.

(3) *Alternative contents.* If the consumer is afforded a broader right to opt out of receiving marketing than is required by this subpart, the requirements of this section may be satisfied by providing the consumer with a clear, conspicuous, and concise notice that accurately discloses the consumer's opt-out rights.

(4) *Model notices.* Model notices are provided in Appendix C of this part.

(b) *Coordinated and consolidated notices.* A notice required by this subpart may be coordinated and consolidated with any other notice or disclosure required to be issued under any other provision of law by the entity providing the notice, including but not limited to the notice described in section 603(d)(2)(A)(iii) of the Act and the Gramm-Leach-Bliley Act privacy notice.

(c) *Equivalent notices.* A notice or other disclosure that is equivalent to the notice required by this subpart, and that is provided to a consumer together with disclosures required by any other provision of law, satisfies the requirements of this section.

§ 41.24 Reasonable opportunity to opt out.

(a) *In general.* A bank must not use eligibility information about a consumer that it receives from an affiliate to make a solicitation to the consumer about the bank's products or services, unless the consumer is provided a reasonable opportunity to opt out, as required by § 41.21(a)(1)(ii) of this part.

(b) *Examples of a reasonable opportunity to opt out.* The consumer is given a reasonable opportunity to opt out if:

(1) *By mail.* The opt-out notice is mailed to the consumer. The consumer

is given 30 days from the date the notice is mailed to elect to opt out by any reasonable means.

(2) *By electronic means.* (i) The opt-out notice is provided electronically to the consumer, such as by posting the notice at an Internet Web site at which the consumer has obtained a product or service. The consumer acknowledges receipt of the electronic notice. The consumer is given 30 days after the date the consumer acknowledges receipt to elect to opt out by any reasonable means.

(ii) The opt-out notice is provided to the consumer by e-mail where the consumer has agreed to receive disclosures by e-mail from the person sending the notice. The consumer is given 30 days after the e-mail is sent to elect to opt out by any reasonable means.

(3) *At the time of an electronic transaction.* The opt-out notice is provided to the consumer at the time of an electronic transaction, such as a transaction conducted on an Internet Web site. The consumer is required to decide, as a necessary part of proceeding with the transaction, whether to opt out before completing the transaction. There is a simple process that the consumer may use to opt out at that time using the same mechanism through which the transaction is conducted.

(4) *At the time of an in-person transaction.* The opt-out notice is provided to the consumer in writing at the time of an in-person transaction. The consumer is required to decide, as a necessary part of proceeding with the transaction, whether to opt out before completing the transaction, and is not permitted to complete the transaction without making a choice. There is a simple process that the consumer may use during the course of the in-person transaction to opt out, such as completing a form that requires consumers to write a ''yes'' or ''no'' to indicate their opt-out preference or that requires the consumer to check one of two blank check boxes—one that allows consumers to indicate that they want to opt out and one that allows consumers to indicate that they do not want to opt out.

(5) *By including in a privacy notice.* The opt-out notice is included in a Gramm-Leach-Bliley Act privacy notice. The consumer is allowed to exercise the opt-out within a reasonable period of time and in the same manner as the opt-out under that privacy notice.

§ 41.25 Reasonable and simple methods of opting out.

(a) *In general.* A bank must not use eligibility information about a consumer that it receives from an affiliate to make a solicitation to the consumer about its products or services, unless the consumer is provided a reasonable and simple method to opt out, as required by § 41.21(a)(1)(ii) of this part.

(b) *Examples.* (1) *Reasonable and simple opt-out methods.* Reasonable and simple methods for exercising the opt-out right include—

(i) Designating a check-off box in a prominent position on the opt-out form;

(ii) Including a reply form and a self-addressed envelope together with the opt-out notice;

(iii) Providing an electronic means to opt out, such as a form that can be electronically mailed or processed at an Internet Web site, if the consumer agrees to the electronic delivery of information;

(iv) Providing a toll-free telephone number that consumers may call to opt out; or

(v) Allowing consumers to exercise all of their opt-out rights described in a consolidated opt-out notice that includes the privacy opt-out under the Gramm-Leach-Bliley Act, 15 U.S.C. 6801 *et seq.*, the affiliate sharing opt-out under the Act, and the affiliate marketing opt-out under the Act, by a single method, such as by calling a single toll-free telephone number.

(2) Opt-out methods that are not reasonable and simple. Reasonable and simple methods for exercising an opt-out right *do not* include—

(i) Requiring the consumer to write his or her own letter;

(ii) Requiring the consumer to call or write to obtain a form for opting out, rather than including the form with the opt-out notice;

(iii) Requiring the consumer who receives the opt-out notice in electronic form only, such as through posting at an Internet Web site, to opt out solely by paper mail or by visiting a different Web site without providing a link to that site.

(c) *Specific opt-out means.* Each consumer may be required to opt out through a specific means, as long as that means is reasonable and simple for that consumer.

§ 41.26 Delivery of opt-out notices.

(a) *In general.* The opt-out notice must be provided so that each consumer can reasonably be expected to receive actual notice. For opt-out notices provided electronically, the notice may be provided in compliance with either the electronic disclosure provisions in this subpart or the provisions in section 101 of the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. 7001 *et seq.*

(b) *Examples of reasonable expectation of actual notice.* A consumer may reasonably be expected to receive actual notice if the affiliate providing the notice:

(1) Hand-delivers a printed copy of the notice to the consumer;

(2) Mails a printed copy of the notice to the last known mailing address of the consumer;

(3) Provides a notice by e-mail to a consumer who has agreed to receive electronic disclosures by e-mail from the affiliate providing the notice; or

(4) Posts the notice on the Internet Web site at which the consumer obtained a product or service electronically and requires the consumer to acknowledge receipt of the notice.

(c) *Examples of no reasonable expectation of actual notice.* A consumer may not reasonably be expected to receive actual notice if the affiliate providing the notice:

(1) Only posts the notice on a sign in a branch or office or generally publishes the notice in a newspaper;

(2) Sends the notice via e-mail to a consumer who has not agreed to receive electronic disclosures by e-mail from the affiliate providing the notice; or

(3) Posts the notice on an Internet Web site without requiring the consumer to acknowledge receipt of the notice.

§ 41.27 Renewal of opt-out.

(a) *Renewal notice and opt-out requirement.* (1) *In general.* After the opt-out period expires, a bank may not make solicitations based on eligibility information it receives from an affiliate to a consumer who previously opted out, unless:

(i) The consumer has been given a renewal notice that complies with the requirements of this section and §§ 41.24 through 41.26 of this part, and a reasonable opportunity and a reasonable and simple method to renew the opt-out, and the consumer does not renew the opt-out; or

(ii) An exception in § 41.21(c) of this part applies.

(2) *Renewal period.* Each opt-out renewal must be effective for a period of at least five years as provided in § 41.22(b) of this part.

(3) *Affiliates who may provide the notice.* The notice required by this paragraph must be provided:

(i) By the affiliate that provided the previous opt-out notice, or its successor; or (ii) As part of a joint renewal notice from two or more members of an affiliated group of companies, or their

successors, that jointly provided the previous opt-out notice.

(b) *Contents of renewal notice.* The renewal notice must be clear, conspicuous, and concise, and must accurately disclose:

(1) The name of the affiliate(s) providing the notice. If the notice is provided jointly by multiple affiliates and each affiliate shares a common name, such as ''ABC,'' then the notice may indicate that it is being provided by multiple companies with the ABC name or multiple companies in the ABC group or family of companies, for example, by stating that the notice is provided by ''all of the ABC companies,'' ''the ABC banking, credit card, insurance, and securities companies,'' or by listing the name of each affiliate providing the notice. But if the affiliates providing the joint notice do not all share a common name, then the notice must either separately identify each affiliate by name or identify each of the common names used by those affiliates, for example, by stating that the notice is provided by ''all of the ABC and XYZ companies'' or by ''the ABC banking and credit card companies and the XYZ insurance companies'';

(2) A list of the affiliates or types of affiliates whose use of eligibility information is covered by the notice, which may include companies that become affiliates after the notice is provided to the consumer. If each affiliate covered by the notice shares a common name, such as ''ABC,'' then the notice may indicate that it applies to multiple companies with the ABC name or multiple companies in the ABC group or family of companies, for example, by stating that the notice is provided by ''all of the ABC companies,'' ''the ABC banking, credit card, insurance, and securities companies,'' or by listing the name of each affiliate providing the notice. But if the affiliates covered by the notice do not all share a common name, then the notice must either separately identify each covered affiliate by name or identify each of the common names used by those affiliates, for example, by stating that the notice applies to ''all of the ABC and XYZ companies'' or to ''the ABC banking and credit card companies and the XYZ insurance companies'';

(3) A general description of the types of eligibility information that may be used to make solicitations to the consumer;

(4) That the consumer previously elected to limit the use of certain information to make solicitations to the consumer;

(5) That the consumer's election has expired or is about to expire;

(6) That the consumer may elect to renew the consumer's previous election;

(7) If applicable, that the consumer's election to renew will apply for the specified period of time stated in the notice and that the consumer will be allowed to renew the election once that period expires; and

(8) A reasonable and simple method for the consumer to opt out.

(c) *Timing of the renewal notice.* (1) *In general.* A renewal notice may be provided to the consumer either—

(i) A reasonable period of time before the expiration of the opt-out period; or

(ii) Any time after the expiration of the opt-out period but before solicitations that would have been prohibited by the expired opt-out are made to the consumer.

(2) *Combination with annual privacy notice.* If a bank provides an annual privacy notice under the Gramm-Leach-Bliley Act, 15 U.S.C. 6801 *et seq.*, providing a renewal notice with the last annual privacy notice provided to the consumer before expiration of the opt-out period is a reasonable period of time before expiration of the opt-out in all cases.

(d) *No effect on opt-out period.* An opt-out period may not be shortened by sending a renewal notice to the consumer before expiration of the opt-out period, even if the consumer does not renew the opt out.

§ 41.28 Effective date, compliance date, and prospective application.

(a) *Effective date.* This subpart is effective January 1, 2008.

(b) *Mandatory compliance date.* Compliance with this subpart is required not later than October 1, 2008.

(c) *Prospective application.* The provisions of this subpart shall not prohibit a bank from using eligibility information that it receives from an affiliate to make solicitations to a consumer if the bank receives such information prior to October 1, 2008. For purposes of this section, a bank is deemed to receive eligibility information when such information is placed into a common database and is accessible by the bank.

3. Appendixes A and B to part 41 are added and reserved, and a new Appendix C to part 41 is added to read as follows:

Appendix C To Part 41—Model Forms for Opt-Out Notices

a. Although use of the model forms is not required, use of the model forms in this Appendix (as applicable) complies with the requirement in section 624 of the Act for clear, conspicuous, and concise notices.

b. Certain changes may be made to the language or format of the model forms without losing the protection from liability afforded by use of the model forms. These changes may not be so extensive as to affect the substance, clarity, or meaningful sequence of the language in the model forms. Persons making such extensive revisions will lose the safe harbor that this Appendix provides. Acceptable changes include, for example:

1. Rearranging the order of the references to ''your income,'' ''your account history,'' and ''your credit score.''

2. Substituting other types of information for ''income,'' ''account history,'' or ''credit score'' for accuracy, such as ''payment history,'' ''credit history,'' ''payoff status,'' or ''claims history.''

3. Substituting a clearer and more accurate description of the affiliates providing or covered by the notice for phrases such as ''the [ABC] group of companies,'' including without limitation a statement that the entity providing the notice recently purchased the consumer's account.

4. Substituting other types of affiliates covered by the notice for ''credit card,'' ''insurance,'' or ''securities'' affiliates.

5. Omitting items that are not accurate or applicable. For example, if a person does not limit the duration of the opt-out period, the notice may omit information about the renewal notice.

6. Adding a statement informing consumers how much time they have to opt out before shared eligibility information may be used to make solicitations to them.

7. Adding a statement that the consumer may exercise the right to opt out at any time.

8. Adding the following statement, if accurate: ''If you previously opted out, you do not need to do so again.''

9. Providing a place on the form for the consumer to fill in identifying information, such as his or her name and address:

C–1 Model Form for Initial Opt-out Notice (Single-Affiliate Notice)
C–2 Model Form for Initial Opt-out Notice (Joint Notice)
C–3 Model Form for Renewal Notice (Single-Affiliate Notice)
C–4 Model Form for Renewal Notice (Joint Notice)
C–5 Model Form for Voluntary ''No Marketing'' Notice

C–1—Model Form for Initial Opt-out Notice (Single-Affiliate Notice)—[Your Choice To Limit Marketing]/[Marketing Opt–out]

- [Name of Affiliate] is providing this notice.
- [Optional: Federal law gives you the right to limit some but not all marketing from our affiliates. Federal law also requires us to give you this notice to tell you about your choice to limit marketing from our affiliates.]
- You may limit our affiliates in the [ABC] group of companies, such as our [credit card, insurance, and securities] affiliates, from marketing their products or services to you based on your personal information that we collect and share with them. This information includes your [income], your [account history with us], and your [credit score].
- Your choice to limit marketing offers from our affiliates will apply [until you tell

us to change your choice]/[for x years from when you tell us your choice]/[for at least 5 years from when you tell us your choice]. [Include if the opt-out period expires.] Once that period expires, you will receive a renewal notice that will allow you to continue to limit marketing offers from our affiliates for [another x years]/[at least another 5 years].

• [Include, if applicable, in a subsequent notice, including an annual notice, for consumers who may have previously opted out.] If you have already made a choice to limit marketing offers from our affiliates, you do not need to act again until you receive the renewal notice.

To limit marketing offers, contact us [include all that apply]:

• By telephone: 1–877–###–####

• On the Web: *www.---.com*

• By mail: Check the box and complete the form below, and send the form to:

[Company name]
[Company address]

__Do not allow your affiliates to use my personal information to market to me.

C–2—Model Form for Initial Opt-out Notice (Joint Notice)—[Your Choice To Limit Marketing]/[Marketing Opt-out]

• The [ABC group of companies] is providing this notice.

• [Optional: Federal law gives you the right to limit some but not all marketing from the [ABC] companies. Federal law also requires us to give you this notice to tell you about your choice to limit marketing from the [ABC] companies.]

• You may limit the [ABC] companies, such as the [ABC credit card, insurance, and securities] affiliates, from marketing their products or services to you based on your personal information that they receive from other [ABC] companies. This information includes your [income], your [account history], and your [credit score].

• Your choice to limit marketing offers from the [ABC] companies will apply [until you tell us to change your choice]/[for x years from when you tell us your choice]/[for at least 5 years from when you tell us your choice]. [Include if the opt-out period expires.] Once that period expires, you will receive a renewal notice that will allow you to continue to limit marketing offers from the [ABC] companies for [another x years]/[at least another 5 years].

• [Include, if applicable, in a subsequent notice, including an annual notice, for consumers who may have previously opted out.] If you have already made a choice to limit marketing offers from the [ABC] companies, you do not need to act again until you receive the renewal notice.

To limit marketing offers, contact us [include all that apply]:

• By telephone: 1–877–###–####

• On the Web: *www.---.com*

• By mail: Check the box and complete the form below, and send the form to:

[Company name]
[Company address]

__Do not allow any company [in the ABC group of companies] to use my personal information to market to me.

C–3—Model Form for Renewal Notice (Single-Affiliate Notice)—[Renewing Your Choice to Limit Marketing]/[Renewing Your Marketing Opt-out]

• [Name of Affiliate] is providing this notice.

• [Optional: Federal law gives you the right to limit some but not all marketing from our affiliates. Federal law also requires us to give you this notice to tell you about your choice to limit marketing from our affiliates.]

• You previously chose to limit our affiliates in the [ABC] group of companies, such as our [credit card, insurance, and securities] affiliates, from marketing their products or services to you based on your personal information that we share with them. This information includes your [income], your [account history with us], and your [credit score].

• Your choice has expired or is about to expire.

To renew your choice to limit marketing for [x] more years, contact us [include all that apply]:

• By telephone: 1–877–###–####

• On the Web: *www.---.com*

• By mail: Check the box and complete the form below, and send the form to:

[Company name]
[Company address]

__Renew my choice to limit marketing for [x] more years.

C–4—Model Form for Renewal Notice (Joint Notice)—[Renewing Your Choice To Limit Marketing]/[Renewing Your Marketing Opt-out]

• The [ABC group of companies] is providing this notice.

• [Optional: Federal law gives you the right to limit some but not all marketing from the [ABC] companies. Federal law also requires us to give you this notice to tell you about your choice to limit marketing from the [ABC] companies.]

• You previously chose to limit the [ABC] companies, such as the [ABC credit card, insurance, and securities] affiliates, from marketing their products or services to you based on your personal information that they receive from other ABC companies. This information includes your [income], your [account history], and your [credit score].

• Your choice has expired or is about to expire.

To renew your choice to limit marketing for [x] more years, contact us [include all that apply]:

• By telephone: 1–877–###–####

• On the Web: *www.---.com*

• By mail: Check the box and complete the form below, and send the form to:

[Company name]
[Company address]

__Renew my choice to limit marketing for [x] more years.

C–5—Model Form for Voluntary ''No Marketing'' Notice—Your Choice to Stop Marketing

• [Name of Affiliate] is providing this notice.

• You may choose to stop all marketing from us and our affiliates.

To stop all marketing, contact us [include all that apply]:

• By telephone: 1–877–###–-####

• On the Web: *www.---.com*

• By mail: Check the box and complete the form below, and send the form to:

[Company name]
[Company address]

__Do not market to me.

Board of Governors of the Federal Reserve System

12 CFR Chapter II.

Authority and Issuance

■ For the reasons set forth in the joint preamble, part 222 of title 12, chapter II, of the Code of Federal Regulations is amended as follows:

PART 222—FAIR CREDIT REPORTING (REGULATION V)

■ 1. The authority citation for part 222 is revised to read as follows:

Authority: 15 U.S.C. 1681a, 1681b, 1681c, 1681m, 1681s, 1681s-2, 1681s-3, 1681t, and 1681w; Secs. 3 and 214, Pub. L. 108–159, 117 Stat. 1952.

Subpart A—General Provisions

■ 2. Section 222.1 is amended by adding a new paragraph (a) and revising paragraph (b)(2)(i) to read as follows:

§ 222.1 Purpose, scope, and effective dates.

(a) *Purpose.* The purpose of this part is to implement the Fair Credit Reporting Act. This part generally applies to persons that obtain and use information about consumers to determine the consumer's eligibility for products, services, or employment, share such information among affiliates, and furnish information to consumer reporting agencies.

(b) * * *

(2) *Institutions covered.* (i) Except as otherwise provided in this part, the regulations in this part apply to banks that are members of the Federal Reserve System (other than national banks) and their respective operating subsidiaries that are not functionally regulated within the meaning of section 5(c)(5) of the Bank Holding Company Act, as amended (12 U.S.C. 1844(c)(5)), branches and Agencies of foreign banks (other than Federal branches, Federal Agencies, and insured State branches of foreign banks), commercial lending companies owned or controlled by foreign banks, organizations operating under section 25 or 25A of the Federal Reserve Act (12 U.S.C. 601 *et seq.*, and 611 *et seq.*), and bank holding companies and affiliates of such holding companies, but do not apply to affiliates

of bank holding companies that are depository institutions regulated by another federal banking agency or to consumer reporting agencies.

* * * * *

■ 3. A new Subpart C is added to part 222 to read as follows:

Subpart C—Affiliate Marketing

Sec.

222.20 Coverage and definitions.
222.21 Affiliate marketing opt-out and exceptions.
222.22 Scope and duration of opt-out.
222.23 Contents of opt-out notice; consolidated and equivalent notices.
222.24 Reasonable opportunity to opt out.
222.25 Reasonable and simple methods of opting out.
222.26 Delivery of opt-out notices.
222.27 Renewal of opt-out.
222.28 Effective date, compliance date, and prospective application.

Subpart C—Affiliate Marketing

§ 222.20 Coverage and definitions.

(a) *Coverage.* Subpart C of this part applies to member banks of the Federal Reserve System (other than national banks) and their respective operating subsidiaries that are not functionally regulated within the meaning of section 5(c)(5) of the Bank Holding Company Act, as amended (12 U.S.C. 1844(c)(5)), branches and Agencies of foreign banks (other than Federal branches, Federal Agencies, and insured State branches of foreign banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under section 25 or 25A of the Federal Reserve Act (12 U.S.C. 601 *et seq.*, and 611 *et seq.*).

(b) *Definitions.* For purposes of this subpart:

(1) *Clear and conspicuous.* The term ''clear and conspicuous'' means reasonably understandable and designed to call attention to the nature and significance of the information presented.

(2) *Concise.* (i) *In general.* The term ''concise'' means a reasonably brief expression or statement.

(ii) *Combination with other required disclosures.* A notice required by this subpart may be concise even if it is combined with other disclosures required or authorized by federal or state law.

(3) *Eligibility information.* The term ''eligibility information'' means any information the communication of which would be a consumer report if the exclusions from the definition of ''consumer report'' in section 603(d)(2)(A) of the Act did not apply. Eligibility information does not include aggregate or blind data that does not contain personal identifiers such as account numbers, names, or addresses.

(4) *Pre-existing business relationship.* (i) *In general.* The term ''pre-existing business relationship'' means a relationship between a person, or a person's licensed agent, and a consumer based on—

(A) A financial contract between the person and the consumer which is in force on the date on which the consumer is sent a solicitation covered by this subpart;

(B) The purchase, rental, or lease by the consumer of the person's goods or services, or a financial transaction (including holding an active account or a policy in force or having another continuing relationship) between the consumer and the person, during the 18-month period immediately preceding the date on which the consumer is sent a solicitation covered by this subpart; or

(C) An inquiry or application by the consumer regarding a product or service offered by that person during the three-month period immediately preceding the date on which the consumer is sent a solicitation covered by this subpart.

(ii) *Examples of pre-existing business relationships.* (A) If a consumer has a time deposit account, such as a certificate of deposit, at a depository institution that is currently in force, the depository institution has a pre-existing business relationship with the consumer and can use eligibility information it receives from its affiliates to make solicitations to the consumer about its products or services.

(B) If a consumer obtained a certificate of deposit from a depository institution, but did not renew the certificate at maturity, the depository institution has a pre-existing business relationship with the consumer and can use eligibility information it receives from its affiliates to make solicitations to the consumer about its products or services for 18 months after the date of maturity of the certificate of deposit.

(C) If a consumer obtains a mortgage, the mortgage lender has a pre-existing business relationship with the consumer. If the mortgage lender sells the consumer's entire loan to an investor, the mortgage lender has a pre-existing business relationship with the consumer and can use eligibility information it receives from its affiliates to make solicitations to the consumer about its products or services for 18 months after the date it sells the loan, and the investor has a pre-existing business relationship with the consumer upon purchasing the loan. If, however, the mortgage lender sells a fractional interest in the consumer's loan to an investor but also retains an ownership interest in the loan, the mortgage lender continues to have a pre-existing business relationship with the consumer, but the investor does not have a pre-existing business relationship with the consumer. If the mortgage lender retains ownership of the loan, but sells ownership of the servicing rights to the consumer's loan, the mortgage lender continues to have a pre-existing business relationship with the consumer. The purchaser of the servicing rights also has a pre-existing business relationship with the consumer as of the date it purchases ownership of the servicing rights, but only if it collects payments from or otherwise deals directly with the consumer on a continuing basis.

(D) If a consumer applies to a depository institution for a product or service that it offers, but does not obtain a product or service from or enter into a financial contract or transaction with the institution, the depository institution has a pre-existing business relationship with the consumer and can therefore use eligibility information it receives from an affiliate to make solicitations to the consumer about its products or services for three months after the date of the application.

(E) If a consumer makes a telephone inquiry to a depository institution about its products or services and provides contact information to the institution, but does not obtain a product or service from or enter into a financial contract or transaction with the institution, the depository institution has a pre-existing business relationship with the consumer and can therefore use eligibility information it receives from an affiliate to make solicitations to the consumer about its products or services for three months after the date of the inquiry.

(F) If a consumer makes an inquiry to a depository institution by e-mail about its products or services, but does not obtain a product or service from or enter into a financial contract or transaction with the institution, the depository institution has a pre-existing business relationship with the consumer and can therefore use eligibility information it receives from an affiliate to make solicitations to the consumer about its products or services for three months after the date of the inquiry.

(G) If a consumer has an existing relationship with a depository institution that is part of a group of affiliated companies, makes a telephone call to the centralized call center for the group of affiliated companies to inquire about products or services offered by the insurance affiliate, and provides contact information to the call center, the call constitutes an inquiry to the insurance

affiliate that offers those products or services. The insurance affiliate has a pre-existing business relationship with the consumer and can therefore use eligibility information it receives from its affiliated depository institution to make solicitations to the consumer about its products or services for three months after the date of the inquiry.

(iii) *Examples where no pre-existing business relationship is created.* (A) If a consumer makes a telephone call to a centralized call center for a group of affiliated companies to inquire about the consumer's existing account at a depository institution, the call does not constitute an inquiry to any affiliate other than the depository institution that holds the consumer's account and does not establish a pre-existing business relationship between the consumer and any affiliate of the account-holding depository institution.

(B) If a consumer who has a deposit account with a depository institution makes a telephone call to an affiliate of the institution to ask about the affiliate's retail locations and hours, but does not make an inquiry about the affiliate's products or services, the call does not constitute an inquiry and does not establish a pre-existing business relationship between the consumer and the affiliate. Also, the affiliate's capture of the consumer's telephone number does not constitute an inquiry and does not establish a pre-existing business relationship between the consumer and the affiliate.

(C) If a consumer makes a telephone call to a depository institution in response to an advertisement that offers a free promotional item to consumers who call a toll-free number, but the advertisement does not indicate that the depository institution's products or services will be marketed to consumers who call in response, the call does not create a pre-existing business relationship between the consumer and the depository institution because the consumer has not made an inquiry about a product or service offered by the institution, but has merely responded to an offer for a free promotional item.

(5) *Solicitation.* (i) *In general.* The term ''solicitation'' means the marketing of a product or service initiated by a person to a particular consumer that is—

(A) Based on eligibility information communicated to that person by its affiliate as described in this subpart; and

(B) Intended to encourage the consumer to purchase or obtain such product or service.

(ii) *Exclusion of marketing directed at the general public.* A solicitation does not include marketing communications that are directed at the general public. For example, television, general circulation magazine, and billboard advertisements do not constitute solicitations, even if those communications are intended to encourage consumers to purchase products and services from the person initiating the communications.

(iii) *Examples of solicitations.* A solicitation would include, for example, a telemarketing call, direct mail, e-mail, or other form of marketing communication directed to a particular consumer that is based on eligibility information received from an affiliate.

(6) *You* means a person described in paragraph (a) of this section.

§ 222.21 Affiliate marketing opt-out and exceptions.

(a) *Initial notice and opt-out requirement.* (1) *In general.* You may not use eligibility information about a consumer that you receive from an affiliate to make a solicitation for marketing purposes to the consumer, unless—

(i) It is clearly and conspicuously disclosed to the consumer in writing or, if the consumer agrees, electronically, in a concise notice that you may use eligibility information about that consumer received from an affiliate to make solicitations for marketing purposes to the consumer;

(ii) The consumer is provided a reasonable opportunity and a reasonable and simple method to ''opt out,'' or prohibit you from using eligibility information to make solicitations for marketing purposes to the consumer; and

(iii) The consumer has not opted out.

(2) *Example.* A consumer has a homeowner's insurance policy with an insurance company. The insurance company furnishes eligibility information about the consumer to its affiliated depository institution. Based on that eligibility information, the depository institution wants to make a solicitation to the consumer about its home equity loan products. The depository institution does not have a pre-existing business relationship with the consumer and none of the other exceptions apply. The depository institution is prohibited from using eligibility information received from its insurance affiliate to make solicitations to the consumer about its home equity loan products unless the consumer is given a notice and opportunity to opt out and the consumer does not opt out.

(3) *Affiliates who may provide the notice.* The notice required by this paragraph must be provided:

(i) By an affiliate that has or has previously had a pre-existing business relationship with the consumer; or

(ii) As part of a joint notice from two or more members of an affiliated group of companies, provided that at least one of the affiliates on the joint notice has or has previously had a pre-existing business relationship with the consumer.

(b) *Making solicitations.* (1) *In general.* For purposes of this subpart, you make a solicitation for marketing purposes if—

(i) You receive eligibility information from an affiliate;

(ii) You use that eligibility information to do one or more of the following:

(A) Identify the consumer or type of consumer to receive a solicitation;

(B) Establish criteria used to select the consumer to receive a solicitation; or

(C) Decide which of your products or services to market to the consumer or tailor your solicitation to that consumer; and

(iii) As a result of your use of the eligibility information, the consumer is provided a solicitation.

(2) *Receiving eligibility information from an affiliate, including through a common database.* You may receive eligibility information from an affiliate in various ways, including when the affiliate places that information into a common database that you may access.

(3) *Receipt or use of eligibility information by your service provider.* Except as provided in paragraph (b)(5) of this section, you receive or use an affiliate's eligibility information if a service provider acting on your behalf (whether an affiliate or a nonaffiliated third party) receives or uses that information in the manner described in paragraphs (b)(1)(i) or (b)(1)(ii) of this section. All relevant facts and circumstances will determine whether a person is acting as your service provider when it receives or uses an affiliate's eligibility information in connection with marketing your products and services.

(4) *Use by an affiliate of its own eligibility information.* Unless you have used eligibility information that you receive from an affiliate in the manner described in paragraph (b)(1)(ii) of this section, you do not make a solicitation subject to this subpart if your affiliate:

(i) Uses its own eligibility information that it obtained in connection with a pre-existing business relationship it has or had with the consumer to market your products or services to the consumer; or

(ii) Directs its service provider to use the affiliate's own eligibility information

that it obtained in connection with a pre-existing business relationship it has or had with the consumer to market your products or services to the consumer, and you do not communicate directly with the service provider regarding that use.

(5) *Use of eligibility information by a service provider.* (i) *In general.* You do not make a solicitation subject to Subpart C of this part if a service provider (including an affiliated or third-party service provider that maintains or accesses a common database that you may access) receives eligibility information from your affiliate that your affiliate obtained in connection with a pre-existing business relationship it has or had with the consumer and uses that eligibility information to market your products or services to the consumer, so long as—

(A) Your affiliate controls access to and use of its eligibility information by the service provider (including the right to establish the specific terms and conditions under which the service provider may use such information to market your products or services);

(B) Your affiliate establishes specific terms and conditions under which the service provider may access and use the affiliate's eligibility information to market your products and services (or those of affiliates generally) to the consumer, such as the identity of the affiliated companies whose products or services may be marketed to the consumer by the service provider, the types of products or services of affiliated companies that may be marketed, and the number of times the consumer may receive marketing materials, and periodically evaluates the service provider's compliance with those terms and conditions;

(C) Your affiliate requires the service provider to implement reasonable policies and procedures designed to ensure that the service provider uses the affiliate's eligibility information in accordance with the terms and conditions established by the affiliate relating to the marketing of your products or services;

(D) Your affiliate is identified on or with the marketing materials provided to the consumer; and

(E) You do not directly use your affiliate's eligibility information in the manner described in paragraph (b)(1)(ii) of this section.

(ii) *Writing requirements.* (A) The requirements of paragraphs (b)(5)(i)(A) and (C) of this section must be set forth in a written agreement between your affiliate and the service provider; and

(B) The specific terms and conditions established by your affiliate as provided in paragraph (b)(5)(i)(B) of this section must be set forth in writing.

(6) *Examples of making solicitations.* (i) A consumer has a deposit account with a depository institution, which is affiliated with an insurance company. The insurance company receives eligibility information about the consumer from the depository institution. The insurance company uses that eligibility information to identify the consumer to receive a solicitation about insurance products, and, as a result, the insurance company provides a solicitation to the consumer about its insurance products. Pursuant to paragraph (b)(1) of this section, the insurance company has made a solicitation to the consumer.

(ii) The same facts as in the example in paragraph (b)(6)(i) of this section, except that after using the eligibility information to identify the consumer to receive a solicitation about insurance products, the insurance company asks the depository institution to send the solicitation to the consumer and the depository institution does so. Pursuant to paragraph (b)(1) of this section, the insurance company has made a solicitation to the consumer because it used eligibility information about the consumer that it received from an affiliate to identify the consumer to receive a solicitation about its products or services, and, as a result, a solicitation was provided to the consumer about the insurance company's products.

(iii) The same facts as in the example in paragraph (b)(6)(i) of this section, except that eligibility information about consumers that have deposit accounts with the depository institution is placed into a common database that all members of the affiliated group of companies may independently access and use. Without using the depository institution's eligibility information, the insurance company develops selection criteria and provides those criteria, marketing materials, and related instructions to the depository institution. The depository institution reviews eligibility information about its own consumers using the selection criteria provided by the insurance company to determine which consumers should receive the insurance company's marketing materials and sends marketing materials about the insurance company's products to those consumers. Even though the insurance company has received eligibility information through the common database as provided in paragraph (b)(2) of this section, it did not use that information to identify consumers or establish selection criteria; instead, the depository institution used its own eligibility information. Therefore, pursuant to paragraph (b)(4)(i) of this section, the insurance company has not made a solicitation to the consumer.

(iv) The same facts as in the example in paragraph (b)(6)(iii) of this section, except that the depository institution provides the insurance company's criteria to the depository institution's service provider and directs the service provider to use the depository institution's eligibility information to identify depository institution consumers who meet the criteria and to send the insurance company's marketing materials to those consumers. The insurance company does not communicate directly with the service provider regarding the use of the depository institution's information to market its products to the depository institution's consumers. Pursuant to paragraph (b)(4)(ii) of this section, the insurance company has not made a solicitation to the consumer.

(v) An affiliated group of companies includes a depository institution, an insurance company, and a service provider. Each affiliate in the group places information about its consumers into a common database. The service provider has access to all information in the common database. The depository institution controls access to and use of its eligibility information by the service provider. This control is set forth in a written agreement between the depository institution and the service provider. The written agreement also requires the service provider to establish reasonable policies and procedures designed to ensure that the service provider uses the depository institution's eligibility information in accordance with specific terms and conditions established by the depository institution relating to the marketing of the products and services of all affiliates, including the insurance company. In a separate written communication, the depository institution specifies the terms and conditions under which the service provider may use the depository institution's eligibility information to market the insurance company's products and services to the depository institution's consumers. The specific terms and conditions are: A list of affiliated companies (including the insurance company) whose products or services may be marketed to the depository institution's consumers by the service provider; the specific products or types of products that may be marketed to the depository institution's consumers by the service provider; the categories of eligibility

information that may be used by the service provider in marketing products or services to the depository institution's consumers; the types or categories of the depository institution's consumers to whom the service provider may market products or services of depository institution affiliates; the number and/or types of marketing communications that the service provider may send to the depository institution's consumers; and the length of time during which the service provider may market the products or services of the depository institution's affiliates to its consumers. The depository institution periodically evaluates the service provider's compliance with these terms and conditions. The insurance company asks the service provider to market insurance products to certain consumers who have deposit accounts with the depository institution. Without using the depository institution's eligibility information, the insurance company develops selection criteria and provides those criteria, marketing materials, and related instructions to the service provider. The service provider uses the depository institution's eligibility information from the common database to identify the depository institution's consumers to whom insurance products will be marketed. When the insurance company's marketing materials are provided to the identified consumers, the name of the depository institution is displayed on the insurance marketing materials, an introductory letter that accompanies the marketing materials, an account statement that accompanies the marketing materials, or the envelope containing the marketing materials. The requirements of paragraph (b)(5) of this section have been satisfied, and the insurance company has not made a solicitation to the consumer.

(vi) The same facts as in the example in paragraph (b)(6)(v) of this section, except that the terms and conditions permit the service provider to use the depository institution's eligibility information to market the products and services of other affiliates to the depository institution's consumers whenever the service provider deems it appropriate to do so. The service provider uses the depository institution's eligibility information in accordance with the discretion afforded to it by the terms and conditions. Because the terms and conditions are not specific, the requirements of paragraph (b)(5) of this section have not been satisfied.

(c) *Exceptions.* The provisions of this subpart do not apply to you if you use eligibility information that you receive from an affiliate:

(1) To make a solicitation for marketing purposes to a consumer with whom you have a pre-existing business relationship;

(2) To facilitate communications to an individual for whose benefit you provide employee benefit or other services pursuant to a contract with an employer related to and arising out of the current employment relationship or status of the individual as a participant or beneficiary of an employee benefit plan;

(3) To perform services on behalf of an affiliate, except that this subparagraph shall not be construed as permitting you to send solicitations on behalf of an affiliate if the affiliate would not be permitted to send the solicitation as a result of the election of the consumer to opt out under this subpart;

(4) In response to a communication about your products or services initiated by the consumer;

(5) In response to an authorization or request by the consumer to receive solicitations; or

(6) If your compliance with this subpart would prevent you from complying with any provision of State insurance laws pertaining to unfair discrimination in any State in which you are lawfully doing business.

(d) *Examples of exceptions.* (1) *Example of the pre-existing business relationship exception.* A consumer has a deposit account with a depository institution. The consumer also has a relationship with the depository institution's securities affiliate for management of the consumer's securities portfolio. The depository institution receives eligibility information about the consumer from its securities affiliate and uses that information to make a solicitation to the consumer about the depository institution's wealth management services. The depository institution may make this solicitation even if the consumer has not been given a notice and opportunity to opt out because the depository institution has a pre-existing business relationship with the consumer.

(2) *Examples of service provider exception.* (i) A consumer has an insurance policy issued by an insurance company. The insurance company furnishes eligibility information about the consumer to its affiliated depository institution. Based on that eligibility information, the depository institution wants to make a solicitation to the consumer about its deposit products. The depository institution does not have a pre-existing business relationship with the consumer and none of the other exceptions in paragraph (c) of this section apply. The consumer has been given an opt-out notice and has elected to opt out of receiving such solicitations. The depository institution asks a service provider to send the solicitation to the consumer on its behalf. The service provider may not send the solicitation on behalf of the depository institution because, as a result of the consumer's opt-out election, the depository institution is not permitted to make the solicitation.

(ii) The same facts as in paragraph (d)(2)(i) of this section, except the consumer has been given an opt-out notice, but has not elected to opt out. The depository institution asks a service provider to send the solicitation to the consumer on its behalf. The service provider may send the solicitation on behalf of the depository institution because, as a result of the consumer's not opting out, the depository institution is permitted to make the solicitation.

(3) *Examples of consumer-initiated communications.* (i) A consumer who has a deposit account with a depository institution initiates a communication with the depository institution's credit card affiliate to request information about a credit card. The credit card affiliate may use eligibility information about the consumer it obtains from the depository institution or any other affiliate to make solicitations regarding credit card products in response to the consumer-initiated communication.

(ii) A consumer who has a deposit account with a depository institution contacts the institution to request information about how to save and invest for a child's college education without specifying the type of product in which the consumer may be interested. Information about a range of different products or services offered by the depository institution and one or more affiliates of the institution may be responsive to that communication. Such products or services may include the following: Mutual funds offered by the institution's mutual fund affiliate; section 529 plans offered by the institution, its mutual fund affiliate, or another securities affiliate; or trust services offered by a different financial institution in the affiliated group. Any affiliate offering investment products or services that would be responsive to the consumer's request for information about saving and investing for a child's college education may use eligibility information to make solicitations to the consumer in response to this communication.

(iii) A credit card issuer makes a marketing call to the consumer without using eligibility information received from an affiliate. The issuer leaves a voice-mail message that invites the consumer to call a toll-free number to apply for the issuer's credit card. If the consumer calls the toll-free number to inquire about the credit card, the call is a consumer-initiated communication about a product or service and the credit card issuer may now use eligibility information it receives from its affiliates to make solicitations to the consumer.

(iv) A consumer calls a depository institution to ask about retail locations and hours, but does not request information about products or services. The institution may not use eligibility information it receives from an affiliate to make solicitations to the consumer about its products or services because the consumer-initiated communication does not relate to the depository institution's products or services. Thus, the use of eligibility information received from an affiliate would not be responsive to the communication and the exception does not apply.

(v) A consumer calls a depository institution to ask about retail locations and hours. The customer service representative asks the consumer if there is a particular product or service about which the consumer is seeking information. The consumer responds that the consumer wants to stop in and find out about certificates of deposit. The customer service representative offers to provide that information by telephone and mail additional information and application materials to the consumer. The consumer agrees and provides or confirms contact information for receipt of the materials to be mailed. The depository institution may use eligibility information it receives from an affiliate to make solicitations to the consumer about certificates of deposit because such solicitations would respond to the consumer-initiated communication about products or services.

(4) *Examples of consumer authorization or request for solicitations.* (i) A consumer who obtains a mortgage from a mortgage lender authorizes or requests information about homeowner's insurance offered by the mortgage lender's insurance affiliate. Such authorization or request, whether given to the mortgage lender or to the insurance affiliate, would permit the insurance affiliate to use eligibility information about the consumer it obtains from the mortgage lender or any other affiliate to make solicitations to the consumer about homeowner's insurance.

(ii) A consumer completes an online application to apply for a credit card from a credit card issuer. The issuer's online application contains a blank check box that the consumer may check to authorize or request information from the credit card issuer's affiliates. The consumer checks the box. The consumer has authorized or requested solicitations from the card issuer's affiliates.

(iii) A consumer completes an online application to apply for a credit card from a credit card issuer. The issuer's online application contains a pre-selected check box indicating that the consumer authorizes or requests information from the issuer's affiliates. The consumer does not deselect the check box. The consumer has not authorized or requested solicitations from the card issuer's affiliates.

(iv) The terms and conditions of a credit card account agreement contain preprinted boilerplate language stating that by applying to open an account the consumer authorizes or requests to receive solicitations from the credit card issuer's affiliates. The consumer has not authorized or requested solicitations from the card issuer's affiliates.

(e) *Relation to affiliate-sharing notice and opt-out.* Nothing in this subpart limits the responsibility of a person to comply with the notice and opt-out provisions of section 603(d)(2)(A)(iii) of the Act where applicable.

§ 222.22 Scope and duration of opt-out.

(a) *Scope of opt-out.* (1) *In general.* Except as otherwise provided in this section, the consumer's election to opt out prohibits any affiliate covered by the opt-out notice from using eligibility information received from another affiliate as described in the notice to make solicitations to the consumer.

(2) *Continuing relationship.* (i) *In general.* If the consumer establishes a continuing relationship with you or your affiliate, an opt-out notice may apply to eligibility information obtained in connection with—

(A) A single continuing relationship or multiple continuing relationships that the consumer establishes with you or your affiliates, including continuing relationships established subsequent to delivery of the opt-out notice, so long as the notice adequately describes the continuing relationships covered by the opt-out; or

(B) Any other transaction between the consumer and you or your affiliates as described in the notice.

(ii) Examples of continuing relationships. A consumer has a continuing relationship with you or your affiliate if the consumer—

(A) Opens a deposit or investment account with you or your affiliate;

(B) Obtains a loan for which you or your affiliate owns the servicing rights;

(C) Purchases an insurance product from you or your affiliate;

(D) Holds an investment product through you or your affiliate, such as when you act or your affiliate acts as a custodian for securities or for assets in an individual retirement arrangement;

(E) Enters into an agreement or understanding with you or your affiliate whereby you or your affiliate undertakes to arrange or broker a home mortgage loan for the consumer;

(F) Enters into a lease of personal property with you or your affiliate; or

(G) Obtains financial, investment, or economic advisory services from you or your affiliate for a fee.

(3) *No continuing relationship.* (i) *In general.* If there is no continuing relationship between a consumer and you or your affiliate, and you or your affiliate obtain eligibility information about a consumer in connection with a transaction with the consumer, such as an isolated transaction or a credit application that is denied, an opt-out notice provided to the consumer only applies to eligibility information obtained in connection with that transaction.

(ii) *Examples of isolated transactions.* An isolated transaction occurs if–

(A) The consumer uses your or your affiliate's ATM to withdraw cash from an account at another financial institution; or

(B) You or your affiliate sells the consumer a cashier's check or money order, airline tickets, travel insurance, or traveler's checks in isolated transactions.

(4) *Menu of alternatives.* A consumer may be given the opportunity to choose from a menu of alternatives when electing to prohibit solicitations, such as by electing to prohibit solicitations from certain types of affiliates covered by the opt-out notice but not other types of affiliates covered by the notice, electing to prohibit solicitations based on certain types of eligibility information but not other types of eligibility information, or electing to prohibit solicitations by certain methods of delivery but not other methods of delivery. However, one of the alternatives must allow the consumer to prohibit all solicitations from all of the affiliates that are covered by the notice.

(5) *Special rule for a notice following termination of all continuing relationships.* (i) *In general.* A consumer must be given a new opt-out notice if,

after all continuing relationships with you or your affiliate(s) are terminated, the consumer subsequently establishes another continuing relationship with you or your affiliate(s) and the consumer's eligibility information is to be used to make a solicitation. The new opt-out notice must apply, at a minimum, to eligibility information obtained in connection with the new continuing relationship. Consistent with paragraph (b) of this section, the consumer's decision not to opt out after receiving the new opt-out notice would not override a prior opt-out election by the consumer that applies to eligibility information obtained in connection with a terminated relationship, regardless of whether the new opt-out notice applies to eligibility information obtained in connection with the terminated relationship.

(ii) *Example.* A consumer has a checking account with a depository institution that is part of an affiliated group. The consumer closes the checking account. One year after closing the checking account, the consumer opens a savings account with the same depository institution. The consumer must be given a new notice and opportunity to opt out before the depository institution's affiliates may make solicitations to the consumer using eligibility information obtained by the depository institution in connection with the new savings account relationship, regardless of whether the consumer opted out in connection with the checking account.

(b) *Duration of opt-out.* The election of a consumer to opt out must be effective for a period of at least five years (the ''opt-out period'') beginning when the consumer's opt-out election is received and implemented, unless the consumer subsequently revokes the opt-out in writing or, if the consumer agrees, electronically. An opt-out period of more than five years may be established, including an opt-out period that does not expire unless revoked by the consumer.

(c) *Time of opt-out.* A consumer may opt out at any time.

§ 222.23 Contents of opt-out notice; consolidated and equivalent notices.

(a) *Contents of opt-out notice.* (1) *In general.* A notice must be clear, conspicuous, and concise, and must accurately disclose:

(i) The name of the affiliate(s) providing the notice. If the notice is provided jointly by multiple affiliates and each affiliate shares a common name, such as ''ABC,'' then the notice may indicate that it is being provided by multiple companies with the ABC name or multiple companies in the ABC group or family of companies, for example, by stating that the notice is provided by ''all of the ABC companies,'' ''the ABC banking, credit card, insurance, and securities companies,'' or by listing the name of each affiliate providing the notice. But if the affiliates providing the joint notice do not all share a common name, then the notice must either separately identify each affiliate by name or identify each of the common names used by those affiliates, for example, by stating that the notice is provided by ''all of the ABC and XYZ companies'' or by ''the ABC banking and credit card companies and the XYZ insurance companies'';

(ii) A list of the affiliates or types of affiliates whose use of eligibility information is covered by the notice, which may include companies that become affiliates after the notice is provided to the consumer. If each affiliate covered by the notice shares a common name, such as ''ABC,'' then the notice may indicate that it applies to multiple companies with the ABC name or multiple companies in the ABC group or family of companies, for example, by stating that the notice is provided by ''all of the ABC companies,'' ''the ABC banking, credit card, insurance, and securities companies,'' or by listing the name of each affiliate providing the notice. But if the affiliates covered by the notice do not all share a common name, then the notice must either separately identify each covered affiliate by name or identify each of the common names used by those affiliates, for example, by stating that the notice applies to ''all of the ABC and XYZ companies'' or to ''the ABC banking and credit card companies and the XYZ insurance companies'';

(iii) A general description of the types of eligibility information that may be used to make solicitations to the consumer;

(iv) That the consumer may elect to limit the use of eligibility information to make solicitations to the consumer;

(v) That the consumer's election will apply for the specified period of time stated in the notice and, if applicable, that the consumer will be allowed to renew the election once that period expires;

(vi) If the notice is provided to consumers who may have previously opted out, such as if a notice is provided to consumers annually, that the consumer who has chosen to limit solicitations does not need to act again until the consumer receives a renewal notice; and

(vii) A reasonable and simple method for the consumer to opt out.

(2) *Joint relationships.* (i) If two or more consumers jointly obtain a product or service, a single opt-out notice may be provided to the joint consumers. Any of the joint consumers may exercise the right to opt out.

(ii) The opt-out notice must explain how an opt-out direction by a joint consumer will be treated. An opt-out direction by a joint consumer may be treated as applying to all of the associated joint consumers, or each joint consumer may be permitted to opt out separately. If each joint consumer is permitted to opt out separately, one of the joint consumers must be permitted to opt out on behalf of all of the joint consumers and the joint consumers must be permitted to exercise their separate rights to opt out in a single response.

(iii) It is impermissible to require *all* joint consumers to opt out before implementing *any* opt-out direction.

(3) *Alternative contents.* If the consumer is afforded a broader right to opt out of receiving marketing than is required by this subpart, the requirements of this section may be satisfied by providing the consumer with a clear, conspicuous, and concise notice that accurately discloses the consumer's opt-out rights.

(4) *Model notices.* Model notices are provided in Appendix C of this part.

(b) *Coordinated and consolidated notices.* A notice required by this subpart may be coordinated and consolidated with any other notice or disclosure required to be issued under any other provision of law by the entity providing the notice, including but not limited to the notice described in section 603(d)(2)(A)(iii) of the Act and the Gramm-Leach-Bliley Act privacy notice.

(c) *Equivalent notices.* A notice or other disclosure that is equivalent to the notice required by this subpart, and that is provided to a consumer together with disclosures required by any other provision of law, satisfies the requirements of this section.

§ 222.24 Reasonable opportunity to opt out.

(a) *In general.* You must not use eligibility information about a consumer that you receive from an affiliate to make a solicitation to the consumer about your products or services, unless the consumer is provided a reasonable opportunity to opt out, as required by § 222.21(a)(1)(ii) of this part.

(b) *Examples of a reasonable opportunity to opt out.* The consumer is given a reasonable opportunity to opt out if:

(1) *By mail.* The opt-out notice is mailed to the consumer. The consumer is given 30 days from the date the notice is mailed to elect to opt out by any reasonable means.

(2) *By electronic means.* (i) The opt-out notice is provided electronically to the consumer, such as by posting the notice at an Internet Web site at which the consumer has obtained a product or service. The consumer acknowledges receipt of the electronic notice. The consumer is given 30 days after the date the consumer acknowledges receipt to elect to opt out by any reasonable means.

(ii) The opt-out notice is provided to the consumer by e-mail where the consumer has agreed to receive disclosures by e-mail from the person sending the notice. The consumer is given 30 days after the e-mail is sent to elect to opt out by any reasonable means.

(3) *At the time of an electronic transaction.* The opt-out notice is provided to the consumer at the time of an electronic transaction, such as a transaction conducted on an Internet Web site. The consumer is required to decide, as a necessary part of proceeding with the transaction, whether to opt out before completing the transaction. There is a simple process that the consumer may use to opt out at that time using the same mechanism through which the transaction is conducted.

(4) *At the time of an in-person transaction.* The opt-out notice is provided to the consumer in writing at the time of an in-person transaction. The consumer is required to decide, as a necessary part of proceeding with the transaction, whether to opt out before completing the transaction, and is not permitted to complete the transaction without making a choice. There is a simple process that the consumer may use during the course of the in-person transaction to opt out, such as completing a form that requires consumers to write a ''yes'' or ''no'' to indicate their opt-out preference or that requires the consumer to check one of two blank check boxes—one that allows consumers to indicate that they want to opt out and one that allows consumers to indicate that they do not want to opt out.

(5) *By including in a privacy notice.* The opt-out notice is included in a Gramm-Leach-Bliley Act privacy notice. The consumer is allowed to exercise the opt-out within a reasonable period of time and in the same manner as the opt-out under that privacy notice.

§ 222.25 Reasonable and simple methods of opting out.

(a) *In general.* You must not use eligibility information about a consumer that you receive from an affiliate to make a solicitation to the consumer about your products or services, unless the consumer is provided a reasonable and simple method to opt out, as required by § 222.21(a)(1)(ii) of this part.

(b) *Examples.* (1) *Reasonable and simple opt-out methods.* Reasonable and simple methods for exercising the opt-out right include—

(i) Designating a check-off box in a prominent position on the opt-out form;

(ii) Including a reply form and a self-addressed envelope together with the opt-out notice;

(iii) Providing an electronic means to opt out, such as a form that can be electronically mailed or processed at an Internet Web site, if the consumer agrees to the electronic delivery of information;

(iv) Providing a toll-free telephone number that consumers may call to opt out; or

(v) Allowing consumers to exercise all of their opt-out rights described in a consolidated opt-out notice that includes the privacy opt-out under the Gramm-Leach-Bliley Act, 15 U.S.C. 6801 *et seq.*, the affiliate sharing opt-out under the Act, and the affiliate marketing opt-out under the Act, by a single method, such as by calling a single toll-free telephone number.

(2) *Opt-out methods that are not reasonable and simple.* Reasonable and simple methods for exercising an opt-out right *do not* include—

(i) Requiring the consumer to write his or her own letter;

(ii) Requiring the consumer to call or write to obtain a form for opting out, rather than including the form with the opt-out notice;

(iii) Requiring the consumer who receives the opt-out notice in electronic form only, such as through posting at an Internet Web site, to opt out solely by paper mail or by visiting a different Web site without providing a link to that site.

(c) *Specific opt-out means.* Each consumer may be required to opt out through a specific means, as long as that means is reasonable and simple for that consumer.

§ 222.26 Delivery of opt-out notices.

(a) *In general.* The opt-out notice must be provided so that each consumer can reasonably be expected to receive actual notice. For opt-out notices provided electronically, the notice may be provided in compliance with either the electronic disclosure provisions in this subpart or the provisions in section 101 of the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. 7001 *et seq.*

(b) *Examples of reasonable expectation of actual notice.* A consumer may reasonably be expected to receive actual notice if the affiliate providing the notice:

(1) Hand-delivers a printed copy of the notice to the consumer;

(2) Mails a printed copy of the notice to the last known mailing address of the consumer;

(3) Provides a notice by e-mail to a consumer who has agreed to receive electronic disclosures by e-mail from the affiliate providing the notice; or

(4) Posts the notice on the Internet Web site at which the consumer obtained a product or service electronically and requires the consumer to acknowledge receipt of the notice.

(c) *Examples of no reasonable expectation of actual notice.* A consumer may *not* reasonably be expected to receive actual notice if the affiliate providing the notice:

(1) Only posts the notice on a sign in a branch or office or generally publishes the notice in a newspaper;

(2) Sends the notice via e-mail to a consumer who has not agreed to receive electronic disclosures by e-mail from the affiliate providing the notice; or

(3) Posts the notice on an Internet Web site without requiring the consumer to acknowledge receipt of the notice.

§ 222.27 Renewal of opt-out.

(a) *Renewal notice and opt-out requirement.* (1) *In general.* After the opt-out period expires, you may not make solicitations based on eligibility information you receive from an affiliate to a consumer who previously opted out, unless:

(i) The consumer has been given a renewal notice that complies with the requirements of this section and §§ 222.24 through 222.26 of this part, and a reasonable opportunity and a reasonable and simple method to renew the opt-out, and the consumer does not renew the opt-out; or

(ii) An exception in § 222.21(c) of this part applies.

(2) *Renewal period.* Each opt-out renewal must be effective for a period of at least five years as provided in § 222.22(b) of this part.

(3) *Affiliates who may provide the notice.* The notice required by this paragraph must be provided:

(i) By the affiliate that provided the previous opt-out notice, or its successor; or

(ii) As part of a joint renewal notice from two or more members of an

affiliated group of companies, or their successors, that jointly provided the previous opt-out notice.

(b) *Contents of renewal notice.* The renewal notice must be clear, conspicuous, and concise, and must accurately disclose:

(1) The name of the affiliate(s) providing the notice. If the notice is provided jointly by multiple affiliates and each affiliate shares a common name, such as ''ABC,'' then the notice may indicate that it is being provided by multiple companies with the ABC name or multiple companies in the ABC group or family of companies, for example, by stating that the notice is provided by ''all of the ABC companies,'' ''the ABC banking, credit card, insurance, and securities companies,'' or by listing the name of each affiliate providing the notice. But if the affiliates providing the joint notice do not all share a common name, then the notice must either separately identify each affiliate by name or identify each of the common names used by those affiliates, for example, by stating that the notice is provided by ''all of the ABC and XYZ companies'' or by ''the ABC banking and credit card companies and the XYZ insurance companies'';

(2) A list of the affiliates or types of affiliates whose use of eligibility information is covered by the notice, which may include companies that become affiliates after the notice is provided to the consumer. If each affiliate covered by the notice shares a common name, such as ''ABC,'' then the notice may indicate that it applies to multiple companies with the ABC name or multiple companies in the ABC group or family of companies, for example, by stating that the notice is provided by ''all of the ABC companies,'' ''the ABC banking, credit card, insurance, and securities companies,'' or by listing the name of each affiliate providing the notice. But if the affiliates covered by the notice do not all share a common name, then the notice must either separately identify each covered affiliate by name or identify each of the common names used by those affiliates, for example, by stating that the notice applies to ''all of the ABC and XYZ companies'' or to ''the ABC banking and credit card companies and the XYZ insurance companies'';

(3) A general description of the types of eligibility information that may be used to make solicitations to the consumer;

(4) That the consumer previously elected to limit the use of certain information to make solicitations to the consumer;

(5) That the consumer's election has expired or is about to expire;

(6) That the consumer may elect to renew the consumer's previous election;

(7) If applicable, that the consumer's election to renew will apply for the specified period of time stated in the notice and that the consumer will be allowed to renew the election once that period expires; and

(8) A reasonable and simple method for the consumer to opt out.

(c) *Timing of the renewal notice.* (1) *In general.* A renewal notice may be provided to the consumer either—

(i) A reasonable period of time before the expiration of the opt-out period; or

(ii) Any time after the expiration of the opt-out period but before solicitations that would have been prohibited by the expired opt-out are made to the consumer.

(2) *Combination with annual privacy notice.* If you provide an annual privacy notice under the Gramm-Leach-Bliley Act, 15 U.S.C. 6801 *et seq.*, providing a renewal notice with the last annual privacy notice provided to the consumer before expiration of the opt-out period is a reasonable period of time before expiration of the opt-out in all cases.

(d) *No effect on opt-out period.* An opt-out period may not be shortened by sending a renewal notice to the consumer before expiration of the opt-out period, even if the consumer does not renew the opt out.

§ 222.28 Effective date, compliance date, and prospective application.

(a) *Effective date.* This subpart is effective January 1, 2008.

(b) *Mandatory compliance date.* Compliance with this subpart is required not later than October 1, 2008.

(c) *Prospective application.* The provisions of this subpart shall not prohibit you from using eligibility information that you receive from an affiliate to make solicitations to a consumer if you receive such information prior to October 1, 2008. For purposes of this section, you are deemed to receive eligibility information when such information is placed into a common database and is accessible by you.

■ 4. A new Appendix C to part 222 is added to read as follows:

Appendix C to Part 222—Model Forms for Opt-Out Notices

a. Although use of the model forms is not required, use of the model forms in this Appendix (as applicable) complies with the requirement in section 624 of the Act for clear, conspicuous, and concise notices.

b. Certain changes may be made to the language or format of the model forms without losing the protection from liability afforded by use of the model forms. These changes may not be so extensive as to affect the substance, clarity, or meaningful sequence of the language in the model forms. Persons making such extensive revisions will lose the safe harbor that this Appendix provides. Acceptable changes include, for example:

1. Rearranging the order of the references to ''your income,'' ''your account history,'' and ''your credit score.''

2. Substituting other types of information for ''income,'' ''account history,'' or ''credit score'' for accuracy, such as ''payment history,'' ''credit history,'' ''payoff status,'' or ''claims history.''

3. Substituting a clearer and more accurate description of the affiliates providing or covered by the notice for phrases such as ''the [ABC] group of companies,'' including without limitation a statement that the entity providing the notice recently purchased the consumer's account.

4. Substituting other types of affiliates covered by the notice for ''credit card,'' ''insurance,'' or ''securities'' affiliates.

5. Omitting items that are not accurate or applicable. For example, if a person does not limit the duration of the opt-out period, the notice may omit information about the renewal notice.

6. Adding a statement informing consumers how much time they have to opt out before shared eligibility information may be used to make solicitations to them.

7. Adding a statement that the consumer may exercise the right to opt out at any time.

8. Adding the following statement, if accurate: ''If you previously opted out, you do not need to do so again.''

9. Providing a place on the form for the consumer to fill in identifying information, such as his or her name and address

C–1 Model Form for Initial Opt-out Notice (Single-Affiliate Notice)

C–2 Model Form for Initial Opt-out Notice (Joint Notice)

C–3 Model Form for Renewal Notice (Single-Affiliate Notice)

C–4 Model Form for Renewal Notice (Joint Notice)

C–5 Model Form for Voluntary ''No Marketing'' Notice

C–1—Model Form for Initial Opt-out Notice (Single-Affiliate Notice)—[Your Choice To Limit Marketing]/[Marketing Opt-out]

• [Name of Affiliate] is providing this notice.

• [Optional: Federal law gives you the right to limit some but not all marketing from our affiliates. Federal law also requires us to give you this notice to tell you about your choice to limit marketing from our affiliates.]

• You may limit our affiliates in the [ABC] group of companies, such as our [credit card, insurance, and securities] affiliates, from marketing their products or services to you based on your personal information that we collect and share with them. This information includes your [income], your [account history with us], and your [credit score].

• Your choice to limit marketing offers from our affiliates will apply [until you tell

us to change your choice]/[for x years from when you tell us your choice]/[for at least 5 years from when you tell us your choice]. [Include if the opt-out period expires.] Once that period expires, you will receive a renewal notice that will allow you to continue to limit marketing offers from our affiliates for [another x years]/[at least another 5 years].

• [Include, if applicable, in a subsequent notice, including an annual notice, for consumers who may have previously opted out.] If you have already made a choice to limit marketing offers from our affiliates, you do not need to act again until you receive the renewal notice.

To limit marketing offers, contact us [include all that apply]:

• By telephone: 1–877–###–####
• On the Web: *www.---.com*
• By mail: Check the box and complete the form below, and send the form to:

[Company name]
[Company address]

__Do not allow your affiliates to use my personal information to market to me.

C–2—Model Form for Initial Opt-out Notice (Joint Notice)—[Your Choice To Limit Marketing]/[Marketing Opt-out]

• The [ABC group of companies] is providing this notice.
• [Optional: Federal law gives you the right to limit some but not all marketing from the [ABC] companies. Federal law also requires us to give you this notice to tell you about your choice to limit marketing from the [ABC] companies.]
• You may limit the [ABC] companies, such as the [ABC credit card, insurance, and securities] affiliates, from marketing their products or services to you based on your personal information that they receive from other [ABC] companies. This information includes your [income], your [account history], and your [credit score].
• Your choice to limit marketing offers from the [ABC] companies will apply [until you tell us to change your choice]/[for x years from when you tell us your choice]/[for at least 5 years from when you tell us your choice]. [Include if the opt-out period expires.] Once that period expires, you will receive a renewal notice that will allow you to continue to limit marketing offers from the [ABC] companies for [another x years]/[at least another 5 years].
• [Include, if applicable, in a subsequent notice, including an annual notice, for consumers who may have previously opted out.] If you have already made a choice to limit marketing offers from the [ABC] companies, you do not need to act again until you receive the renewal notice.

To limit marketing offers, contact us [include all that apply]:

• By telephone: 1–877–###–####
• On the Web: *www.---.com*
• By mail: Check the box and complete the form below, and send the form to:

[Company name]
[Company address]

__Do not allow any company [in the ABC group of companies] to use my personal information to market to me.

C–3—Model Form for Renewal Notice (Single-Affiliate Notice)—[Renewing Your Choice To Limit Marketing]/[Renewing Your Marketing Opt-Out]

• [Name of Affiliate] is providing this notice.
• [Optional: Federal law gives you the right to limit some but not all marketing from our affiliates. Federal law also requires us to give you this notice to tell you about your choice to limit marketing from our affiliates.]
• You previously chose to limit our affiliates in the [ABC] group of companies, such as our [credit card, insurance, and securities] affiliates, from marketing their products or services to you based on your personal information that we share with them. This information includes your [income], your [account history with us], and your [credit score].
• Your choice has expired or is about to expire.

To renew your choice to limit marketing for [x] more years, contact us [include all that apply]:

• By telephone: 1–877–###–####
• On the Web: *www.---.com*
• By mail: Check the box and complete the form below, and send the form to:

[Company name]
[Company address]

__Renew my choice to limit marketing for [x] more years.

C–4—Model Form for Renewal Notice (Joint Notice)—[Renewing Your Choice To Limit Marketing]/[Renewing Your Marketing Opt-Out]

• The [ABC group of companies] is providing this notice.
• [Optional: Federal law gives you the right to limit some but not all marketing from the [ABC] companies. Federal law also requires us to give you this notice to tell you about your choice to limit marketing from the [ABC] companies.]
• You previously chose to limit the [ABC] companies, such as the [ABC credit card, insurance, and securities] affiliates, from marketing their products or services to you based on your personal information that they receive from other ABC companies. This information includes your [income], your [account history], and your [credit score].
• Your choice has expired or is about to expire.

To renew your choice to limit marketing for [x] more years, contact us [include all that apply]:

• By telephone: 1–877–###–####
• On the Web: *www.---.com*
• By mail: Check the box and complete the form below, and send the form to:

[Company name]
[Company address]

__Renew my choice to limit marketing for [x] more years.

C–5—Model Form for Voluntary ''No Marketing'' Notice—Your Choice To Stop Marketing

• [Name of Affiliate] is providing this notice.
• You may choose to stop all marketing from us and our affiliates.

To stop all marketing, contact us [include all that apply]:

• By telephone: 1–877–###–####
• On the Web: www.---.com
• By mail: Check the box and complete the form below, and send the form to:

[Company name]
[Company address]

__Do not market to me.

Federal Deposit Insurance Corporation

12 CFR Chapter III.

Authority and Issuance

■ For the reasons set forth in the joint preamble, part 334 of title 12, chapter III, of the Code of Federal Regulations is amended as follows:

PART 334—FAIR CREDIT REPORTING

■ 1. The authority citation for part 334 is revised to read as follows:

Authority: 12 U.S.C. 1818 and 1819 (Tenth); 15 U.S.C. 1681b, 1681c, 1681m, 1681s, 1681w, 6801 and 6805.

Subpart A—General Provisions

■ 2. A new § 334.1 is added to part 334 to read as follows:

§ 334.1 Purpose and scope.

(a) *Purpose.* The purpose of this part is to implement the Fair Credit Reporting Act. This part generally applies to persons that obtain and use information about consumers to determine the consumer's eligibility for products, services, or employment, share such information among affiliates, and furnish information to consumer reporting agencies.

(b) *Scope.* Except as otherwise provided in this part, the regulations in this part apply to insured state nonmember banks, insured state licensed branches of foreign banks, and subsidiaries of such entities (except brokers, dealers, persons providing insurance, investment companies, and investment advisers).

■ 3. A new Subpart C is added to part 334 to read as follows:

Subpart C—Affiliate Marketing

Sec.
334.20 Coverage and definitions.
334.21 Affiliate marketing opt-out and exceptions.
334.22 Scope and duration of opt-out.
334.23 Contents of opt-out notice; consolidated and equivalent notices.
334.24 Reasonable opportunity to opt out.
334.25 Reasonable and simple methods of opting out.
334.26 Delivery of opt-out notices.
334.27 Renewal of opt-out.
334.28 Effective date, compliance date, and prospective application.

Subpart C—Affiliate Marketing

§ 334.20 Coverage and definitions.

(a) *Coverage.* Subpart C of this part applies to insured state nonmember banks, insured state licensed branches of foreign banks, and subsidiaries of such entities (except brokers, dealers, persons providing insurance, investment companies, and investment advisers).

(b) *Definitions.* For purposes of this subpart:

(1) *Clear and conspicuous.* The term ''clear and conspicuous'' means reasonably understandable and designed to call attention to the nature and significance of the information presented.

(2) *Concise.* (i) *In general.* The term ''concise'' means a reasonably brief expression or statement.

(ii) *Combination with other required disclosures.* A notice required by this subpart may be concise even if it is combined with other disclosures required or authorized by federal or state law.

(3) *Eligibility information.* The term ''eligibility information'' means any information the communication of which would be a consumer report if the exclusions from the definition of ''consumer report'' in section 603(d)(2)(A) of the Act did not apply. Eligibility information does not include aggregate or blind data that does not contain personal identifiers such as account numbers, names, or addresses.

(4) *Pre-existing business relationship.* (i) In general. The term ''pre-existing business relationship'' means a relationship between a person, or a person's licensed agent, and a consumer based on—

(A) A financial contract between the person and the consumer which is in force on the date on which the consumer is sent a solicitation covered by this subpart;

(B) The purchase, rental, or lease by the consumer of the person's goods or services, or a financial transaction (including holding an active account or a policy in force or having another continuing relationship) between the consumer and the person, during the 18-month period immediately preceding the date on which the consumer is sent a solicitation covered by this subpart; or

(C) An inquiry or application by the consumer regarding a product or service offered by that person during the three-month period immediately preceding the date on which the consumer is sent a solicitation covered by this subpart.

(ii) *Examples of pre-existing business relationships.* (A) If a consumer has a time deposit account, such as a certificate of deposit, at a depository institution that is currently in force, the depository institution has a pre-existing business relationship with the consumer and can use eligibility information it receives from its affiliates to make solicitations to the consumer about its products or services.

(B) If a consumer obtained a certificate of deposit from a depository institution, but did not renew the certificate at maturity, the depository institution has a pre-existing business relationship with the consumer and can use eligibility information it receives from its affiliates to make solicitations to the consumer about its products or services for 18 months after the date of maturity of the certificate of deposit.

(C) If a consumer obtains a mortgage, the mortgage lender has a pre-existing business relationship with the consumer. If the mortgage lender sells the consumer's entire loan to an investor, the mortgage lender has a pre-existing business relationship with the consumer and can use eligibility information it receives from its affiliates to make solicitations to the consumer about its products or services for 18 months after the date it sells the loan, and the investor has a pre-existing business relationship with the consumer upon purchasing the loan. If, however, the mortgage lender sells a fractional interest in the consumer's loan to an investor but also retains an ownership interest in the loan, the mortgage lender continues to have a pre-existing business relationship with the consumer, but the investor does not have a pre-existing business relationship with the consumer. If the mortgage lender retains ownership of the loan, but sells ownership of the servicing rights to the consumer's loan, the mortgage lender continues to have a pre-existing business relationship with the consumer. The purchaser of the servicing rights also has a pre-existing business relationship with the consumer as of the date it purchases ownership of the servicing rights, but only if it collects payments from or otherwise deals directly with the consumer on a continuing basis.

(D) If a consumer applies to a depository institution for a product or service that it offers, but does not obtain a product or service from or enter into a financial contract or transaction with the institution, the depository institution has a pre-existing business relationship with the consumer and can therefore use eligibility information it receives from an affiliate to make solicitations to the consumer about its products or services for three months after the date of the application.

(E) If a consumer makes a telephone inquiry to a depository institution about its products or services and provides contact information to the institution, but does not obtain a product or service from or enter into a financial contract or transaction with the institution, the depository institution has a pre-existing business relationship with the consumer and can therefore use eligibility information it receives from an affiliate to make solicitations to the consumer about its products or services for three months after the date of the inquiry.

(F) If a consumer makes an inquiry to a depository institution by e-mail about its products or services, but does not obtain a product or service from or enter into a financial contract or transaction with the institution, the depository institution has a pre-existing business relationship with the consumer and can therefore use eligibility information it receives from an affiliate to make solicitations to the consumer about its products or services for three months after the date of the inquiry.

(G) If a consumer has an existing relationship with a depository institution that is part of a group of affiliated companies, makes a telephone call to the centralized call center for the group of affiliated companies to inquire about products or services offered by the insurance affiliate, and provides contact information to the call center, the call constitutes an inquiry to the insurance affiliate that offers those products or services. The insurance affiliate has a pre-existing business relationship with the consumer and can therefore use eligibility information it receives from its affiliated depository institution to make solicitations to the consumer about its products or services for three months after the date of the inquiry.

(iii) *Examples where no pre-existing business relationship is created.* (A) If a consumer makes a telephone call to a centralized call center for a group of affiliated companies to inquire about the consumer's existing account at a depository institution, the call does not constitute an inquiry to any affiliate other than the depository institution that holds the consumer's account and does not establish a pre-existing business relationship between the consumer and any affiliate of the account-holding depository institution.

(B) If a consumer who has a deposit account with a depository institution makes a telephone call to an affiliate of the institution to ask about the affiliate's retail locations and hours, but does not make an inquiry about the affiliate's products or services, the call does not constitute an inquiry and does not establish a pre-existing business

relationship between the consumer and the affiliate. Also, the affiliate's capture of the consumer's telephone number does not constitute an inquiry and does not establish a pre-existing business relationship between the consumer and the affiliate.

(C) If a consumer makes a telephone call to a depository institution in response to an advertisement that offers a free promotional item to consumers who call a toll-free number, but the advertisement does not indicate that the depository institution's products or services will be marketed to consumers who call in response, the call does not create a pre-existing business relationship between the consumer and the depository institution because the consumer has not made an inquiry about a product or service offered by the institution, but has merely responded to an offer for a free promotional item.

(5) *Solicitation.* (i) *In general.* The term ''solicitation'' means the marketing of a product or service initiated by a person to a particular consumer that is—

(A) Based on eligibility information communicated to that person by its affiliate as described in this subpart; and

(B) Intended to encourage the consumer to purchase or obtain such product or service.

(ii) *Exclusion of marketing directed at the general public.* A solicitation does not include marketing communications that are directed at the general public. For example, television, general circulation magazine, and billboard advertisements do not constitute solicitations, even if those communications are intended to encourage consumers to purchase products and services from the person initiating the communications.

(iii) *Examples of solicitations.* A solicitation would include, for example, a telemarketing call, direct mail, e-mail, or other form of marketing communication directed to a particular consumer that is based on eligibility information received from an affiliate.

(6) *You* means a person described in paragraph (a) of this section.

§ 334.21 Affiliate marketing opt-out and exceptions.

(a) *Initial notice and opt-out requirement.* (1) *In general.* You may not use eligibility information about a consumer that you receive from an affiliate to make a solicitation for marketing purposes to the consumer, unless—

(i) It is clearly and conspicuously disclosed to the consumer in writing or, if the consumer agrees, electronically, in a concise notice that you may use eligibility information about that consumer received from an affiliate to make solicitations for marketing purposes to the consumer;

(ii) The consumer is provided a reasonable opportunity and a reasonable and simple method to ''opt out,'' or prohibit you from using eligibility information to make solicitations for marketing purposes to the consumer; and

(iii) The consumer has not opted out.

(2) *Example.* A consumer has a homeowner's insurance policy with an insurance company. The insurance company furnishes eligibility information about the consumer to its affiliated depository institution. Based on that eligibility information, the depository institution wants to make a solicitation to the consumer about its home equity loan products. The depository institution does not have a pre-existing business relationship with the consumer and none of the other exceptions apply. The depository institution is prohibited from using eligibility information received from its insurance affiliate to make solicitations to the consumer about its home equity loan products unless the consumer is given a notice and opportunity to opt out and the consumer does not opt out.

(3) *Affiliates who may provide the notice.* The notice required by this paragraph must be provided:

(i) By an affiliate that has or has previously had a pre-existing business relationship with the consumer; or

(ii) As part of a joint notice from two or more members of an affiliated group of companies, provided that at least one of the affiliates on the joint notice has or has previously had a pre-existing business relationship with the consumer.

(b) *Making solicitations.* (1) *In general.* For purposes of this subpart, you make a solicitation for marketing purposes if—

(i) You receive eligibility information from an affiliate;

(ii) You use that eligibility information to do one or more of the following:

(A) Identify the consumer or type of consumer to receive a solicitation;

(B) Establish criteria used to select the consumer to receive a solicitation; or

(C) Decide which of your products or services to market to the consumer or tailor your solicitation to that consumer; and

(iii) As a result of your use of the eligibility information, the consumer is provided a solicitation.

(2) *Receiving eligibility information from an affiliate, including through a common database.* You may receive eligibility information from an affiliate in various ways, including when the affiliate places that information into a common database that you may access.

(3) *Receipt or use of eligibility information by your service provider.* Except as provided in paragraph (b)(5) of this section, you receive or use an affiliate's eligibility information if a service provider acting on your behalf (whether an affiliate or a nonaffiliated third party) receives or uses that information in the manner described in paragraphs (b)(1)(i) or (b)(1)(ii) of this section. All relevant facts and circumstances will determine whether a person is acting as your service provider when it receives or uses an affiliate's eligibility information in connection with marketing your products and services.

(4) *Use by an affiliate of its own eligibility information.* Unless you have used eligibility information that you receive from an affiliate in the manner described in paragraph (b)(1)(ii) of this section, you do not make a solicitation subject to this subpart if your affiliate:

(i) Uses its own eligibility information that it obtained in connection with a pre-existing business relationship it has or had with the consumer to market your products or services to the consumer; or

(ii) Directs its service provider to use the affiliate's own eligibility information that it obtained in connection with a pre-existing business relationship it has or had with the consumer to market your products or services to the consumer, and you do not communicate directly with the service provider regarding that use.

(5) *Use of eligibility information by a service provider.* (i) *In general.* You do not make a solicitation subject to Subpart C of this part if a service provider (including an affiliated or third-party service provider that maintains or accesses a common database that you may access) receives eligibility information from your affiliate that your affiliate obtained in connection with a pre-existing business relationship it has or had with the consumer and uses that eligibility information to market your products or services to the consumer, so long as—

(A) Your affiliate controls access to and use of its eligibility information by the service provider (including the right to establish the specific terms and conditions under which the service provider may use such information to market your products or services);

(B) Your affiliate establishes specific terms and conditions under which the service provider may access and use the affiliate's eligibility information to

market your products and services (or those of affiliates generally) to the consumer, such as the identity of the affiliated companies whose products or services may be marketed to the consumer by the service provider, the types of products or services of affiliated companies that may be marketed, and the number of times the consumer may receive marketing materials, and periodically evaluates the service provider's compliance with those terms and conditions;

(C) Your affiliate requires the service provider to implement reasonable policies and procedures designed to ensure that the service provider uses the affiliate's eligibility information in accordance with the terms and conditions established by the affiliate relating to the marketing of your products or services;

(D) Your affiliate is identified on or with the marketing materials provided to the consumer; and

(E) You do not directly use your affiliate's eligibility information in the manner described in paragraph (b)(1)(ii) of this section.

(ii) *Writing requirements.* (A) The requirements of paragraphs (b)(5)(i)(A) and (C) of this section must be set forth in a written agreement between your affiliate and the service provider; and

(B) The specific terms and conditions established by your affiliate as provided in paragraph (b)(5)(i)(B) of this section must be set forth in writing.

(6) *Examples of making solicitations.* (i) A consumer has a deposit account with a depository institution, which is affiliated with an insurance company. The insurance company receives eligibility information about the consumer from the depository institution. The insurance company uses that eligibility information to identify the consumer to receive a solicitation about insurance products, and, as a result, the insurance company provides a solicitation to the consumer about its insurance products. Pursuant to paragraph (b)(1) of this section, the insurance company has made a solicitation to the consumer.

(ii) The same facts as in the example in paragraph (b)(6)(i) of this section, except that after using the eligibility information to identify the consumer to receive a solicitation about insurance products, the insurance company asks the depository institution to send the solicitation to the consumer and the depository institution does so. Pursuant to paragraph (b)(1) of this section, the insurance company has made a solicitation to the consumer because it used eligibility information about the consumer that it received from an affiliate to identify the consumer to receive a solicitation about its products or services, and, as a result, a solicitation was provided to the consumer about the insurance company's products.

(iii) The same facts as in the example in paragraph (b)(6)(i) of this section, except that eligibility information about consumers that have deposit accounts with the depository institution is placed into a common database that all members of the affiliated group of companies may independently access and use. Without using the depository institution's eligibility information, the insurance company develops selection criteria and provides those criteria, marketing materials, and related instructions to the depository institution. The depository institution reviews eligibility information about its own consumers using the selection criteria provided by the insurance company to determine which consumers should receive the insurance company's marketing materials and sends marketing materials about the insurance company's products to those consumers. Even though the insurance company has received eligibility information through the common database as provided in paragraph (b)(2) of this section, it did not use that information to identify consumers or establish selection criteria; instead, the depository institution used its own eligibility information. Therefore, pursuant to paragraph (b)(4)(i) of this section, the insurance company has not made a solicitation to the consumer.

(iv) The same facts as in the example in paragraph (b)(6)(iii) of this section, except that the depository institution provides the insurance company's criteria to the depository institution's service provider and directs the service provider to use the depository institution's eligibility information to identify depository institution consumers who meet the criteria and to send the insurance company's marketing materials to those consumers. The insurance company does not communicate directly with the service provider regarding the use of the depository institution's information to market its products to the depository institution's consumers. Pursuant to paragraph (b)(4)(ii) of this section, the insurance company has not made a solicitation to the consumer.

(v) An affiliated group of companies includes a depository institution, an insurance company, and a service provider. Each affiliate in the group places information about its consumers into a common database. The service provider has access to all information in the common database. The depository institution controls access to and use of its eligibility information by the service provider. This control is set forth in a written agreement between the depository institution and the service provider. The written agreement also requires the service provider to establish reasonable policies and procedures designed to ensure that the service provider uses the depository institution's eligibility information in accordance with specific terms and conditions established by the depository institution relating to the marketing of the products and services of all affiliates, including the insurance company. In a separate written communication, the depository institution specifies the terms and conditions under which the service provider may use the depository institution's eligibility information to market the insurance company's products and services to the depository institution's consumers. The specific terms and conditions are: a list of affiliated companies (including the insurance company) whose products or services may be marketed to the depository institution's consumers by the service provider; the specific products or types of products that may be marketed to the depository institution's consumers by the service provider; the categories of eligibility information that may be used by the service provider in marketing products or services to the depository institution's consumers; the types or categories of the depository institution's consumers to whom the service provider may market products or services of depository institution affiliates; the number and/or types of marketing communications that the service provider may send to the depository institution's consumers; and the length of time during which the service provider may market the products or services of the depository institution's affiliates to its consumers. The depository institution periodically evaluates the service provider's compliance with these terms and conditions. The insurance company asks the service provider to market insurance products to certain consumers who have deposit accounts with the depository institution. Without using the depository institution's eligibility information, the insurance company develops selection criteria and provides those criteria, marketing materials, and related instructions to the service provider. The service provider uses the depository institution's eligibility information from the common database

to identify the depository institution's consumers to whom insurance products will be marketed. When the insurance company's marketing materials are provided to the identified consumers, the name of the depository institution is displayed on the insurance marketing materials, an introductory letter that accompanies the marketing materials, an account statement that accompanies the marketing materials, or the envelope containing the marketing materials. The requirements of paragraph (b)(5) of this section have been satisfied, and the insurance company has not made a solicitation to the consumer.

(vi) The same facts as in the example in paragraph (b)(6)(v) of this section, except that the terms and conditions permit the service provider to use the depository institution's eligibility information to market the products and services of other affiliates to the depository institution's consumers whenever the service provider deems it appropriate to do so. The service provider uses the depository institution's eligibility information in accordance with the discretion afforded to it by the terms and conditions. Because the terms and conditions are not specific, the requirements of paragraph (b)(5) of this section have not been satisfied.

(c) *Exceptions.* The provisions of this subpart do not apply to you if you use eligibility information that you receive from an affiliate:

(1) To make a solicitation for marketing purposes to a consumer with whom you have a pre-existing business relationship;

(2) To facilitate communications to an individual for whose benefit you provide employee benefit or other services pursuant to a contract with an employer related to and arising out of the current employment relationship or status of the individual as a participant or beneficiary of an employee benefit plan;

(3) To perform services on behalf of an affiliate, except that this subparagraph shall not be construed as permitting you to send solicitations on behalf of an affiliate if the affiliate would not be permitted to send the solicitation as a result of the election of the consumer to opt out under this subpart;

(4) In response to a communication about your products or services initiated by the consumer;

(5) In response to an authorization or request by the consumer to receive solicitations; or

(6) If your compliance with this subpart would prevent you from complying with any provision of State insurance laws pertaining to unfair discrimination in any State in which you are lawfully doing business.

(d) *Examples of exceptions.* (1) *Example of the pre-existing business relationship exception.* A consumer has a deposit account with a depository institution. The consumer also has a relationship with the depository institution's securities affiliate for management of the consumer's securities portfolio. The depository institution receives eligibility information about the consumer from its securities affiliate and uses that information to make a solicitation to the consumer about the depository institution's wealth management services. The depository institution may make this solicitation even if the consumer has not been given a notice and opportunity to opt out because the depository institution has a pre-existing business relationship with the consumer.

(2) *Examples of service provider exception.* (i) A consumer has an insurance policy issued by an insurance company. The insurance company furnishes eligibility information about the consumer to its affiliated depository institution. Based on that eligibility information, the depository institution wants to make a solicitation to the consumer about its deposit products. The depository institution does not have a pre-existing business relationship with the consumer and none of the other exceptions in paragraph (c) of this section apply. The consumer has been given an opt-out notice and has elected to opt out of receiving such solicitations. The depository institution asks a service provider to send the solicitation to the consumer on its behalf. The service provider may not send the solicitation on behalf of the depository institution because, as a result of the consumer's opt-out election, the depository institution is not permitted to make the solicitation.

(ii) The same facts as in paragraph (d)(2)(i) of this section, except the consumer has been given an opt-out notice, but has not elected to opt out. The depository institution asks a service provider to send the solicitation to the consumer on its behalf. The service provider may send the solicitation on behalf of the depository institution because, as a result of the consumer's not opting out, the depository institution is permitted to make the solicitation.

(3) *Examples of consumer-initiated communications.* (i) A consumer who has a deposit account with a depository institution initiates a communication with the depository institution's credit card affiliate to request information about a credit card. The credit card affiliate may use eligibility information about the consumer it obtains from the depository institution or any other affiliate to make solicitations regarding credit card products in response to the consumer-initiated communication.

(ii) A consumer who has a deposit account with a depository institution contacts the institution to request information about how to save and invest for a child's college education without specifying the type of product in which the consumer may be interested. Information about a range of different products or services offered by the depository institution and one or more affiliates of the institution may be responsive to that communication. Such products or services may include the following: Mutual funds offered by the institution's mutual fund affiliate; section 529 plans offered by the institution, its mutual fund affiliate, or another securities affiliate; or trust services offered by a different financial institution in the affiliated group. Any affiliate offering investment products or services that would be responsive to the consumer's request for information about saving and investing for a child's college education may use eligibility information to make solicitations to the consumer in response to this communication.

(iii) A credit card issuer makes a marketing call to the consumer without using eligibility information received from an affiliate. The issuer leaves a voice-mail message that invites the consumer to call a toll-free number to apply for the issuer's credit card. If the consumer calls the toll-free number to inquire about the credit card, the call is a consumer-initiated communication about a product or service and the credit card issuer may now use eligibility information it receives from its affiliates to make solicitations to the consumer.

(iv) A consumer calls a depository institution to ask about retail locations and hours, but does not request information about products or services. The institution may not use eligibility information it receives from an affiliate to make solicitations to the consumer about its products or services because the consumer-initiated communication does not relate to the depository institution's products or services. Thus, the use of eligibility information received from an affiliate would not be responsive to the communication and the exception does not apply.

(v) A consumer calls a depository institution to ask about retail locations and hours. The customer service representative asks the consumer if

there is a particular product or service about which the consumer is seeking information. The consumer responds that the consumer wants to stop in and find out about certificates of deposit. The customer service representative offers to provide that information by telephone and mail additional information and application materials to the consumer. The consumer agrees and provides or confirms contact information for receipt of the materials to be mailed. The depository institution may use eligibility information it receives from an affiliate to make solicitations to the consumer about certificates of deposit because such solicitations would respond to the consumer-initiated communication about products or services.

(4) *Examples of consumer authorization or request for solicitations.* (i) A consumer who obtains a mortgage from a mortgage lender authorizes or requests information about homeowner's insurance offered by the mortgage lender's insurance affiliate. Such authorization or request, whether given to the mortgage lender or to the insurance affiliate, would permit the insurance affiliate to use eligibility information about the consumer it obtains from the mortgage lender or any other affiliate to make solicitations to the consumer about homeowner's insurance.

(ii) A consumer completes an online application to apply for a credit card from a credit card issuer. The issuer's online application contains a blank check box that the consumer may check to authorize or request information from the credit card issuer's affiliates. The consumer checks the box. The consumer has authorized or requested solicitations from the card issuer's affiliates.

(iii) A consumer completes an online application to apply for a credit card from a credit card issuer. The issuer's online application contains a pre-selected check box indicating that the consumer authorizes or requests information from the issuer's affiliates. The consumer does not deselect the check box. The consumer has not authorized or requested solicitations from the card issuer's affiliates.

(iv) The terms and conditions of a credit card account agreement contain preprinted boilerplate language stating that by applying to open an account the consumer authorizes or requests to receive solicitations from the credit card issuer's affiliates. The consumer has not authorized or requested solicitations from the card issuer's affiliates.

(e) *Relation to affiliate-sharing notice and opt-out.* Nothing in this subpart limits the responsibility of a person to comply with the notice and opt-out provisions of section 603(d)(2)(A)(iii) of the Act where applicable.

§ 334.22 Scope and duration of opt-out.

(a) *Scope of opt-out.* (1) *In general.* Except as otherwise provided in this section, the consumer's election to opt out prohibits any affiliate covered by the opt-out notice from using eligibility information received from another affiliate as described in the notice to make solicitations to the consumer.

(2) *Continuing relationship.* (i) *In general.* If the consumer establishes a continuing relationship with you or your affiliate, an opt-out notice may apply to eligibility information obtained in connection with—

(A) A single continuing relationship or multiple continuing relationships that the consumer establishes with you or your affiliates, including continuing relationships established subsequent to delivery of the opt-out notice, so long as the notice adequately describes the continuing relationships covered by the opt-out; or

(B) Any other transaction between the consumer and you or your affiliates as described in the notice.

(ii) *Examples of continuing relationships.* A consumer has a continuing relationship with you or your affiliate if the consumer—

(A) Opens a deposit or investment account with you or your affiliate;

(B) Obtains a loan for which you or your affiliate owns the servicing rights;

(C) Purchases an insurance product from you or your affiliate;

(D) Holds an investment product through you or your affiliate, such as when you act or your affiliate acts as a custodian for securities or for assets in an individual retirement arrangement;

(E) Enters into an agreement or understanding with you or your affiliate whereby you or your affiliate undertakes to arrange or broker a home mortgage loan for the consumer;

(F) Enters into a lease of personal property with you or your affiliate; or

(G) Obtains financial, investment, or economic advisory services from you or your affiliate for a fee.

(3) *No continuing relationship.* (i) *In general.* If there is no continuing relationship between a consumer and you or your affiliate, and you or your affiliate obtain eligibility information about a consumer in connection with a transaction with the consumer, such as an isolated transaction or a credit application that is denied, an opt-out notice provided to the consumer only applies to eligibility information obtained in connection with that transaction.

(ii) *Examples of isolated transactions.* An isolated transaction occurs if—

(A) The consumer uses your or your affiliate's ATM to withdraw cash from an account at another financial institution; or

(B) You or your affiliate sells the consumer a cashier's check or money order, airline tickets, travel insurance, or traveler's checks in isolated transactions.

(4) *Menu of alternatives.* A consumer may be given the opportunity to choose from a menu of alternatives when electing to prohibit solicitations, such as by electing to prohibit solicitations from certain types of affiliates covered by the opt-out notice but not other types of affiliates covered by the notice, electing to prohibit solicitations based on certain types of eligibility information but not other types of eligibility information, or electing to prohibit solicitations by certain methods of delivery but not other methods of delivery. However, one of the alternatives must allow the consumer to prohibit all solicitations from all of the affiliates that are covered by the notice.

(5) *Special rule for a notice following termination of all continuing relationships.* (i) *In general.* A consumer must be given a new opt-out notice if, after all continuing relationships with you or your affiliate(s) are terminated, the consumer subsequently establishes another continuing relationship with you or your affiliate(s) and the consumer's eligibility information is to be used to make a solicitation. The new opt-out notice must apply, at a minimum, to eligibility information obtained in connection with the new continuing relationship. Consistent with paragraph (b) of this section, the consumer's decision not to opt out after receiving the new opt-out notice would not override a prior opt-out election by the consumer that applies to eligibility information obtained in connection with a terminated relationship, regardless of whether the new opt-out notice applies to eligibility information obtained in connection with the terminated relationship.

(ii) *Example.* A consumer has a checking account with a depository institution that is part of an affiliated group. The consumer closes the checking account. One year after closing the checking account, the consumer opens a savings account with the same depository institution. The consumer must be given a new notice and opportunity to opt out before the depository institution's affiliates may make solicitations to the consumer using eligibility information obtained by the depository institution in connection

with the new savings account relationship, regardless of whether the consumer opted out in connection with the checking account.

(b) *Duration of opt-out.* The election of a consumer to opt out must be effective for a period of at least five years (the ''opt-out period'') beginning when the consumer's opt-out election is received and implemented, unless the consumer subsequently revokes the opt-out in writing or, if the consumer agrees, electronically. An opt-out period of more than five years may be established, including an opt-out period that does not expire unless revoked by the consumer.

(c) *Time of opt-out.* A consumer may opt out at any time.

§ 334.23 Contents of opt-out notice; consolidated and equivalent notices.

(a) *Contents of opt-out notice.* (1) *In general.* A notice must be clear, conspicuous, and concise, and must accurately disclose:

(i) The name of the affiliate(s) providing the notice. If the notice is provided jointly by multiple affiliates and each affiliate shares a common name, such as ''ABC,'' then the notice may indicate that it is being provided by multiple companies with the ABC name or multiple companies in the ABC group or family of companies, for example, by stating that the notice is provided by ''all of the ABC companies,'' ''the ABC banking, credit card, insurance, and securities companies,'' or by listing the name of each affiliate providing the notice. But if the affiliates providing the joint notice do not all share a common name, then the notice must either separately identify each affiliate by name or identify each of the common names used by those affiliates, for example, by stating that the notice is provided by ''all of the ABC and XYZ companies'' or by ''the ABC banking and credit card companies and the XYZ insurance companies'';

(ii) A list of the affiliates or types of affiliates whose use of eligibility information is covered by the notice, which may include companies that become affiliates after the notice is provided to the consumer. If each affiliate covered by the notice shares a common name, such as ''ABC,'' then the notice may indicate that it applies to multiple companies with the ABC name or multiple companies in the ABC group or family of companies, for example, by stating that the notice is provided by ''all of the ABC companies,'' ''the ABC banking, credit card, insurance, and securities companies,'' or by listing the name of each affiliate providing the notice. But if the affiliates covered by the notice do not all share a common name, then the notice must either separately identify each covered affiliate by name or identify each of the common names used by those affiliates, for example, by stating that the notice applies to ''all of the ABC and XYZ companies'' or to ''the ABC banking and credit card companies and the XYZ insurance companies'';

(iii) A general description of the types of eligibility information that may be used to make solicitations to the consumer;

(iv) That the consumer may elect to limit the use of eligibility information to make solicitations to the consumer;

(v) That the consumer's election will apply for the specified period of time stated in the notice and, if applicable, that the consumer will be allowed to renew the election once that period expires;

(vi) If the notice is provided to consumers who may have previously opted out, such as if a notice is provided to consumers annually, that the consumer who has chosen to limit solicitations does not need to act again until the consumer receives a renewal notice; and

(vii) A reasonable and simple method for the consumer to opt out.

(2) *Joint relationships.* (i) If two or more consumers jointly obtain a product or service, a single opt-out notice may be provided to the joint consumers. Any of the joint consumers may exercise the right to opt out.

(ii) The opt-out notice must explain how an opt-out direction by a joint consumer will be treated. An opt-out direction by a joint consumer may be treated as applying to all of the associated joint consumers, or each joint consumer may be permitted to opt-out separately. If each joint consumer is permitted to opt out separately, one of the joint consumers must be permitted to opt out on behalf of all of the joint consumers and the joint consumers must be permitted to exercise their separate rights to opt out in a single response.

(iii) It is impermissible to require *all* joint consumers to opt out before implementing *any* opt-out direction.

(3) *Alternative contents.* If the consumer is afforded a broader right to opt out of receiving marketing than is required by this subpart, the requirements of this section may be satisfied by providing the consumer with a clear, conspicuous, and concise notice that accurately discloses the consumer's opt-out rights.

(4) *Model notices.* Model notices are provided in Appendix C of this part.

(b) *Coordinated and consolidated notices.* A notice required by this subpart may be coordinated and consolidated with any other notice or disclosure required to be issued under any other provision of law by the entity providing the notice, including but not limited to the notice described in section 603(d)(2)(A)(iii) of the Act and the Gramm-Leach-Bliley Act privacy notice.

(c) *Equivalent notices.* A notice or other disclosure that is equivalent to the notice required by this subpart, and that is provided to a consumer together with disclosures required by any other provision of law, satisfies the requirements of this section.

§ 334.24 Reasonable opportunity to opt out.

(a) *In general.* You must not use eligibility information about a consumer that you receive from an affiliate to make a solicitation to the consumer about your products or services, unless the consumer is provided a reasonable opportunity to opt out, as required by § 334.21(a)(1)(ii) of this part.

(b) *Examples of a reasonable opportunity to opt out.* The consumer is given a reasonable opportunity to opt out if:

(1) *By mail.* The opt-out notice is mailed to the consumer. The consumer is given 30 days from the date the notice is mailed to elect to opt out by any reasonable means.

(2) *By electronic means.* (i) The opt-out notice is provided electronically to the consumer, such as by posting the notice at an Internet Web site at which the consumer has obtained a product or service. The consumer acknowledges receipt of the electronic notice. The consumer is given 30 days after the date the consumer acknowledges receipt to elect to opt out by any reasonable means.

(ii) The opt-out notice is provided to the consumer by e-mail where the consumer has agreed to receive disclosures by e-mail from the person sending the notice. The consumer is given 30 days after the e-mail is sent to elect to opt out by any reasonable means.

(3) *At the time of an electronic transaction.* The opt-out notice is provided to the consumer at the time of an electronic transaction, such as a transaction conducted on an Internet Web site. The consumer is required to decide, as a necessary part of proceeding with the transaction, whether to opt out before completing the transaction. There is a simple process that the consumer may use to opt out at that time using the same

mechanism through which the transaction is conducted.

(4) *At the time of an in-person transaction.* The opt-out notice is provided to the consumer in writing at the time of an in-person transaction. The consumer is required to decide, as a necessary part of proceeding with the transaction, whether to opt out before completing the transaction, and is not permitted to complete the transaction without making a choice. There is a simple process that the consumer may use during the course of the in-person transaction to opt out, such as completing a form that requires consumers to write a ''yes'' or ''no'' to indicate their opt-out preference or that requires the consumer to check one of two blank check boxes—one that allows consumers to indicate that they want to opt out and one that allows consumers to indicate that they do not want to opt out.

(5) *By including in a privacy notice.* The opt-out notice is included in a Gramm-Leach-Bliley Act privacy notice. The consumer is allowed to exercise the opt-out within a reasonable period of time and in the same manner as the opt-out under that privacy notice.

§ 334.25 Reasonable and simple methods of opting out.

(a) *In general.* You must not use eligibility information about a consumer that you receive from an affiliate to make a solicitation to the consumer about your products or services, unless the consumer is provided a reasonable and simple method to opt out, as required by § 334.21(a)(1)(ii) of this part.

(b) *Examples.* (1) *Reasonable and simple opt-out methods.* Reasonable and simple methods for exercising the opt-out right include—

(i) Designating a check-off box in a prominent position on the opt-out form;

(ii) Including a reply form and a self-addressed envelope together with the opt-out notice;

(iii) Providing an electronic means to opt out, such as a form that can be electronically mailed or processed at an Internet Web site, if the consumer agrees to the electronic delivery of information;

(iv) Providing a toll-free telephone number that consumers may call to opt out; or

(v) Allowing consumers to exercise all of their opt-out rights described in a consolidated opt-out notice that includes the privacy opt-out under the Gramm-Leach-Bliley Act, 15 U.S.C. 6801 *et seq.*, the affiliate sharing opt-out under the Act, and the affiliate marketing opt-out under the Act, by a single method, such as by calling a single toll-free telephone number.

(2) *Opt-out methods that are not reasonable and simple.* Reasonable and simple methods for exercising an opt-out right *do not* include—

(i) Requiring the consumer to write his or her own letter;

(ii) Requiring the consumer to call or write to obtain a form for opting out, rather than including the form with the opt-out notice;

(iii) Requiring the consumer who receives the opt-out notice in electronic form only, such as through posting at an Internet Web site, to opt out solely by paper mail or by visiting a different Web site without providing a link to that site.

(c) *Specific opt-out means.* Each consumer may be required to opt out through a specific means, as long as that means is reasonable and simple for that consumer.

§ 334.26 Delivery of opt-out notices.

(a) *In general.* The opt-out notice must be provided so that each consumer can reasonably be expected to receive actual notice. For opt-out notices provided electronically, the notice may be provided in compliance with either the electronic disclosure provisions in this subpart or the provisions in section 101 of the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. 7001 *et seq.*

(b) *Examples of reasonable expectation of actual notice.* A consumer may reasonably be expected to receive actual notice if the affiliate providing the notice:

(1) Hand-delivers a printed copy of the notice to the consumer;

(2) Mails a printed copy of the notice to the last known mailing address of the consumer;

(3) Provides a notice by e-mail to a consumer who has agreed to receive electronic disclosures by e-mail from the affiliate providing the notice; or

(4) Posts the notice on the Internet Web site at which the consumer obtained a product or service electronically and requires the consumer to acknowledge receipt of the notice.

(c) *Examples of no reasonable expectation of actual notice.* A consumer may *not* reasonably be expected to receive actual notice if the affiliate providing the notice:

(1) Only posts the notice on a sign in a branch or office or generally publishes the notice in a newspaper;

(2) Sends the notice via e-mail to a consumer who has not agreed to receive electronic disclosures by e-mail from the affiliate providing the notice; or

(3) Posts the notice on an Internet Web site without requiring the consumer to acknowledge receipt of the notice.

§ 334.27 Renewal of opt-out.

(a) *Renewal notice and opt-out requirement.* (1) *In general.* After the opt-out period expires, you may not make solicitations based on eligibility information you receive from an affiliate to a consumer who previously opted out, unless:

(i) The consumer has been given a renewal notice that complies with the requirements of this section and §§ 334.24 through 334.26 of this part, and a reasonable opportunity and a reasonable and simple method to renew the opt-out, and the consumer does not renew the opt-out; or

(ii) An exception in § 334.21(c) of this part applies.

(2) *Renewal period.* Each opt-out renewal must be effective for a period of at least five years as provided in § 334.22(b) of this part.

(3) *Affiliates who may provide the notice.* The notice required by this paragraph must be provided:

(i) By the affiliate that provided the previous opt-out notice, or its successor; or

(ii) As part of a joint renewal notice from two or more members of an affiliated group of companies, or their successors, that jointly provided the previous opt-out notice.

(b) *Contents of renewal notice.* The renewal notice must be clear, conspicuous, and concise, and must accurately disclose:

(1) The name of the affiliate(s) providing the notice. If the notice is provided jointly by multiple affiliates and each affiliate shares a common name, such as ''ABC,'' then the notice may indicate that it is being provided by multiple companies with the ABC name or multiple companies in the ABC group or family of companies, for example, by stating that the notice is provided by ''all of the ABC companies,'' ''the ABC banking, credit card, insurance, and securities companies,'' or by listing the name of each affiliate providing the notice. But if the affiliates providing the joint notice do not all share a common name, then the notice must either separately identify each affiliate by name or identify each of the common names used by those affiliates, for example, by stating that the notice is provided by ''all of the ABC and XYZ companies'' or by ''the ABC banking and credit card companies and the XYZ insurance companies;''

(2) A list of the affiliates or types of affiliates whose use of eligibility information is covered by the notice, which may include companies that become affiliates after the notice is provided to the consumer. If each affiliate covered by the notice shares a

common name, such as ''ABC,'' then the notice may indicate that it applies to multiple companies with the ABC name or multiple companies in the ABC group or family of companies, for example, by stating that the notice is provided by ''all of the ABC companies,'' ''the ABC banking, credit card, insurance, and securities companies,'' or by listing the name of each affiliate providing the notice. But if the affiliates covered by the notice do not all share a common name, then the notice must either separately identify each covered affiliate by name or identify each of the common names used by those affiliates, for example, by stating that the notice applies to ''all of the ABC and XYZ companies'' or to ''the ABC banking and credit card companies and the XYZ insurance companies;''

(3) A general description of the types of eligibility information that may be used to make solicitations to the consumer;

(4) That the consumer previously elected to limit the use of certain information to make solicitations to the consumer;

(5) That the consumer's election has expired or is about to expire;

(6) That the consumer may elect to renew the consumer's previous election;

(7) If applicable, that the consumer's election to renew will apply for the specified period of time stated in the notice and that the consumer will be allowed to renew the election once that period expires; and

(8) A reasonable and simple method for the consumer to opt out.

(c) *Timing of the renewal notice.* (1) *In general.* A renewal notice may be provided to the consumer either—

(i) A reasonable period of time before the expiration of the opt-out period; or

(ii) Any time after the expiration of the opt-out period but before solicitations that would have been prohibited by the expired opt-out are made to the consumer.

(2) *Combination with annual privacy notice.* If you provide an annual privacy notice under the Gramm-Leach-Bliley Act, 15 U.S.C. 6801 *et seq.*, providing a renewal notice with the last annual privacy notice provided to the consumer before expiration of the opt-out period is a reasonable period of time before expiration of the opt-out in all cases.

(d) *No effect on opt-out period.* An opt-out period may not be shortened by sending a renewal notice to the consumer before expiration of the opt-out period, even if the consumer does not renew the opt-out.

§ 334.28 Effective date, compliance date, and prospective application.

(a) *Effective date.* This subpart is effective January 1, 2008.

(b) *Mandatory compliance date.* Compliance with this subpart is required not later than October 1, 2008.

(c) *Prospective application.* The provisions of this subpart shall not prohibit you from using eligibility information that you receive from an affiliate to make solicitations to a consumer if you receive such information prior to October 1, 2008. For purposes of this section, you are deemed to receive eligibility information when such information is placed into a common database and is accessible by you.

■ 4. Appendixes A and B to part 334 are added and reserved, and a new Appendix C to part 334 is added to read as follows:

Appendix C To Part 334—Model Forms for Opt-Out Notices

a. Although use of the model forms is not required, use of the model forms in this Appendix (as applicable) complies with the requirement in section 624 of the Act for clear, conspicuous, and concise notices.

b. Certain changes may be made to the language or format of the model forms without losing the protection from liability afforded by use of the model forms. These changes may not be so extensive as to affect the substance, clarity, or meaningful sequence of the language in the model forms. Persons making such extensive revisions will lose the safe harbor that this Appendix provides. Acceptable changes include, for example:

1. Rearranging the order of the references to ''your income,'' ''your account history,'' and ''your credit score.''

2. Substituting other types of information for ''income,'' ''account history,'' or ''credit score'' for accuracy, such as ''payment history,'' ''credit history,'' ''payoff status,'' or ''claims history.''

3. Substituting a clearer and more accurate description of the affiliates providing or covered by the notice for phrases such as ''the [ABC] group of companies,'' including without limitation a statement that the entity providing the notice recently purchased the consumer's account.

4. Substituting other types of affiliates covered by the notice for ''credit card,'' ''insurance,'' or ''securities'' affiliates.

5. Omitting items that are not accurate or applicable. For example, if a person does not limit the duration of the opt-out period, the notice may omit information about the renewal notice.

6. Adding a statement informing consumers how much time they have to opt out before shared eligibility information may be used to make solicitations to them.

7. Adding a statement that the consumer may exercise the right to opt out at any time.

8. Adding the following statement, if accurate: ''If you previously opted out, you do not need to do so again.''

9. Providing a place on the form for the consumer to fill in identifying information, such as his or her name and address:

C–1 Model Form for Initial Opt-out Notice (Single-Affiliate Notice)
C–2 Model Form for Initial Opt-out Notice (Joint Notice)
C–3 Model Form for Renewal Notice (Single-Affiliate Notice)
C–4 Model Form for Renewal Notice (Joint Notice)
C–5 Model Form for Voluntary ''No Marketing'' Notice

C–1—Model Form for Initial Opt-out Notice (Single-Affiliate Notice)—[Your Choice To Limit Marketing]/[Marketing Opt-out]

• [Name of Affiliate] is providing this notice.

• [Optional: Federal law gives you the right to limit some but not all marketing from our affiliates. Federal law also requires us to give you this notice to tell you about your choice to limit marketing from our affiliates.]

• You may limit our affiliates in the [ABC] group of companies, such as our [credit card, insurance, and securities] affiliates, from marketing their products or services to you based on your personal information that we collect and share with them. This information includes your [income], your [account history with us], and your [credit score].

• Your choice to limit marketing offers from our affiliates will apply [until you tell us to change your choice]/[for x years from when you tell us your choice]/[for at least 5 years from when you tell us your choice]. [Include if the opt-out period expires.] Once that period expires, you will receive a renewal notice that will allow you to continue to limit marketing offers from our affiliates for [another x years]/[at least another 5 years].

• [Include, if applicable, in a subsequent notice, including an annual notice, for consumers who may have previously opted out.] If you have already made a choice to limit marketing offers from our affiliates, you do not need to act again until you receive the renewal notice.

To limit marketing offers, contact us [include all that apply]:

• By telephone: 1–877–###–####

• On the Web: *www.---.com*

• By mail: Check the box and complete the form below, and send the form to:

[Company name]
[Company address]

__Do not allow your affiliates to use my personal information to market to me.

C–2—Model Form for Initial Opt-out Notice (Joint Notice)—[Your Choice To Limit Marketing]/[Marketing Opt-out]

• The [ABC group of companies] is providing this notice.

• [Optional: Federal law gives you the right to limit some but not all marketing from the [ABC] companies. Federal law also requires us to give you this notice to tell you about your choice to limit marketing from the [ABC] companies.]

• You may limit the [ABC] companies, such as the [ABC credit card, insurance, and securities] affiliates, from marketing their

products or services to you based on your personal information that they receive from other [ABC] companies. This information includes your [income], your [account history], and your [credit score].

• Your choice to limit marketing offers from the [ABC] companies will apply [until you tell us to change your choice]/[for x years from when you tell us your choice]/[for at least 5 years from when you tell us your choice]. [Include if the opt-out period expires.] Once that period expires, you will receive a renewal notice that will allow you to continue to limit marketing offers from the [ABC] companies for [another x years]/[at least another 5 years].

• [Include, if applicable, in a subsequent notice, including an annual notice, for consumers who may have previously opted out.] If you have already made a choice to limit marketing offers from the [ABC] companies, you do not need to act again until you receive the renewal notice.

To limit marketing offers, contact us [include all that apply]:

• By telephone: 1–877–###–####

• On the Web: *www.---.com*

• By mail: Check the box and complete the form below, and send the form to:

[Company name]
[Company address]

__Do not allow any company [in the ABC group of companies] to use my personal information to market to me.

C–3—Model Form for Renewal Notice (Single-Affiliate Notice)—[Renewing Your Choice To Limit Marketing]/[Renewing Your Marketing Opt-out]

• [Name of Affiliate] is providing this notice.

• [Optional: Federal law gives you the right to limit some but not all marketing from our affiliates. Federal law also requires us to give you this notice to tell you about your choice to limit marketing from our affiliates.]

• You previously chose to limit our affiliates in the [ABC] group of companies, such as our [credit card, insurance, and securities] affiliates, from marketing their products or services to you based on your personal information that we share with them. This information includes your [income], your [account history with us], and your [credit score].

• Your choice has expired or is about to expire.

To renew your choice to limit marketing for [x] more years, contact us [include all that apply]:

• By telephone: 1–877–###–####

• On the Web: *www.---.com*

• By mail: Check the box and complete the form below, and send the form to:

[Company name]
[Company address]

__Renew my choice to limit marketing for [x] more years.

C–4—Model Form for Renewal Notice (Joint Notice)—[Renewing Your Choice To Limit Marketing]/[Renewing Your Marketing Opt-out]

• The [ABC group of companies] is providing this notice.

• [Optional: Federal law gives you the right to limit some but not all marketing from the [ABC] companies. Federal law also requires us to give you this notice to tell you about your choice to limit marketing from the [ABC] companies.]

• You previously chose to limit the [ABC] companies, such as the [ABC credit card, insurance, and securities] affiliates, from marketing their products or services to you based on your personal information that they receive from other ABC companies. This information includes your [income], your [account history], and your [credit score].

• Your choice has expired or is about to expire.

To renew your choice to limit marketing for [x] more years, contact us [include all that apply]:

• By telephone: 1–877–###–####

• On the Web: *www.---.com*

• By mail: Check the box and complete the form below, and send the form to:

[Company name]
[Company address]

__Renew my choice to limit marketing for [x] more years.

C–5—Model Form for Voluntary ''No Marketing'' Notice—Your Choice To Stop Marketing

• [Name of Affiliate] is providing this notice.

• You may choose to stop all marketing from us and our affiliates.

To stop all marketing, contact us [include all that apply]:

• By telephone: 1–877–###–####

• On the Web: *www.---.com*

• By mail: Check the box and complete the form below, and send the form to:

[Company name]
[Company address]

__Do not market to me.

Department of the Treasury

Office of Thrift Supervision

12 CFR Chapter V.

Authority and Issuance

■ For the reasons discussed in the joint preamble, the Office of Thrift Supervision is amending chapter V of title 12 of the Code of Federal Regulations by amending 12 CFR part 571 as follows:

PART 571—FAIR CREDIT REPORTING

■ 1. The authority citation for part 571 is revised to read as follows:

Authority: 12 U.S.C. 1462a, 1463, 1464, 1467a, 1828, 1831p–1, and 1881–1884; 15 U.S.C. 1681b, 1681c, 1681m, 1681s, and 1681w; 15 U.S.C. 6801 and 6805; Sec. 214 Pub. L. 108–159, 117 Stat. 1952.

Subpart A—General Provisions

■ 2. Amend § 571.1 by adding a new paragraph (b)(3) to read as follows:

§ 571.1 Purpose and scope.

* * * * *

(b) * * *

(3) The scope of Subpart C of this part is stated in § 571.20(a) of this part.

* * * * *

■ 3. Add a new Subpart C to part 571 to read as follows:

Subpart C—Affiliate Marketing

Sec.

571.20 Coverage and definitions.
571.21 Affiliate marketing opt-out and exceptions.
571.22 Scope and duration of opt-out.
571.23 Contents of opt-out notice; consolidated and equivalent notices.
571.24 Reasonable opportunity to opt out.
571.25 Reasonable and simple methods of opting out.
571.26 Delivery of opt-out notices.
571.27 Renewal of opt-out.
571.28 Effective date, compliance date, and prospective application.

Subpart C—Affiliate Marketing

§ 571.20 Coverage and definitions.

(a) *Coverage.* Subpart C of this part applies to savings associations whose deposits are insured by the Federal Deposit Insurance Corporation or, in accordance with § 559.3(h)(1) of this chapter, federal savings association operating subsidiaries that are not functionally regulated within the meaning of section 5(c)(5) of the Bank Holding Company Act of 1956, as amended (12 U.S.C. 1844(c)(5)).

(b) *Definitions.* For purposes of this subpart:

(1) *Clear and conspicuous.* The term ''clear and conspicuous'' means reasonably understandable and designed to call attention to the nature and significance of the information presented.

(2) *Concise.* (i) *In general.* The term ''concise'' means a reasonably brief expression or statement.

(ii) *Combination with other required disclosures.* A notice required by this subpart may be concise even if it is combined with other disclosures required or authorized by federal or state law.

(3) *Eligibility information.* The term ''eligibility information'' means any information the communication of which would be a consumer report if the exclusions from the definition of ''consumer report'' in section 603(d)(2)(A) of the Act did not apply. Eligibility information does not include aggregate or blind data that does not contain personal identifiers such as account numbers, names, or addresses.

(4) *Pre-existing business relationship.* (i) *In general.* The term ''pre-existing business relationship'' means a relationship between a person, or a person's licensed agent, and a consumer based on—

(A) A financial contract between the person and the consumer which is in force on the date on which the consumer is sent a solicitation covered by this subpart;

(B) The purchase, rental, or lease by the consumer of the person's goods or services, or a financial transaction (including holding an active account or a policy in force or having another continuing relationship) between the consumer and the person, during the 18-month period immediately preceding the date on which the consumer is sent a solicitation covered by this subpart; or

(C) An inquiry or application by the consumer regarding a product or service offered by that person during the three-month period immediately preceding the date on which the consumer is sent a solicitation covered by this subpart.

(ii) *Examples of pre-existing business relationships.* (A) If a consumer has a time deposit account, such as a certificate of deposit, at a depository institution that is currently in force, the depository institution has a pre-existing business relationship with the consumer and can use eligibility information it receives from its affiliates to make solicitations to the consumer about its products or services.

(B) If a consumer obtained a certificate of deposit from a depository institution, but did not renew the certificate at maturity, the depository institution has a pre-existing business relationship with the consumer and can use eligibility information it receives from its affiliates to make solicitations to the consumer about its products or services for 18 months after the date of maturity of the certificate of deposit.

(C) If a consumer obtains a mortgage, the mortgage lender has a pre-existing business relationship with the consumer. If the mortgage lender sells the consumer's entire loan to an investor, the mortgage lender has a pre-existing business relationship with the consumer and can use eligibility information it receives from its affiliates to make solicitations to the consumer about its products or services for 18 months after the date it sells the loan, and the investor has a pre-existing business relationship with the consumer upon purchasing the loan. If, however, the mortgage lender sells a fractional interest in the consumer's loan to an investor but also retains an ownership interest in the loan, the mortgage lender continues to have a pre-existing business relationship with the consumer, but the investor does not have a pre-existing business relationship with the consumer. If the mortgage lender retains ownership of the loan, but sells ownership of the servicing rights to the consumer's loan, the mortgage lender continues to have a pre-existing business relationship with the consumer. The purchaser of the servicing rights also has a pre-existing business relationship with the consumer as of the date it purchases ownership of the servicing rights, but only if it collects payments from or otherwise deals directly with the consumer on a continuing basis.

(D) If a consumer applies to a depository institution for a product or service that it offers, but does not obtain a product or service from or enter into a financial contract or transaction with the institution, the depository institution has a pre-existing business relationship with the consumer and can therefore use eligibility information it receives from an affiliate to make solicitations to the consumer about its products or services for three months after the date of the application.

(E) If a consumer makes a telephone inquiry to a depository institution about its products or services and provides contact information to the institution, but does not obtain a product or service from or enter into a financial contract or transaction with the institution, the depository institution has a pre-existing business relationship with the consumer and can therefore use eligibility information it receives from an affiliate to make solicitations to the consumer about its products or services for three months after the date of the inquiry.

(F) If a consumer makes an inquiry to a depository institution by e-mail about its products or services, but does not obtain a product or service from or enter into a financial contract or transaction with the institution, the depository institution has a pre-existing business relationship with the consumer and can therefore use eligibility information it receives from an affiliate to make solicitations to the consumer about its products or services for three months after the date of the inquiry.

(G) If a consumer has an existing relationship with a depository institution that is part of a group of affiliated companies, makes a telephone call to the centralized call center for the group of affiliated companies to inquire about products or services offered by the insurance affiliate, and provides contact information to the call center, the call constitutes an inquiry to the insurance affiliate that offers those products or services. The insurance affiliate has a pre-existing business relationship with the consumer and can therefore use eligibility information it receives from its affiliated depository institution to make solicitations to the consumer about its products or services for three months after the date of the inquiry.

(iii) *Examples where no pre-existing business relationship is created.* (A) If a consumer makes a telephone call to a centralized call center for a group of affiliated companies to inquire about the consumer's existing account at a depository institution, the call does not constitute an inquiry to any affiliate other than the depository institution that holds the consumer's account and does not establish a pre-existing business relationship between the consumer and any affiliate of the account-holding depository institution.

(B) If a consumer who has a deposit account with a depository institution makes a telephone call to an affiliate of the institution to ask about the affiliate's retail locations and hours, but does not make an inquiry about the affiliate's products or services, the call does not constitute an inquiry and does not establish a pre-existing business relationship between the consumer and the affiliate. Also, the affiliate's capture of the consumer's telephone number does not constitute an inquiry and does not establish a pre-existing business relationship between the consumer and the affiliate.

(C) If a consumer makes a telephone call to a depository institution in response to an advertisement that offers a free promotional item to consumers who call a toll-free number, but the advertisement does not indicate that the depository institution's products or services will be marketed to consumers who call in response, the call does not create a pre-existing business relationship between the consumer and the depository institution because the consumer has not made an inquiry about a product or service offered by the institution, but has merely responded to an offer for a free promotional item.

(5) *Solicitation.* (i) *In general.* The term ''solicitation'' means the marketing of a product or service initiated by a person to a particular consumer that is—

(A) Based on eligibility information communicated to that person by its affiliate as described in this subpart; and

(B) Intended to encourage the consumer to purchase or obtain such product or service.

(ii) *Exclusion of marketing directed at the general public.* A solicitation does not include marketing communications that are directed at the general public. For example, television, general circulation magazine, and billboard advertisements do not constitute solicitations, even if those communications are intended to encourage consumers to purchase

products and services from the person initiating the communications.

(iii) *Examples of solicitations.* A solicitation would include, for example, a telemarketing call, direct mail, e-mail, or other form of marketing communication directed to a particular consumer that is based on eligibility information received from an affiliate.

(6) *You* means a person described in paragraph (a) of this section.

§ 571.21 Affiliate marketing opt-out and exceptions.

(a) *Initial notice and opt-out requirement.* (1) *In general.* You may not use eligibility information about a consumer that you receive from an affiliate to make a solicitation for marketing purposes to the consumer, unless—

(i) It is clearly and conspicuously disclosed to the consumer in writing or, if the consumer agrees, electronically, in a concise notice that you may use eligibility information about that consumer received from an affiliate to make solicitations for marketing purposes to the consumer;

(ii) The consumer is provided a reasonable opportunity and a reasonable and simple method to ''opt out,'' or prohibit you from using eligibility information to make solicitations for marketing purposes to the consumer; and

(iii) The consumer has not opted out.

(2) *Example.* A consumer has a homeowner's insurance policy with an insurance company. The insurance company furnishes eligibility information about the consumer to its affiliated depository institution. Based on that eligibility information, the depository institution wants to make a solicitation to the consumer about its home equity loan products. The depository institution does not have a pre-existing business relationship with the consumer and none of the other exceptions apply. The depository institution is prohibited from using eligibility information received from its insurance affiliate to make solicitations to the consumer about its home equity loan products unless the consumer is given a notice and opportunity to opt out and the consumer does not opt out.

(3) *Affiliates who may provide the notice.* The notice required by this paragraph must be provided:

(i) By an affiliate that has or has previously had a pre-existing business relationship with the consumer; or

(ii) As part of a joint notice from two or more members of an affiliated group of companies, provided that at least one of the affiliates on the joint notice has or has previously had a pre-existing business relationship with the consumer.

(b) *Making solicitations.* (1) *In general.* For purposes of this subpart, you make a solicitation for marketing purposes if—

(i) You receive eligibility information from an affiliate;

(ii) You use that eligibility information to do one or more of the following:

(A) Identify the consumer or type of consumer to receive a solicitation;

(B) Establish criteria used to select the consumer to receive a solicitation; or

(C) Decide which of your products or services to market to the consumer or tailor your solicitation to that consumer; and

(iii) As a result of your use of the eligibility information, the consumer is provided a solicitation.

(2) *Receiving eligibility information from an affiliate, including through a common database.* You may receive eligibility information from an affiliate in various ways, including when the affiliate places that information into a common database that you may access.

(3) *Receipt or use of eligibility information by your service provider.* Except as provided in paragraph (b)(5) of this section, you receive or use an affiliate's eligibility information if a service provider acting on your behalf (whether an affiliate or a nonaffiliated third party) receives or uses that information in the manner described in paragraphs (b)(1)(i) or (b)(1)(ii) of this section. All relevant facts and circumstances will determine whether a person is acting as your service provider when it receives or uses an affiliate's eligibility information in connection with marketing your products and services.

(4) *Use by an affiliate of its own eligibility information.* Unless you have used eligibility information that you receive from an affiliate in the manner described in paragraph (b)(1)(ii) of this section, you do not make a solicitation subject to this subpart if your affiliate:

(i) Uses its own eligibility information that it obtained in connection with a pre-existing business relationship it has or had with the consumer to market your products or services to the consumer; or

(ii) Directs its service provider to use the affiliate's own eligibility information that it obtained in connection with a pre-existing business relationship it has or had with the consumer to market your products or services to the consumer, and you do not communicate directly with the service provider regarding that use.

(5) *Use of eligibility information by a service provider.* (i) *In general.* You do not make a solicitation subject to Subpart C of this part if a service provider (including an affiliated or third-party service provider that maintains or accesses a common database that you may access) receives eligibility information from your affiliate that your affiliate obtained in connection with a pre-existing business relationship it has or had with the consumer and uses that eligibility information to market your products or services to the consumer, so long as—

(A) Your affiliate controls access to and use of its eligibility information by the service provider (including the right to establish the specific terms and conditions under which the service provider may use such information to market your products or services);

(B) Your affiliate establishes specific terms and conditions under which the service provider may access and use the affiliate's eligibility information to market your products and services (or those of affiliates generally) to the consumer, such as the identity of the affiliated companies whose products or services may be marketed to the consumer by the service provider, the types of products or services of affiliated companies that may be marketed, and the number of times the consumer may receive marketing materials, and periodically evaluates the service provider's compliance with those terms and conditions;

(C) Your affiliate requires the service provider to implement reasonable policies and procedures designed to ensure that the service provider uses the affiliate's eligibility information in accordance with the terms and conditions established by the affiliate relating to the marketing of your products or services;

(D) Your affiliate is identified on or with the marketing materials provided to the consumer; and

(E) You do not directly use your affiliate's eligibility information in the manner described in paragraph (b)(1)(ii) of this section.

(ii) *Writing requirements.* (A) The requirements of paragraphs (b)(5)(i)(A) and (C) of this section must be set forth in a written agreement between your affiliate and the service provider; and

(B) The specific terms and conditions established by your affiliate as provided in paragraph (b)(5)(i)(B) of this section must be set forth in writing.

(6) *Examples of making solicitations.* (i) A consumer has a deposit account with a depository institution, which is affiliated with an insurance company. The insurance company receives

eligibility information about the consumer from the depository institution. The insurance company uses that eligibility information to identify the consumer to receive a solicitation about insurance products, and, as a result, the insurance company provides a solicitation to the consumer about its insurance products. Pursuant to paragraph (b)(1) of this section, the insurance company has made a solicitation to the consumer.

(ii) The same facts as in the example in paragraph (b)(6)(i) of this section, except that after using the eligibility information to identify the consumer to receive a solicitation about insurance products, the insurance company asks the depository institution to send the solicitation to the consumer and the depository institution does so. Pursuant to paragraph (b)(1) of this section, the insurance company has made a solicitation to the consumer because it used eligibility information about the consumer that it received from an affiliate to identify the consumer to receive a solicitation about its products or services, and, as a result, a solicitation was provided to the consumer about the insurance company's products.

(iii) The same facts as in the example in paragraph (b)(6)(i) of this section, except that eligibility information about consumers that have deposit accounts with the depository institution is placed into a common database that all members of the affiliated group of companies may independently access and use. Without using the depository institution's eligibility information, the insurance company develops selection criteria and provides those criteria, marketing materials, and related instructions to the depository institution. The depository institution reviews eligibility information about its own consumers using the selection criteria provided by the insurance company to determine which consumers should receive the insurance company's marketing materials and sends marketing materials about the insurance company's products to those consumers. Even though the insurance company has received eligibility information through the common database as provided in paragraph (b)(2) of this section, it did not use that information to identify consumers or establish selection criteria; instead, the depository institution used its own eligibility information. Therefore, pursuant to paragraph (b)(4)(i) of this section, the insurance company has not made a solicitation to the consumer.

(iv) The same facts as in the example in paragraph (b)(6)(iii) of this section, except that the depository institution provides the insurance company's criteria to the depository institution's service provider and directs the service provider to use the depository institution's eligibility information to identify depository institution consumers who meet the criteria and to send the insurance company's marketing materials to those consumers. The insurance company does not communicate directly with the service provider regarding the use of the depository institution's information to market its products to the depository institution's consumers. Pursuant to paragraph (b)(4)(ii) of this section, the insurance company has not made a solicitation to the consumer.

(v) An affiliated group of companies includes a depository institution, an insurance company, and a service provider. Each affiliate in the group places information about its consumers into a common database. The service provider has access to all information in the common database. The depository institution controls access to and use of its eligibility information by the service provider. This control is set forth in a written agreement between the depository institution and the service provider. The written agreement also requires the service provider to establish reasonable policies and procedures designed to ensure that the service provider uses the depository institution's eligibility information in accordance with specific terms and conditions established by the depository institution relating to the marketing of the products and services of all affiliates, including the insurance company. In a separate written communication, the depository institution specifies the terms and conditions under which the service provider may use the depository institution's eligibility information to market the insurance company's products and services to the depository institution's consumers. The specific terms and conditions are: A list of affiliated companies (including the insurance company) whose products or services may be marketed to the depository institution's consumers by the service provider; the specific products or types of products that may be marketed to the depository institution's consumers by the service provider; the categories of eligibility information that may be used by the service provider in marketing products or services to the depository institution's consumers; the types or categories of the depository institution's consumers to whom the service provider may market products or services of depository institution affiliates; the number and/or types of marketing communications that the service provider may send to the depository institution's consumers; and the length of time during which the service provider may market the products or services of the depository institution's affiliates to its consumers. The depository institution periodically evaluates the service provider's compliance with these terms and conditions. The insurance company asks the service provider to market insurance products to certain consumers who have deposit accounts with the depository institution. Without using the depository institution's eligibility information, the insurance company develops selection criteria and provides those criteria, marketing materials, and related instructions to the service provider. The service provider uses the depository institution's eligibility information from the common database to identify the depository institution's consumers to whom insurance products will be marketed. When the insurance company's marketing materials are provided to the identified consumers, the name of the depository institution is displayed on the insurance marketing materials, an introductory letter that accompanies the marketing materials, an account statement that accompanies the marketing materials, or the envelope containing the marketing materials. The requirements of paragraph (b)(5) of this section have been satisfied, and the insurance company has not made a solicitation to the consumer.

(vi) The same facts as in the example in paragraph (b)(6)(v) of this section, except that the terms and conditions permit the service provider to use the depository institution's eligibility information to market the products and services of other affiliates to the depository institution's consumers whenever the service provider deems it appropriate to do so. The service provider uses the depository institution's eligibility information in accordance with the discretion afforded to it by the terms and conditions. Because the terms and conditions are not specific, the requirements of paragraph (b)(5) of this section have not been satisfied.

(c) *Exceptions.* The provisions of this subpart do not apply to you if you use eligibility information that you receive from an affiliate:

(1) To make a solicitation for marketing purposes to a consumer with whom you have a pre-existing business relationship;

(2) To facilitate communications to an individual for whose benefit you provide employee benefit or other services pursuant to a contract with an employer related to and arising out of the current employment relationship or status of the individual as a participant or beneficiary of an employee benefit plan;

(3) To perform services on behalf of an affiliate, except that this subparagraph shall not be construed as permitting you to send solicitations on behalf of an affiliate if the affiliate would not be permitted to send the solicitation as a result of the election of the consumer to opt out under this subpart;

(4) In response to a communication about your products or services initiated by the consumer;

(5) In response to an authorization or request by the consumer to receive solicitations; or

(6) If your compliance with this subpart would prevent you from complying with any provision of State insurance laws pertaining to unfair discrimination in any State in which you are lawfully doing business.

(d) *Examples of exceptions.* (1) *Example of the pre-existing business relationship exception.* A consumer has a deposit account with a depository institution. The consumer also has a relationship with the depository institution's securities affiliate for management of the consumer's securities portfolio. The depository institution receives eligibility information about the consumer from its securities affiliate and uses that information to make a solicitation to the consumer about the depository institution's wealth management services. The depository institution may make this solicitation even if the consumer has not been given a notice and opportunity to opt out because the depository institution has a pre-existing business relationship with the consumer.

(2) *Examples of service provider exception.* (i) A consumer has an insurance policy issued by an insurance company. The insurance company furnishes eligibility information about the consumer to its affiliated depository institution. Based on that eligibility information, the depository institution wants to make a solicitation to the consumer about its deposit products. The depository institution does not have a pre-existing business relationship with the consumer and none of the other exceptions in paragraph (c) of this section apply. The consumer has been given an opt-out notice and has elected to opt out of receiving such solicitations. The depository institution asks a service provider to send the solicitation to the consumer on its behalf. The service provider may not send the solicitation on behalf of the depository institution because, as a result of the consumer's opt-out election, the depository institution is not permitted to make the solicitation.

(ii) The same facts as in paragraph (d)(2)(i) of this section, except the consumer has been given an opt-out notice, but has not elected to opt out. The depository institution asks a service provider to send the solicitation to the consumer on its behalf. The service provider may send the solicitation on behalf of the depository institution because, as a result of the consumer's not opting out, the depository institution is permitted to make the solicitation.

(3) *Examples of consumer-initiated communications.* (i) A consumer who has a deposit account with a depository institution initiates a communication with the depository institution's credit card affiliate to request information about a credit card. The credit card affiliate may use eligibility information about the consumer it obtains from the depository institution or any other affiliate to make solicitations regarding credit card products in response to the consumer-initiated communication.

(ii) A consumer who has a deposit account with a depository institution contacts the institution to request information about how to save and invest for a child's college education without specifying the type of product in which the consumer may be interested. Information about a range of different products or services offered by the depository institution and one or more affiliates of the institution may be responsive to that communication. Such products or services may include the following: Mutual funds offered by the institution's mutual fund affiliate; section 529 plans offered by the institution, its mutual fund affiliate, or another securities affiliate; or trust services offered by a different financial institution in the affiliated group. Any affiliate offering investment products or services that would be responsive to the consumer's request for information about saving and investing for a child's college education may use eligibility information to make solicitations to the consumer in response to this communication.

(iii) A credit card issuer makes a marketing call to the consumer without using eligibility information received from an affiliate. The issuer leaves a voice-mail message that invites the consumer to call a toll-free number to apply for the issuer's credit card. If the consumer calls the toll-free number to inquire about the credit card, the call is a consumer-initiated communication about a product or service and the credit card issuer may now use eligibility information it receives from its affiliates to make solicitations to the consumer.

(iv) A consumer calls a depository institution to ask about retail locations and hours, but does not request information about products or services. The institution may not use eligibility information it receives from an affiliate to make solicitations to the consumer about its products or services because the consumer-initiated communication does not relate to the depository institution's products or services. Thus, the use of eligibility information received from an affiliate would not be responsive to the communication and the exception does not apply.

(v) A consumer calls a depository institution to ask about retail locations and hours. The customer service representative asks the consumer if there is a particular product or service about which the consumer is seeking information. The consumer responds that the consumer wants to stop in and find out about certificates of deposit. The customer service representative offers to provide that information by telephone and mail additional information and application materials to the consumer. The consumer agrees and provides or confirms contact information for receipt of the materials to be mailed. The depository institution may use eligibility information it receives from an affiliate to make solicitations to the consumer about certificates of deposit because such solicitations would respond to the consumer-initiated communication about products or services.

(4) *Examples of consumer authorization or request for solicitations.* (i) A consumer who obtains a mortgage from a mortgage lender authorizes or requests information about homeowner's insurance offered by the mortgage lender's insurance affiliate. Such authorization or request, whether given to the mortgage lender or to the insurance affiliate, would permit the insurance affiliate to use eligibility information about the consumer it obtains from the mortgage lender or any other affiliate to make solicitations to the consumer about homeowner's insurance.

(ii) A consumer completes an online application to apply for a credit card from a credit card issuer. The issuer's online application contains a blank check box that the consumer may check

to authorize or request information from the credit card issuer's affiliates. The consumer checks the box. The consumer has authorized or requested solicitations from the card issuer's affiliates.

(iii) A consumer completes an online application to apply for a credit card from a credit card issuer. The issuer's online application contains a pre-selected check box indicating that the consumer authorizes or requests information from the issuer's affiliates. The consumer does not deselect the check box. The consumer has not authorized or requested solicitations from the card issuer's affiliates.

(iv) The terms and conditions of a credit card account agreement contain preprinted boilerplate language stating that by applying to open an account the consumer authorizes or requests to receive solicitations from the credit card issuer's affiliates. The consumer has not authorized or requested solicitations from the card issuer's affiliates.

(e) *Relation to affiliate-sharing notice and opt-out.* Nothing in this subpart limits the responsibility of a person to comply with the notice and opt-out provisions of section 603(d)(2)(A)(iii) of the Act where applicable.

§ 571.22 Scope and duration of opt-out.

(a) *Scope of opt-out.* (1) *In general.* Except as otherwise provided in this section, the consumer's election to opt out prohibits any affiliate covered by the opt-out notice from using eligibility information received from another affiliate as described in the notice to make solicitations to the consumer.

(2) *Continuing relationship.* (i) *In general.* If the consumer establishes a continuing relationship with you or your affiliate, an opt-out notice may apply to eligibility information obtained in connection with—

(A) A single continuing relationship or multiple continuing relationships that the consumer establishes with you or your affiliates, including continuing relationships established subsequent to delivery of the opt-out notice, so long as the notice adequately describes the continuing relationships covered by the opt-out; or

(B) Any other transaction between the consumer and you or your affiliates as described in the notice.

(ii) *Examples of continuing relationships.* A consumer has a continuing relationship with you or your affiliate if the consumer—

(A) Opens a deposit or investment account with you or your affiliate;

(B) Obtains a loan for which you or your affiliate owns the servicing rights;

(C) Purchases an insurance product from you or your affiliate;

(D) Holds an investment product through you or your affiliate, such as when you act or your affiliate acts as a custodian for securities or for assets in an individual retirement arrangement;

(E) Enters into an agreement or understanding with you or your affiliate whereby you or your affiliate undertakes to arrange or broker a home mortgage loan for the consumer;

(F) Enters into a lease of personal property with you or your affiliate; or

(G) Obtains financial, investment, or economic advisory services from you or your affiliate for a fee.

(3) *No continuing relationship.* (i) *In general.* If there is no continuing relationship between a consumer and you or your affiliate, and you or your affiliate obtain eligibility information about a consumer in connection with a transaction with the consumer, such as an isolated transaction or a credit application that is denied, an opt-out notice provided to the consumer only applies to eligibility information obtained in connection with that transaction.

(ii) *Examples of isolated transactions.* An isolated transaction occurs if—

(A) The consumer uses your or your affiliate's ATM to withdraw cash from an account at another financial institution; or

(B) You or your affiliate sells the consumer a cashier's check or money order, airline tickets, travel insurance, or traveler's checks in isolated transactions.

(4) *Menu of alternatives.* A consumer may be given the opportunity to choose from a menu of alternatives when electing to prohibit solicitations, such as by electing to prohibit solicitations from certain types of affiliates covered by the opt-out notice but not other types of affiliates covered by the notice, electing to prohibit solicitations based on certain types of eligibility information but not other types of eligibility information, or electing to prohibit solicitations by certain methods of delivery but not other methods of delivery. However, one of the alternatives must allow the consumer to prohibit all solicitations from all of the affiliates that are covered by the notice.

(5) *Special rule for a notice following termination of all continuing relationships.* (i) *In general.* A consumer must be given a new opt-out notice if, after all continuing relationships with you or your affiliate(s) are terminated, the consumer subsequently establishes another continuing relationship with you or your affiliate(s) and the consumer's eligibility information is to be used to make a solicitation. The new opt-out notice must apply, at a minimum, to eligibility information obtained in connection with the new continuing relationship. Consistent with paragraph (b) of this section, the consumer's decision not to opt out after receiving the new opt-out notice would not override a prior opt-out election by the consumer that applies to eligibility information obtained in connection with a terminated relationship, regardless of whether the new opt-out notice applies to eligibility information obtained in connection with the terminated relationship.

(ii) *Example.* A consumer has a checking account with a depository institution that is part of an affiliated group. The consumer closes the checking account. One year after closing the checking account, the consumer opens a savings account with the same depository institution. The consumer must be given a new notice and opportunity to opt out before the depository institution's affiliates may make solicitations to the consumer using eligibility information obtained by the depository institution in connection with the new savings account relationship, regardless of whether the consumer opted out in connection with the checking account.

(b) *Duration of opt-out.* The election of a consumer to opt out must be effective for a period of at least five years (the ''opt-out period'') beginning when the consumer's opt-out election is received and implemented, unless the consumer subsequently revokes the opt-out in writing or, if the consumer agrees, electronically. An opt-out period of more than five years may be established, including an opt-out period that does not expire unless revoked by the consumer.

(c) *Time of opt-out.* A consumer may opt out at any time.

§ 571.23 Contents of opt-out notice; consolidated and equivalent notices.

(a) *Contents of opt-out notice.* (1) *In general.* A notice must be clear, conspicuous, and concise, and must accurately disclose:

(i) The name of the affiliate(s) providing the notice. If the notice is provided jointly by multiple affiliates and each affiliate shares a common name, such as ''ABC,'' then the notice may indicate that it is being provided by multiple companies with the ABC name or multiple companies in the ABC group or family of companies, for example, by stating that the notice is provided by ''all of the ABC companies,'' ''the ABC banking, credit card, insurance, and securities companies,'' or by listing the name of each affiliate providing the notice. But if the affiliates providing the

joint notice do not all share a common name, then the notice must either separately identify each affiliate by name or identify each of the common names used by those affiliates, for example, by stating that the notice is provided by ''all of the ABC and XYZ companies'' or by ''the ABC banking and credit card companies and the XYZ insurance companies'';

(ii) A list of the affiliates or types of affiliates whose use of eligibility information is covered by the notice, which may include companies that become affiliates after the notice is provided to the consumer. If each affiliate covered by the notice shares a common name, such as ''ABC,'' then the notice may indicate that it applies to multiple companies with the ABC name or multiple companies in the ABC group or family of companies, for example, by stating that the notice is provided by ''all of the ABC companies,'' ''the ABC banking, credit card, insurance, and securities companies,'' or by listing the name of each affiliate providing the notice. But if the affiliates covered by the notice do not all share a common name, then the notice must either separately identify each covered affiliate by name or identify each of the common names used by those affiliates, for example, by stating that the notice applies to ''all of the ABC and XYZ companies'' or to ''the ABC banking and credit card companies and the XYZ insurance companies'';

(iii) A general description of the types of eligibility information that may be used to make solicitations to the consumer;

(iv) That the consumer may elect to limit the use of eligibility information to make solicitations to the consumer;

(v) That the consumer's election will apply for the specified period of time stated in the notice and, if applicable, that the consumer will be allowed to renew the election once that period expires;

(vi) If the notice is provided to consumers who may have previously opted out, such as if a notice is provided to consumers annually, that the consumer who has chosen to limit solicitations does not need to act again until the consumer receives a renewal notice; and

(vii) A reasonable and simple method for the consumer to opt out.

(2) *Joint relationships.* (i) If two or more consumers jointly obtain a product or service, a single opt-out notice may be provided to the joint consumers. Any of the joint consumers may exercise the right to opt out.

(ii) The opt-out notice must explain how an opt-out direction by a joint consumer will be treated. An opt-out direction by a joint consumer may be treated as applying to all of the associated joint consumers, or each joint consumer may be permitted to opt-out separately. If each joint consumer is permitted to opt out separately, one of the joint consumers must be permitted to opt out on behalf of all of the joint consumers and the joint consumers must be permitted to exercise their separate rights to opt out in a single response.

(iii) It is impermissible to require *all* joint consumers to opt out before implementing *any* opt-out direction.

(3) *Alternative contents.* If the consumer is afforded a broader right to opt out of receiving marketing than is required by this subpart, the requirements of this section may be satisfied by providing the consumer with a clear, conspicuous, and concise notice that accurately discloses the consumer's opt-out rights.

(4) *Model notices.* Model notices are provided in Appendix C of this part.

(b) *Coordinated and consolidated notices.* A notice required by this subpart may be coordinated and consolidated with any other notice or disclosure required to be issued under any other provision of law by the entity providing the notice, including but not limited to the notice described in section 603(d)(2)(A)(iii) of the Act and the Gramm-Leach-Bliley Act privacy notice.

(c) *Equivalent notices.* A notice or other disclosure that is equivalent to the notice required by this subpart, and that is provided to a consumer together with disclosures required by any other provision of law, satisfies the requirements of this section.

§ 571.24 Reasonable opportunity to opt out.

(a) *In general.* You must not use eligibility information about a consumer that you receive from an affiliate to make a solicitation to the consumer about your products or services, unless the consumer is provided a reasonable opportunity to opt out, as required by § 571.21(a)(1)(ii) of this part.

(b) *Examples of a reasonable opportunity to opt out.* The consumer is given a reasonable opportunity to opt out if:

(1) *By mail.* The opt-out notice is mailed to the consumer. The consumer is given 30 days from the date the notice is mailed to elect to opt out by any reasonable means.

(2) *By electronic means.* (i) The opt-out notice is provided electronically to the consumer, such as by posting the notice at an Internet Web site at which the consumer has obtained a product or service. The consumer acknowledges receipt of the electronic notice. The consumer is given 30 days after the date the consumer acknowledges receipt to elect to opt out by any reasonable means.

(ii) The opt-out notice is provided to the consumer by e-mail where the consumer has agreed to receive disclosures by e-mail from the person sending the notice. The consumer is given 30 days after the e-mail is sent to elect to opt out by any reasonable means.

(3) *At the time of an electronic transaction.* The opt-out notice is provided to the consumer at the time of an electronic transaction, such as a transaction conducted on an Internet Web site. The consumer is required to decide, as a necessary part of proceeding with the transaction, whether to opt out before completing the transaction. There is a simple process that the consumer may use to opt out at that time using the same mechanism through which the transaction is conducted.

(4) *At the time of an in-person transaction.* The opt-out notice is provided to the consumer in writing at the time of an in-person transaction. The consumer is required to decide, as a necessary part of proceeding with the transaction, whether to opt out before completing the transaction, and is not permitted to complete the transaction without making a choice. There is a simple process that the consumer may use during the course of the in-person transaction to opt out, such as completing a form that requires consumers to write a ''yes'' or ''no'' to indicate their opt-out preference or that requires the consumer to check one of two blank check boxes—one that allows consumers to indicate that they want to opt out and one that allows consumers to indicate that they do not want to opt out.

(5) *By including in a privacy notice.* The opt-out notice is included in a Gramm-Leach-Bliley Act privacy notice. The consumer is allowed to exercise the opt-out within a reasonable period of time and in the same manner as the opt-out under that privacy notice.

§ 571.25 Reasonable and simple methods of opting out.

(a) *In general.* You must not use eligibility information about a consumer that you receive from an affiliate to make a solicitation to the consumer about your products or services, unless the consumer is provided a reasonable and simple method to opt out, as required by § 571.21(a)(1)(ii) of this part.

(b) *Examples.* (1) *Reasonable and simple opt-out methods.* Reasonable and simple methods for exercising the opt-out right include—

(i) Designating a check-off box in a prominent position on the opt-out form;

(ii) Including a reply form and a self-addressed envelope together with the opt-out notice;

(iii) Providing an electronic means to opt out, such as a form that can be electronically mailed or processed at an Internet Web site, if the consumer agrees to the electronic delivery of information;

(iv) Providing a toll-free telephone number that consumers may call to opt out; or

(v) Allowing consumers to exercise all of their opt-out rights described in a consolidated opt-out notice that includes the privacy opt-out under the Gramm-Leach-Bliley Act (15 U.S.C. 6801 et seq.), the affiliate sharing opt-out under the Act, and the affiliate marketing opt-out under the Act, by a single method, such as by calling a single toll-free telephone number.

(2) *Opt-out methods that are not reasonable and simple.* Reasonable and simple methods for exercising an opt-out right *do not* include—

(i) Requiring the consumer to write his or her own letter;

(ii) Requiring the consumer to call or write to obtain a form for opting out, rather than including the form with the opt-out notice;

(iii) Requiring the consumer who receives the opt-out notice in electronic form only, such as through posting at an Internet Web site, to opt out solely by paper mail or by visiting a different Web site without providing a link to that site.

(c) *Specific opt-out means.* Each consumer may be required to opt out through a specific means, as long as that means is reasonable and simple for that consumer.

§ 571.26 Delivery of opt-out notices.

(a) *In general.* The opt-out notice must be provided so that each consumer can reasonably be expected to receive actual notice. For opt-out notices provided electronically, the notice may be provided in compliance with either the electronic disclosure provisions in this subpart or the provisions in section 101 of the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. 7001 *et seq.*

(b) *Examples of reasonable expectation of actual notice.* A consumer may reasonably be expected to receive actual notice if the affiliate providing the notice:

(1) Hand-delivers a printed copy of the notice to the consumer;

(2) Mails a printed copy of the notice to the last known mailing address of the consumer;

(3) Provides a notice by e-mail to a consumer who has agreed to receive electronic disclosures by e-mail from the affiliate providing the notice; or

(4) Posts the notice on the Internet Web site at which the consumer obtained a product or service electronically and requires the consumer to acknowledge receipt of the notice.

(c) *Examples of no reasonable expectation of actual notice.* A consumer may *not* reasonably be expected to receive actual notice if the affiliate providing the notice:

(1) Only posts the notice on a sign in a branch or office or generally publishes the notice in a newspaper;

(2) Sends the notice via e-mail to a consumer who has not agreed to receive electronic disclosures by e-mail from the affiliate providing the notice; or

(3) Posts the notice on an Internet Web site without requiring the consumer to acknowledge receipt of the notice.

§ 571.27 Renewal of opt-out.

(a) *Renewal notice and opt-out requirement.* (1) *In general.* After the opt-out period expires, you may not make solicitations based on eligibility information you receive from an affiliate to a consumer who previously opted out, unless:

(i) The consumer has been given a renewal notice that complies with the requirements of this section and §§ 571.24 through 571.26 of this part, and a reasonable opportunity and a reasonable and simple method to renew the opt-out, and the consumer does not renew the opt-out; or

(ii) An exception in § 571.21(c) of this part applies.

(2) *Renewal period.* Each opt-out renewal must be effective for a period of at least five years as provided in § 571.22(b) of this part.

(3) *Affiliates who may provide the notice.* The notice required by this paragraph must be provided:

(i) By the affiliate that provided the previous opt-out notice, or its successor; or

(ii) As part of a joint renewal notice from two or more members of an affiliated group of companies, or their successors, that jointly provided the previous opt-out notice.

(b) *Contents of renewal notice.* The renewal notice must be clear, conspicuous, and concise, and must accurately disclose:

(1) The name of the affiliate(s) providing the notice. If the notice is provided jointly by multiple affiliates and each affiliate shares a common name, such as ''ABC,'' then the notice may indicate that it is being provided by multiple companies with the ABC name or multiple companies in the ABC group or family of companies, for example, by stating that the notice is provided by ''all of the ABC companies,'' ''the ABC banking, credit card, insurance, and securities companies,'' or by listing the name of each affiliate providing the notice. But if the affiliates providing the joint notice do not all share a common name, then the notice must either separately identify each affiliate by name or identify each of the common names used by those affiliates, for example, by stating that the notice is provided by ''all of the ABC and XYZ companies'' or by ''the ABC banking and credit card companies and the XYZ insurance companies'';

(2) A list of the affiliates or types of affiliates whose use of eligibility information is covered by the notice, which may include companies that become affiliates after the notice is provided to the consumer. If each affiliate covered by the notice shares a common name, such as ''ABC,'' then the notice may indicate that it applies to multiple companies with the ABC name or multiple companies in the ABC group or family of companies, for example, by stating that the notice is provided by ''all of the ABC companies,'' ''the ABC banking, credit card, insurance, and securities companies,'' or by listing the name of each affiliate providing the notice. But if the affiliates covered by the notice do not all share a common name, then the notice must either separately identify each covered affiliate by name or identify each of the common names used by those affiliates, for example, by stating that the notice applies to ''all of the ABC and XYZ companies'' or to ''the ABC banking and credit card companies and the XYZ insurance companies'';

(3) A general description of the types of eligibility information that may be used to make solicitations to the consumer;

(4) That the consumer previously elected to limit the use of certain information to make solicitations to the consumer;

(5) That the consumer's election has expired or is about to expire;

(6) That the consumer may elect to renew the consumer's previous election;

(7) If applicable, that the consumer's election to renew will apply for the specified period of time stated in the notice and that the consumer will be allowed to renew the election once that period expires; and

(8) A reasonable and simple method for the consumer to opt out.

(c) *Timing of the renewal notice.* (1) *In general.* A renewal notice may be provided to the consumer either—

(i) A reasonable period of time before the expiration of the opt-out period; or

(ii) Any time after the expiration of the opt-out period but before solicitations that would have been prohibited by the expired opt-out are made to the consumer.

(2) *Combination with annual privacy notice.* If you provide an annual privacy notice under the Gramm-Leach-Bliley Act, 15 U.S.C. 6801 *et seq.*, providing a renewal notice with the last annual privacy notice provided to the consumer before expiration of the opt-out period is a reasonable period of time before expiration of the opt-out in all cases.

(d) *No effect on opt-out period.* An opt-out period may not be shortened by sending a renewal notice to the consumer before expiration of the opt-out period, even if the consumer does not renew the opt-out.

§ 571.28 Effective date, compliance date, and prospective application.

(a) *Effective date.* This subpart is effective January 1, 2008.

(b) *Mandatory compliance date.* Compliance with this subpart is required not later than October 1, 2008.

(c) *Prospective application.* The provisions of this subpart shall not prohibit you from using eligibility information that you receive from an affiliate to make solicitations to a consumer if you receive such information prior to October 1, 2008. For purposes of this section, you are deemed to receive eligibility information when such information is placed into a common database and is accessible by you.

■ 4. Add and reserve Appendixes A and B to part 571, and add a new Appendix C to part 571 to read as follows:

Appendix C To Part 571—Model Forms for Opt-Out Notices

a. Although use of the model forms is not required, use of the model forms in this Appendix (as applicable) complies with the requirement in section 624 of the Act for clear, conspicuous, and concise notices.

b. Certain changes may be made to the language or format of the model forms without losing the protection from liability afforded by use of the model forms. These changes may not be so extensive as to affect the substance, clarity, or meaningful sequence of the language in the model forms. Persons making such extensive revisions will lose the safe harbor that this Appendix provides. Acceptable changes include, for example:

1. Rearranging the order of the references to ''your income,'' ''your account history,'' and ''your credit score.''

2. Substituting other types of information for ''income,'' ''account history,'' or ''credit score'' for accuracy, such as ''payment history,'' ''credit history,'' ''payoff status,'' or ''claims history.''

3. Substituting a clearer and more accurate description of the affiliates providing or covered by the notice for phrases such as ''the [ABC] group of companies,'' including without limitation a statement that the entity providing the notice recently purchased the consumer's account.

4. Substituting other types of affiliates covered by the notice for ''credit card,'' ''insurance,'' or ''securities'' affiliates.

5. Omitting items that are not accurate or applicable. For example, if a person does not limit the duration of the opt-out period, the notice may omit information about the renewal notice.

6. Adding a statement informing consumers how much time they have to opt out before shared eligibility information may be used to make solicitations to them.

7. Adding a statement that the consumer may exercise the right to opt out at any time.

8. Adding the following statement, if accurate: ''If you previously opted out, you do not need to do so again.''

9. Providing a place on the form for the consumer to fill in identifying information, such as his or her name and address:

C–1 Model Form for Initial Opt-out Notice (Single-Affiliate Notice)
C–2 Model Form for Initial Opt-out Notice (Joint Notice)
C–3 Model Form for Renewal Notice (Single-Affiliate Notice)
C–4 Model Form for Renewal Notice (Joint Notice)
C–5 Model Form for Voluntary ''No Marketing'' Notice

C–1—Model Form for Initial Opt-out Notice (Single-Affiliate Notice)—[Your Choice To Limit Marketing]/[Marketing Opt-out]

• [Name of Affiliate] is providing this notice.

• [Optional: Federal law gives you the right to limit some but not all marketing from our affiliates. Federal law also requires us to give you this notice to tell you about your choice to limit marketing from our affiliates.]

• You may limit our affiliates in the [ABC] group of companies, such as our [credit card, insurance, and securities] affiliates, from marketing their products or services to you based on your personal information that we collect and share with them. This information includes your [income], your [account history with us], and your [credit score].

• Your choice to limit marketing offers from our affiliates will apply [until you tell us to change your choice]/[for x years from when you tell us your choice]/[for at least 5 years from when you tell us your choice]. [Include if the opt-out period expires.] Once that period expires, you will receive a renewal notice that will allow you to continue to limit marketing offers from our affiliates for [another x years]/[at least another 5 years].

• [Include, if applicable, in a subsequent notice, including an annual notice, for consumers who may have previously opted out.] If you have already made a choice to limit marketing offers from our affiliates, you do not need to act again until you receive the renewal notice.

To limit marketing offers, contact us [include all that apply]:

• By telephone: 1–877–###–####
• On the Web: *www.---.com*
• By mail: Check the box and complete the form below, and send the form to:

[Company name]
[Company address]

__Do not allow your affiliates to use my personal information to market to me.

C–2—Model Form for Initial Opt-out Notice (Joint Notice)—[Your Choice To Limit Marketing]/[Marketing Opt-out]

• The [ABC group of companies] is providing this notice.

• [Optional: Federal law gives you the right to limit some but not all marketing from the [ABC] companies. Federal law also requires us to give you this notice to tell you about your choice to limit marketing from the [ABC] companies.]

• You may limit the [ABC] companies, such as the [ABC credit card, insurance, and securities] affiliates, from marketing their products or services to you based on your personal information that they receive from other [ABC] companies. This information includes your [income], your [account history], and your [credit score].

• Your choice to limit marketing offers from the [ABC] companies will apply [until you tell us to change your choice]/[for x years from when you tell us your choice]/[for at least 5 years from when you tell us your choice]. [Include if the opt-out period expires.] Once that period expires, you will receive a renewal notice that will allow you to continue to limit marketing offers from the [ABC] companies for [another x years]/[at least another 5 years].

• [Include, if applicable, in a subsequent notice, including an annual notice, for consumers who may have previously opted out.] If you have already made a choice to limit marketing offers from the [ABC] companies, you do not need to act again until you receive the renewal notice.

To limit marketing offers, contact us [include all that apply]:

• By telephone: 1–877–###–####
• On the Web: *www.---.com*
• By mail: Check the box and complete the form below, and send the form to:

[Company name]
[Company address]

__Do not allow any company [in the ABC group of companies] to use my personal information to market to me.

C–3—Model Form for Renewal Notice (Single-Affiliate Notice)—[Renewing Your Choice To Limit Marketing]/[Renewing Your Marketing Opt-out]

• [Name of Affiliate] is providing this notice.

• [Optional: Federal law gives you the right to limit some but not all marketing from our affiliates. Federal law also requires us to

give you this notice to tell you about your choice to limit marketing from our affiliates.]

• You previously chose to limit our affiliates in the [ABC] group of companies, such as our [credit card, insurance, and securities] affiliates, from marketing their products or services to you based on your personal information that we share with them. This information includes your [income], your [account history with us], and your [credit score].

• Your choice has expired or is about to expire.

To renew your choice to limit marketing for [x] more years, contact us [include all that apply]:

• By telephone: 1–877–###–####

• On the Web: *www.---.com*

• By mail: Check the box and complete the form below, and send the form to:

[Company name]
[Company address]

__Renew my choice to limit marketing for [x] more years.

C–4—Model Form for Renewal Notice (Joint Notice)—[Renewing Your Choice To Limit Marketing]/[Renewing Your Marketing Opt-out]

• The [ABC group of companies] is providing this notice.

• [Optional: Federal law gives you the right to limit some but not all marketing from the [ABC] companies. Federal law also requires us to give you this notice to tell you about your choice to limit marketing from the [ABC] companies.]

• You previously chose to limit the [ABC] companies, such as the [ABC credit card, insurance, and securities] affiliates, from marketing their products or services to you based on your personal information that they receive from other ABC companies. This information includes your [income], your [account history], and your [credit score].

• Your choice has expired or is about to expire.

To renew your choice to limit marketing for [x] more years, contact us [include all that apply]:

• By telephone: 1–877–###–####

• On the Web: *www.---.com*

• By mail: Check the box and complete the form below, and send the form to:

[Company name]
[Company address]

__Renew my choice to limit marketing for [x] more years.

C–5—Model Form for Voluntary ''No Marketing'' Notice Your Choice To Stop Marketing

• [Name of Affiliate] is providing this notice.

• You may choose to stop all marketing from us and our affiliates.

To stop all marketing, contact us [include all that apply]:

• By telephone: 1–877–###–####

• On the Web: *www.---.com*

• By mail: Check the box and complete the form below, and send the form to:

[Company name]
[Company address]

__Do not market to me.

National Credit Union Administration

12 CFR Chapter VII.

Authority and Issuance

■ For the reasons discussed in the joint preamble, the National Credit Union Administration is amending chapter VII of title 12 of the Code of Federal Regulations by amending 12 CFR part 717 as follows:

PART 717—FAIR CREDIT REPORTING

■ 1. The authority citation for part 717 is revised to read as follows:

Authority: 12 U.S.C. 1751 *et seq.*; 15 U.S.C. 1681a, 1681b, 1681c, 1681m, 1681s, 1681w, 6801 and 6805.

Subpart A—General Provisions

■ 2. Revise § 717.1 to read as follows:

§ 717.1 Purpose, scope, and effective dates.

(a) *Purpose.* The purpose of this part is to implement the provisions of the Fair Credit Reporting Act. This part generally applies to federal credit unions that obtain and use information about consumers to determine the consumer's eligibility for products, services, or employment, share such information among affiliates, and furnish information to consumer reporting agencies.

(b) *Scope.*

(1) [Reserved]

(2) *Institutions covered.* (i) Except as otherwise provided in this part, the regulations in this part apply to federal credit unions.

■ 3. A new Subpart C is added to part 717 to read as follows:

Subpart C—Affiliate Marketing

Sec.

717.20 Coverage and definitions.
717.21 Affiliate marketing opt-out and exceptions.
717.22 Scope and duration of opt-out.
717.23 Contents of opt-out notice; consolidated and equivalent notices.
717.24 Reasonable opportunity to opt out.
717.25 Reasonable and simple methods of opting out.
717.26 Delivery of opt-out notices.
717.27 Renewal of opt-out.
717.28 Effective date, compliance date, and prospective application.

Subpart C—Affiliate Marketing

§ 717.20 Coverage and definitions

(a) *Coverage.* Subpart C of this part applies to federal credit unions and their affiliates as defined in § 717.3(a) of Subpart A.

(b) *Definitions.* For purposes of this subpart:

(1) *Clear and conspicuous.* The term ''clear and conspicuous'' means reasonably understandable and designed to call attention to the nature and significance of the information presented.

(2) *Concise.* (i) In general. The term ''concise'' means a reasonably brief expression or statement.

(ii) *Combination with other required disclosures.* A notice required by this subpart may be concise even if it is combined with other disclosures required or authorized by federal or state law.

(3) *Eligibility information.* The term ''eligibility information'' means any information the communication of which would be a consumer report if the exclusions from the definition of ''consumer report'' in section 603(d)(2)(A) of the Act did not apply. Eligibility information does not include aggregate or blind data that does not contain personal identifiers such as account numbers, names, or addresses.

(4) *Pre-existing business relationship.* (i) *In general.* The term ''pre-existing business relationship'' means a relationship between a person, or a person's licensed agent, and a consumer based on—

(A) A financial contract between the person and the consumer which is in force on the date on which the consumer is sent a solicitation covered by this subpart;

(B) The purchase, rental, or lease by the consumer of the person's goods or services, or a financial transaction (including holding an active account or a policy in force or having another continuing relationship) between the consumer and the person, during the 18-month period immediately preceding the date on which the consumer is sent a solicitation covered by this subpart; or

(C) An inquiry or application by the consumer regarding a product or service offered by that person during the three-month period immediately preceding the date on which the consumer is sent a solicitation covered by this subpart.

(ii) *Examples of pre-existing business relationships.* (A) If a consumer has a time deposit account, such as a share certificate, at a federal credit union that is currently in force, the federal credit union has a pre-existing business relationship with the consumer and can use eligibility information it receives from its affiliates to make solicitations to the consumer about its products or services.

(B) If a consumer obtained a share certificate from a federal credit union, but did not renew the certificate at maturity, the federal credit union has a pre-existing business relationship with the consumer and can use eligibility information it receives from its affiliates

to make solicitations to the consumer about its products or services for 18 months after the date of maturity of the share certificate.

(C) If a consumer obtains a mortgage, the mortgage lender has a pre-existing business relationship with the consumer. If the mortgage lender sells the consumer's entire loan to an investor, the mortgage lender has a pre-existing business relationship with the consumer and can use eligibility information it receives from its affiliates to make solicitations to the consumer about its products or services for 18 months after the date it sells the loan, and the investor has a pre-existing business relationship with the consumer upon purchasing the loan. If, however, the mortgage lender sells a fractional interest in the consumer's loan to an investor but also retains an ownership interest in the loan, the mortgage lender continues to have a pre-existing business relationship with the consumer, but the investor does not have a pre-existing business relationship with the consumer. If the mortgage lender retains ownership of the loan, but sells ownership of the servicing rights to the consumer's loan, the mortgage lender continues to have a pre-existing business relationship with the consumer. The purchaser of the servicing rights also has a pre-existing business relationship with the consumer as of the date it purchases ownership of the servicing rights, but only if it collects payments from or otherwise deals directly with the consumer on a continuing basis.

(D) If a consumer applies to a federal credit union for a product or service that it offers, but does not obtain a product or service from or enter into a financial contract or transaction with the institution, the federal credit union has a pre-existing business relationship with the consumer and can therefore use eligibility information it receives from an affiliate to make solicitations to the consumer about its products or services for three months after the date of the application.

(E) If a consumer makes a telephone inquiry to a federal credit union about its products or services and provides contact information to the institution, but does not obtain a product or service from or enter into a financial contract or transaction with the institution, the federal credit union has a pre-existing business relationship with the consumer and can therefore use eligibility information it receives from an affiliate to make solicitations to the consumer about its products or services for three months after the date of the inquiry.

(F) If a consumer makes an inquiry to a federal credit union by e-mail about its products or services, but does not obtain a product or service from or enter into a financial contract or transaction with the institution, the federal credit union has a pre-existing business relationship with the consumer and can therefore use eligibility information it receives from an affiliate to make solicitations to the consumer about its products or services for three months after the date of the inquiry.

(G) If a consumer has an existing relationship with a federal credit union that is part of a group of affiliated companies, makes a telephone call to the centralized call center for the group of affiliated companies to inquire about products or services offered by the insurance brokerage affiliate, and provides contact information to the call center, the call constitutes an inquiry to the insurance brokerage affiliate that offers those products or services. The insurance brokerage affiliate has a pre-existing business relationship with the consumer and can therefore use eligibility information it receives from its affiliated federal credit union to make solicitations to the consumer about its products or services for three months after the date of the inquiry.

(iii) *Examples where no pre-existing business relationship is created.* (A) If a consumer makes a telephone call to a centralized call center for a group of affiliated companies to inquire about the consumer's existing account at a federal credit union, the call does not constitute an inquiry to any affiliate other than the federal credit union that holds the consumer's account and does not establish a pre-existing business relationship between the consumer and any affiliate of the account-holding federal credit union.

(B) If a consumer who has a deposit account with a federal credit union makes a telephone call to an affiliate of the institution to ask about the affiliate's retail locations and hours, but does not make an inquiry about the affiliate's products or services, the call does not constitute an inquiry and does not establish a pre-existing business relationship between the consumer and the affiliate. Also, the affiliate's capture of the consumer's telephone number does not constitute an inquiry and does not establish a pre-existing business relationship between the consumer and the affiliate.

(C) If a consumer makes a telephone call to a federal credit union in response to an advertisement that offers a free promotional item to consumers who call a toll-free number, but the advertisement does not indicate that the federal credit union's products or services will be marketed to consumers who call in response, the call does not create a pre-existing business relationship between the consumer and the federal credit union because the consumer has not made an inquiry about a product or service offered by the institution, but has merely responded to an offer for a free promotional item.

(5) *Solicitation.* (i) *In general.* The term ''solicitation'' means the marketing of a product or service initiated by a person to a particular consumer that is—

(A) Based on eligibility information communicated to that person by its affiliate as described in this subpart; and

(B) Intended to encourage the consumer to purchase or obtain such product or service.

(ii) *Exclusion of marketing directed at the general public.* A solicitation does not include marketing communications that are directed at the general public. For example, television, general circulation magazine, and billboard advertisements do not constitute solicitations, even if those communications are intended to encourage consumers to purchase products and services from the person initiating the communications.

(iii) *Examples of solicitations.* A solicitation would include, for example, a telemarketing call, direct mail, e-mail, or other form of marketing communication directed to a particular consumer that is based on eligibility information received from an affiliate.

(6) You means a person described in paragraph (a) of this section.

§ 717.21 Affiliate marketing opt-out and exceptions.

(a) *Initial notice and opt-out requirement.* (1) *In general.* You may not use eligibility information about a consumer that you receive from an affiliate to make a solicitation for marketing purposes to the consumer, unless—

(i) It is clearly and conspicuously disclosed to the consumer in writing or, if the consumer agrees, electronically, in a concise notice that you may use eligibility information about that consumer received from an affiliate to make solicitations for marketing purposes to the consumer;

(ii) The consumer is provided a reasonable opportunity and a reasonable and simple method to ''opt out,'' or prohibit you from using eligibility information to make solicitations for marketing purposes to the consumer; and

(iii) The consumer has not opted out.

(2) *Example.* A consumer has a homeowner's insurance policy obtained through an insurance brokerage. The insurance brokerage furnishes eligibility information about the consumer to its affiliated federal credit union. Based on that eligibility information, the federal credit union wants to make a solicitation to the consumer about its home equity loan products. The federal credit union does not have a pre-existing business relationship with the consumer and none of the other exceptions apply. The federal credit union is prohibited from using eligibility information received from its insurance brokerage affiliate to make solicitations to the consumer about its home equity loan products unless the consumer is given a notice and opportunity to opt out and the consumer does not opt out.

(3) *Affiliates who may provide the notice.* The notice required by this paragraph must be provided:

(i) By an affiliate that has or has previously had a pre-existing business relationship with the consumer; or

(ii) As part of a joint notice from two or more members of an affiliated group of companies, provided that at least one of the affiliates on the joint notice has or has previously had a pre-existing business relationship with the consumer.

(b) *Making solicitations.* (1) *In general.* For purposes of this subpart, you make a solicitation for marketing purposes if—

(i) You receive eligibility information from an affiliate;

(ii) You use that eligibility information to do one or more of the following:

(A) Identify the consumer or type of consumer to receive a solicitation;

(B) Establish criteria used to select the consumer to receive a solicitation; or

(C) Decide which of your products or services to market to the consumer or tailor your solicitation to that consumer; and

(iii) As a result of your use of the eligibility information, the consumer is provided a solicitation.

(2) *Receiving eligibility information from an affiliate, including through a common database.* You may receive eligibility information from an affiliate in various ways, including when the affiliate places that information into a common database that you may access.

(3) *Receipt or use of eligibility information by your service provider.* Except as provided in paragraph (b)(5) of this section, you receive or use an affiliate's eligibility information if a service provider acting on your behalf (whether an affiliate or a nonaffiliated third party) receives or uses that information in the manner described in paragraphs (b)(1)(i) or (b)(1)(ii) of this section. All relevant facts and circumstances will determine whether a person is acting as your service provider when it receives or uses an affiliate's eligibility information in connection with marketing your products and services.

(4) *Use by an affiliate of its own eligibility information.* Unless you have used eligibility information that you receive from an affiliate in the manner described in paragraph (b)(1)(ii) of this section, you do not make a solicitation subject to this subpart if your affiliate:

(i) Uses its own eligibility information that it obtained in connection with a pre-existing business relationship it has or had with the consumer to market your products or services to the consumer; or

(ii) Directs its service provider to use the affiliate's own eligibility information that it obtained in connection with a pre-existing business relationship it has or had with the consumer to market your products or services to the consumer, and you do not communicate directly with the service provider regarding that use.

(5) *Use of eligibility information by a service provider.* (i) *In general.* You do not make a solicitation subject to Subpart C of this part if a service provider (including an affiliated or third-party service provider that maintains or accesses a common database that you may access) receives eligibility information from your affiliate that your affiliate obtained in connection with a pre-existing business relationship it has or had with the consumer and uses that eligibility information to market your products or services to the consumer, so long as—

(A) Your affiliate controls access to and use of its eligibility information by the service provider (including the right to establish the specific terms and conditions under which the service provider may use such information to market your products or services);

(B) Your affiliate establishes specific terms and conditions under which the service provider may access and use the affiliate's eligibility information to market your products and services (or those of affiliates generally) to the consumer, such as the identity of the affiliated companies whose products or services may be marketed to the consumer by the service provider, the types of products or services of affiliated companies that may be marketed, and the number of times the consumer may receive marketing materials, and periodically evaluates the service provider's compliance with those terms and conditions;

(C) Your affiliate requires the service provider to implement reasonable policies and procedures designed to ensure that the service provider uses the affiliate's eligibility information in accordance with the terms and conditions established by the affiliate relating to the marketing of your products or services;

(D) Your affiliate is identified on or with the marketing materials provided to the consumer; and

(E) You do not directly use your affiliate's eligibility information in the manner described in paragraph (b)(1)(ii) of this section.

(ii) *Writing requirements.* (A) The requirements of paragraphs (b)(5)(i)(A) and (C) of this section must be set forth in a written agreement between your affiliate and the service provider; and

(B) The specific terms and conditions established by your affiliate as provided in paragraph (b)(5)(i)(B) of this section must be set forth in writing.

(6) *Examples of making solicitations.* (i) A consumer has a deposit account with a federal credit union, which is affiliated with an insurance brokerage. The insurance brokerage receives eligibility information about the consumer from the federal credit union. The insurance brokerage uses that eligibility information to identify the consumer to receive a solicitation about insurance brokerage services, and, as a result, the insurance brokerage provides a solicitation to the consumer about its services. Pursuant to paragraph (b)(1) of this section, the insurance brokerage has made a solicitation to the consumer.

(ii) The same facts as in the example in paragraph (b)(6)(i) of this section, except that after using the eligibility information to identify the consumer to receive a solicitation about insurance brokerage services, the insurance brokerage asks the federal credit union to send the solicitation to the consumer and the federal credit union does so. Pursuant to paragraph (b)(1) of this section, the insurance brokerage has made a solicitation to the consumer because it used eligibility information about the consumer that it received from an affiliate to identify the consumer to receive a solicitation about its products or services, and, as a result, a solicitation was provided to the consumer about the insurance brokerage's services.

(iii) The same facts as in the example in paragraph (b)(6)(i) of this section, except that eligibility information about consumers that have deposit accounts with the federal credit union is placed into a common database that all

members of the affiliated group of companies may independently access and use. Without using the federal credit union's eligibility information, the insurance brokerage develops selection criteria and provides those criteria, marketing materials, and related instructions to the federal credit union. The federal credit union reviews eligibility information about its own consumers using the selection criteria provided by the insurance brokerage to determine which consumers should receive the insurance brokerage's marketing materials and sends marketing materials about the insurance brokerage's services to those consumers. Even though the insurance brokerage has received eligibility information through the common database as provided in paragraph (b)(2) of this section, it did not use that information to identify consumers or establish selection criteria; instead, the federal credit union used its own eligibility information. Therefore, pursuant to paragraph (b)(4)(i) of this section, the insurance brokerage has not made a solicitation to the consumer.

(iv) The same facts as in the example in paragraph (b)(6)(iii) of this section, except that the federal credit union provides the insurance brokerage's criteria to the federal credit union's service provider and directs the service provider to use the federal credit union's eligibility information to identify federal credit union consumers who meet the criteria and to send the insurance brokerage's marketing materials to those consumers. The insurance brokerage does not communicate directly with the service provider regarding the use of the federal credit union's information to market its services to the federal credit union's consumers. Pursuant to paragraph (b)(4)(ii) of this section, the insurance brokerage has not made a solicitation to the consumer.

(v) An affiliated group of companies includes a federal credit union, an insurance brokerage, and a service provider. Each affiliate in the group places information about its consumers into a common database. The service provider has access to all information in the common database. The federal credit union controls access to and use of its eligibility information by the service provider. This control is set forth in a written agreement between the federal credit union and the service provider. The written agreement also requires the service provider to establish reasonable policies and procedures designed to ensure that the service provider uses the federal credit union's eligibility information in accordance with specific terms and conditions established by the federal credit union relating to the marketing of the products and services of all affiliates, including the insurance brokerage. In a separate written communication, the federal credit union specifies the terms and conditions under which the service provider may use the federal credit union's eligibility information to market the insurance brokerage's products and services to the federal credit union's consumers. The specific terms and conditions are: a list of affiliated companies (including the insurance brokerage) whose products or services may be marketed to the federal credit union's consumers by the service provider; the specific products or types of products that may be marketed to the federal credit union's consumers by the service provider; the categories of eligibility information that may be used by the service provider in marketing products or services to the federal credit union's consumers; the types or categories of the federal credit union's consumers to whom the service provider may market products or services of federal credit union affiliates; the number and/or types of marketing communications that the service provider may send to the federal credit union's consumers; and the length of time during which the service provider may market the products or services of the federal credit union's affiliates to its consumers. The federal credit union periodically evaluates the service provider's compliance with these terms and conditions. The insurance brokerage asks the service provider to market insurance products to certain consumers who have deposit accounts with the federal credit union. Without using the federal credit union's eligibility information, the insurance brokerage develops selection criteria and provides those criteria, marketing materials, and related instructions to the service provider. The service provider uses the federal credit union's eligibility information from the common database to identify the federal credit union's consumers to whom insurance brokerage services will be marketed. When the insurance brokerage's marketing materials are provided to the identified consumers, the name of the federal credit union is displayed on the brokerage marketing materials, an introductory letter that accompanies the marketing materials, an account statement that accompanies the marketing materials, or the envelope containing the marketing materials. The requirements of paragraph (b)(5) of this section have been satisfied, and the insurance brokerage has not made a solicitation to the consumer.

(vi) The same facts as in the example in paragraph (b)(6)(v) of this section, except that the terms and conditions permit the service provider to use the federal credit union's eligibility information to market the products and services of other affiliates to the federal credit union's consumers whenever the service provider deems it appropriate to do so. The service provider uses the federal credit union's eligibility information in accordance with the discretion afforded to it by the terms and conditions. Because the terms and conditions are not specific, the requirements of paragraph (b)(5) of this section have not been satisfied.

(c) *Exceptions.* The provisions of this subpart do not apply to you if you use eligibility information that you receive from an affiliate:

(1) To make a solicitation for marketing purposes to a consumer with whom you have a pre-existing business relationship;

(2) To facilitate communications to an individual for whose benefit you provide employee benefit or other services pursuant to a contract with an employer related to and arising out of the current employment relationship or status of the individual as a participant or beneficiary of an employee benefit plan;

(3) To perform services on behalf of an affiliate, except that this subparagraph shall not be construed as permitting you to send solicitations on behalf of an affiliate if the affiliate would not be permitted to send the solicitation as a result of the election of the consumer to opt out under this subpart;

(4) In response to a communication about your products or services initiated by the consumer;

(5) In response to an authorization or request by the consumer to receive solicitations; or

(6) If your compliance with this subpart would prevent you from complying with any provision of State insurance laws pertaining to unfair discrimination in any State in which you are lawfully doing business.

(d) *Examples of exceptions.* (1) *Example of the pre-existing business relationship exception.* A consumer has a deposit account with a federal credit union. The consumer also has a relationship with the federal credit union's securities brokerage affiliate. The federal credit union receives eligibility information about the consumer from its securities brokerage affiliate and uses that information to make a solicitation to the consumer

about the federal credit union's wealth management services. The federal credit union may make this solicitation even if the consumer has not been given a notice and opportunity to opt out because the federal credit union has a pre-existing business relationship with the consumer.

(2) *Examples of service provider exception.* (i) A consumer has an insurance policy obtained through an insurance brokerage. The insurance brokerage furnishes eligibility information about the consumer to its affiliated federal credit union. Based on that eligibility information, the federal credit union wants to make a solicitation to the consumer about membership and its deposit products. The federal credit union does not have a pre-existing business relationship with the consumer and none of the other exceptions in paragraph (c) of this section apply. The consumer has been given an opt-out notice and has elected to opt out of receiving such solicitations. The federal credit union asks a service provider to send the solicitation to the consumer on its behalf. The service provider may not send the solicitation on behalf of the federal credit union because, as a result of the consumer's opt-out election, the federal credit union is not permitted to make the solicitation.

(ii) The same facts as in paragraph (d)(2)(i) of this section, except the consumer has been given an opt-out notice, but has not elected to opt out. The federal credit union asks a service provider to send the solicitation to the consumer on its behalf. The service provider may send the solicitation on behalf of the federal credit union because, as a result of the consumer's not opting out, the federal credit union is permitted to make the solicitation.

(3) *Examples of consumer-initiated communications.* (i) A consumer who has a deposit account with a federal credit union initiates a communication with the federal credit union's credit card affiliate to request information about a credit card. The credit card affiliate may use eligibility information about the consumer it obtains from the federal credit union or any other affiliate to make solicitations regarding credit card products in response to the consumer-initiated communication.

(ii) A consumer who has a deposit account with a federal credit union contacts the institution to request information about how to save and invest for a child's college education without specifying the type of product in which the consumer may be interested. Information about a range of different products or services offered by the federal credit union and one or more affiliates of the institution may be responsive to that communication. Such products or services may include the following: Mutual funds offered by the institution; section 529 plans offered by the institution or its securities brokerage affiliate; or trust services offered by the institution or its trust services affiliate. Any affiliate offering investment counseling services that would be responsive to the consumer's request for information about saving and investing for a child's college education may use eligibility information to make solicitations to the consumer in response to this communication.

(iii) A credit card issuer makes a marketing call to the consumer without using eligibility information received from an affiliate. The issuer leaves a voice-mail message that invites the consumer to call a toll-free number to apply for the issuer's credit card. If the consumer calls the toll-free number to inquire about the credit card, the call is a consumer-initiated communication about a product or service and the credit card issuer may now use eligibility information it receives from its affiliates to make solicitations to the consumer.

(iv) A consumer calls a federal credit union to ask about retail locations and hours, but does not request information about products or services. The institution may not use eligibility information it receives from an affiliate to make solicitations to the consumer about its products or services because the consumer-initiated communication does not relate to the federal credit union's products or services. Thus, the use of eligibility information received from an affiliate would not be responsive to the communication and the exception does not apply.

(v) A consumer calls a federal credit union to ask about retail locations and hours. The customer service representative asks the consumer if there is a particular product or service about which the consumer is seeking information. The consumer responds that the consumer wants to stop in and find out about share certificates. The customer service representative offers to provide that information by telephone and mail additional information and application materials to the consumer. The consumer agrees and provides or confirms contact information for receipt of the materials to be mailed. The federal credit union may use eligibility information it receives from an affiliate to make solicitations to the consumer about share certificates because such solicitations would respond to the consumer-initiated communication about products or services.

(4) *Examples of consumer authorization or request for solicitations.* (i) A consumer who obtains a mortgage from a federal credit union authorizes or requests information about obtaining homeowner's insurance through the federal credit union's insurance brokerage affiliate. Such authorization or request, whether given to the federal credit union or to the insurance brokerage affiliate, would permit the insurance brokerage to use eligibility information about the consumer it obtains from the federal credit union or any other affiliate to make solicitations to the consumer about its homeowner's insurance services.

(ii) A consumer completes an online application to apply for a credit card from a credit card issuer. The issuer's online application contains a blank check box that the consumer may check to authorize or request information from the credit card issuer's affiliates. The consumer checks the box. The consumer has authorized or requested solicitations from the card issuer's affiliates.

(iii) A consumer completes an online application to apply for a credit card from a credit card issuer. The issuer's online application contains a pre-selected check box indicating that the consumer authorizes or requests information from the issuer's affiliates. The consumer does not deselect the check box. The consumer has not authorized or requested solicitations from the card issuer's affiliates.

(iv) The terms and conditions of a credit card account agreement contain preprinted boilerplate language stating that by applying to open an account the consumer authorizes or requests to receive solicitations from the credit card issuer's affiliates. The consumer has not authorized or requested solicitations from the card issuer's affiliates.

(e) *Relation to affiliate-sharing notice and opt-out.* Nothing in this subpart limits the responsibility of a person to comply with the notice and opt-out provisions of section 603(d)(2)(A)(iii) of the Act where applicable.

§ 717.22 Scope and duration of opt-out.

(a) *Scope of opt-out.* (1) *In general.* Except as otherwise provided in this section, the consumer's election to opt out prohibits any affiliate covered by the opt-out notice from using eligibility information received from another affiliate as described in the notice to make solicitations to the consumer.

(2) *Continuing relationship.* (i) *In general.* If the consumer establishes a continuing relationship with you or your affiliate, an opt-out notice may

apply to eligibility information obtained in connection with—

(A) A single continuing relationship or multiple continuing relationships that the consumer establishes with you or your affiliates, including continuing relationships established subsequent to delivery of the opt-out notice, so long as the notice adequately describes the continuing relationships covered by the opt-out; or

(B) Any other transaction between the consumer and you or your affiliates as described in the notice.

(ii) *Examples of continuing relationships.* A consumer has a continuing relationship with you or your affiliate if the consumer—

(A) Opens a deposit or investment account with you or your affiliate;

(B) Obtains a loan for which you or your affiliate owns the servicing rights;

(C) Purchases an insurance product from you or your affiliate;

(D) Holds an investment product through you or your affiliate, such as when you act or your affiliate acts as a custodian for securities or for assets in an individual retirement arrangement;

(E) Enters into an agreement or understanding with you or your affiliate whereby you or your affiliate undertakes to arrange or broker a home mortgage loan for the consumer;

(F) Enters into a lease of personal property with you or your affiliate; or

(G) Obtains financial, investment, or economic advisory services from you or your affiliate for a fee.

(3) *No continuing relationship.* (i) *In general.* If there is no continuing relationship between a consumer and you or your affiliate, and you or your affiliate obtain eligibility information about a consumer in connection with a transaction with the consumer, such as an isolated transaction or a credit application that is denied, an opt-out notice provided to the consumer only applies to eligibility information obtained in connection with that transaction.

(ii) *Examples of isolated transactions.* An isolated transaction occurs if—

(A) The consumer uses your or your affiliate's ATM to withdraw cash from an account at another financial institution; or

(B) You or your affiliate sells the consumer a cashier's check or money order, airline tickets, travel insurance, or traveler's checks in isolated transactions.

(4) *Menu of alternatives.* A consumer may be given the opportunity to choose from a menu of alternatives when electing to prohibit solicitations, such as by electing to prohibit solicitations from certain types of affiliates covered by the opt-out notice but not other types of affiliates covered by the notice, electing to prohibit solicitations based on certain types of eligibility information but not other types of eligibility information, or electing to prohibit solicitations by certain methods of delivery but not other methods of delivery. However, one of the alternatives must allow the consumer to prohibit all solicitations from all of the affiliates that are covered by the notice.

(5) *Special rule for a notice following termination of all continuing relationships.* (i) *In general.* A consumer must be given a new opt-out notice if, after all continuing relationships with you or your affiliate(s) are terminated, the consumer subsequently establishes another continuing relationship with you or your affiliate(s) and the consumer's eligibility information is to be used to make a solicitation. The new opt-out notice must apply, at a minimum, to eligibility information obtained in connection with the new continuing relationship. Consistent with paragraph (b) of this section, the consumer's decision not to opt out after receiving the new opt-out notice would not override a prior opt-out election by the consumer that applies to eligibility information obtained in connection with a terminated relationship, regardless of whether the new opt-out notice applies to eligibility information obtained in connection with the terminated relationship.

(ii) *Example.* A consumer is a member of a federal credit union that is part of an affiliated group. The consumer terminates his membership. One year later, the consumer rejoins and opens a savings account with the same federal credit union. The consumer must be given a new notice and opportunity to opt out before the federal credit union's affiliates may make solicitations to the consumer using eligibility information obtained by the federal credit union in connection with the newly established account relationship, regardless of whether the consumer opted out in connection with accounts held during the previous member relationship.

(b) *Duration of opt-out.* The election of a consumer to opt out must be effective for a period of at least five years (the ''opt-out period'') beginning when the consumer's opt-out election is received and implemented, unless the consumer subsequently revokes the opt-out in writing or, if the consumer agrees, electronically. An opt-out period of more than five years may be established, including an opt-out period that does not expire unless revoked by the consumer.

(c) *Time of opt-out.* A consumer may opt out at any time.

§ 717.23 Contents of opt-out notice; consolidated and equivalent notices.

(a) *Contents of opt-out notice.* (1) *In general.* A notice must be clear, conspicuous, and concise, and must accurately disclose:

(i) The name of the affiliate(s) providing the notice. If the notice is provided jointly by multiple affiliates and each affiliate shares a common name, such as ''ABC,'' then the notice may indicate that it is being provided by multiple companies with the ABC name or multiple companies in the ABC group or family of companies, for example, by stating that the notice is provided by ''all of the ABC companies,'' ''the ABC federal credit union, credit card, insurance brokerage, and securities brokerage companies,'' or by listing the name of each affiliate providing the notice. But if the affiliates providing the joint notice do not all share a common name, then the notice must either separately identify each affiliate by name or identify each of the common names used by those affiliates, for example, by stating that the notice is provided by ''all of the ABC and XYZ companies'' or by ''the ABC federal credit union and credit card companies and the XYZ insurance brokerage company'';

(ii) A list of the affiliates or types of affiliates whose use of eligibility information is covered by the notice, which may include companies that become affiliates after the notice is provided to the consumer. If each affiliate covered by the notice shares a common name, such as ''ABC,'' then the notice may indicate that it applies to multiple companies with the ABC name or multiple companies in the ABC group or family of companies, for example, by stating that the notice is provided by ''all of the ABC companies,'' ''the ABC federal credit union, credit card, insurance brokerage, and securities brokerage companies,'' or by listing the name of each affiliate providing the notice. But if the affiliates covered by the notice do not all share a common name, then the notice must either separately identify each covered affiliate by name or identify each of the common names used by those affiliates, for example, by stating that the notice applies to ''all of the ABC and XYZ companies'' or to ''the ABC federal credit union and credit card companies and the XYZ insurance brokerage company'';

(iii) A general description of the types of eligibility information that may be

used to make solicitations to the consumer;

(iv) That the consumer may elect to limit the use of eligibility information to make solicitations to the consumer;

(v) That the consumer's election will apply for the specified period of time stated in the notice and, if applicable, that the consumer will be allowed to renew the election once that period expires;

(vi) If the notice is provided to consumers who may have previously opted out, such as if a notice is provided to consumers annually, that the consumer who has chosen to limit solicitations does not need to act again until the consumer receives a renewal notice; and

(vii) A reasonable and simple method for the consumer to opt out.

(2) *Joint relationships.* (i) If two or more consumers jointly obtain a product or service, a single opt-out notice may be provided to the joint consumers. Any of the joint consumers may exercise the right to opt out.

(ii) The opt-out notice must explain how an opt-out direction by a joint consumer will be treated. An opt-out direction by a joint consumer may be treated as applying to all of the associated joint consumers, or each joint consumer may be permitted to opt-out separately. If each joint consumer is permitted to opt out separately, one of the joint consumers must be permitted to opt out on behalf of all of the joint consumers and the joint consumers must be permitted to exercise their separate rights to opt out in a single response.

(iii) It is impermissible to require all joint consumers to opt out before implementing any opt-out direction.

(3) *Alternative contents.* If the consumer is afforded a broader right to opt out of receiving marketing than is required by this subpart, the requirements of this section may be satisfied by providing the consumer with a clear, conspicuous, and concise notice that accurately discloses the consumer's opt-out rights.

(4) *Model notices.* Model notices are provided in Appendix C of this part.

(b) *Coordinated and consolidated notices.* A notice required by this subpart may be coordinated and consolidated with any other notice or disclosure required to be issued under any other provision of law by the entity providing the notice, including but not limited to the notice described in section 603(d)(2)(A)(iii) of the Act and the Gramm-Leach-Bliley Act privacy notice.

(c) *Equivalent notices.* A notice or other disclosure that is equivalent to the notice required by this subpart, and that is provided to a consumer together with disclosures required by any other provision of law, satisfies the requirements of this section.

§ 717.24 Reasonable opportunity to opt out.

(a) *In general.* You must not use eligibility information about a consumer that you receive from an affiliate to make a solicitation to the consumer about your products or services, unless the consumer is provided a reasonable opportunity to opt out, as required by § 717.21(a)(1)(ii) of this part.

(b) *Examples of a reasonable opportunity to opt out.* The consumer is given a reasonable opportunity to opt out if:

(1) *By mail.* The opt-out notice is mailed to the consumer. The consumer is given 30 days from the date the notice is mailed to elect to opt out by any reasonable means.

(2) *By electronic means.* (i) The opt-out notice is provided electronically to the consumer, such as by posting the notice at an Internet Web site at which the consumer has obtained a product or service. The consumer acknowledges receipt of the electronic notice. The consumer is given 30 days after the date the consumer acknowledges receipt to elect to opt out by any reasonable means.

(ii) The opt-out notice is provided to the consumer by e-mail where the consumer has agreed to receive disclosures by e-mail from the person sending the notice. The consumer is given 30 days after the e-mail is sent to elect to opt out by any reasonable means.

(3) *At the time of an electronic transaction.* The opt-out notice is provided to the consumer at the time of an electronic transaction, such as a transaction conducted on an Internet Web site. The consumer is required to decide, as a necessary part of proceeding with the transaction, whether to opt out before completing the transaction. There is a simple process that the consumer may use to opt out at that time using the same mechanism through which the transaction is conducted.

(4) *At the time of an in-person transaction.* The opt-out notice is provided to the consumer in writing at the time of an in-person transaction. The consumer is required to decide, as a necessary part of proceeding with the transaction, whether to opt out before completing the transaction, and is not permitted to complete the transaction without making a choice. There is a simple process that the consumer may use during the course of the in-person transaction to opt out, such as completing a form that requires consumers to write a ''yes'' or ''no'' to indicate their opt-out preference or that requires the consumer to check one of two blank check boxes—one that allows consumers to indicate that they want to opt out and one that allows consumers to indicate that they do not want to opt out.

(5) *By including in a privacy notice.* The opt-out notice is included in a Gramm-Leach-Bliley Act privacy notice. The consumer is allowed to exercise the opt-out within a reasonable period of time and in the same manner as the opt-out under that privacy notice.

§ 717.25 Reasonable and simple methods of opting out.

(a) *In general.* You must not use eligibility information about a consumer that you receive from an affiliate to make a solicitation to the consumer about your products or services, unless the consumer is provided a reasonable and simple method to opt out, as required by § 717.21(a)(1)(ii) of this part.

(b) *Examples.* (1) *Reasonable and simple opt-out methods.* Reasonable and simple methods for exercising the opt-out right include—

(i) Designating a check-off box in a prominent position on the opt-out form;

(ii) Including a reply form and a self-addressed envelope together with the opt-out notice;

(iii) Providing an electronic means to opt out, such as a form that can be electronically mailed or processed at an Internet Web site, if the consumer agrees to the electronic delivery of information;

(iv) Providing a toll-free telephone number that consumers may call to opt out; or

(v) Allowing consumers to exercise all of their opt-out rights described in a consolidated opt-out notice that includes the privacy opt-out under the Gramm-Leach-Bliley Act, 15 U.S.C. 6801 et seq., the affiliate sharing opt-out under the Act, and the affiliate marketing opt-out under the Act, by a single method, such as by calling a single toll-free telephone number.

(2) *Opt-out methods that are not reasonable and simple.* Reasonable and simple methods for exercising an opt-out right do not include—

(i) Requiring the consumer to write his or her own letter;

(ii) Requiring the consumer to call or write to obtain a form for opting out, rather than including the form with the opt-out notice;

(iii) Requiring the consumer who receives the opt-out notice in electronic form only, such as through posting at an

Internet Web site, to opt out solely by paper mail or by visiting a different Web site without providing a link to that site.

(c) *Specific opt-out means.* Each consumer may be required to opt out through a specific means, as long as that means is reasonable and simple for that consumer.

§ 717.26 Delivery of opt-out notices.

(a) *In general.* The opt-out notice must be provided so that each consumer can reasonably be expected to receive actual notice. For opt-out notices provided electronically, the notice may be provided in compliance with either the electronic disclosure provisions in this subpart or the provisions in section 101 of the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. 7001 *et seq.*

(b) *Examples of reasonable expectation of actual notice.* A consumer may reasonably be expected to receive actual notice if the affiliate providing the notice:

(1) Hand-delivers a printed copy of the notice to the consumer;

(2) Mails a printed copy of the notice to the last known mailing address of the consumer;

(3) Provides a notice by e-mail to a consumer who has agreed to receive electronic disclosures by e-mail from the affiliate providing the notice; or

(4) Posts the notice on the Internet Web site at which the consumer obtained a product or service electronically and requires the consumer to acknowledge receipt of the notice.

(c) *Examples of no reasonable expectation of actual notice.* A consumer may not reasonably be expected to receive actual notice if the affiliate providing the notice:

(1) Only posts the notice on a sign in a branch or office or generally publishes the notice in a newspaper;

(2) Sends the notice via e-mail to a consumer who has not agreed to receive electronic disclosures by e-mail from the affiliate providing the notice; or

(3) Posts the notice on an Internet Web site without requiring the consumer to acknowledge receipt of the notice.

§ 717.27 Renewal of opt-out.

(a) *Renewal notice and opt-out requirement.* (1) *In general.* After the opt-out period expires, you may not make solicitations based on eligibility information you receive from an affiliate to a consumer who previously opted out, unless:

(i) The consumer has been given a renewal notice that complies with the requirements of this section and §§ 717.24 through 717.26 of this part, and a reasonable opportunity and a reasonable and simple method to renew the opt-out, and the consumer does not renew the opt-out; or

(ii) An exception in § 717.21(c) of this part applies.

(2) *Renewal period.* Each opt-out renewal must be effective for a period of at least five years as provided in § 717.22(b) of this part.

(3) *Affiliates who may provide the notice.* The notice required by this paragraph must be provided:

(i) By the affiliate that provided the previous opt-out notice, or its successor; or

(ii) As part of a joint renewal notice from two or more members of an affiliated group of companies, or their successors, that jointly provided the previous opt-out notice.

(b) *Contents of renewal notice.* The renewal notice must be clear, conspicuous, and concise, and must accurately disclose:

(1) The name of the affiliate(s) providing the notice. If the notice is provided jointly by multiple affiliates and each affiliate shares a common name, such as ''ABC,'' then the notice may indicate that it is being provided by multiple companies with the ABC name or multiple companies in the ABC group or family of companies, for example, by stating that the notice is provided by ''all of the ABC companies,'' ''the ABC federal credit union, credit card, insurance brokerage, and securities brokerage companies,'' or by listing the name of each affiliate providing the notice. But if the affiliates providing the joint notice do not all share a common name, then the notice must either separately identify each affiliate by name or identify each of the common names used by those affiliates, for example, by stating that the notice is provided by ''all of the ABC and XYZ companies'' or by ''the ABC federal credit union and credit card companies and the XYZ insurance brokerage company'';

(2) A list of the affiliates or types of affiliates whose use of eligibility information is covered by the notice, which may include companies that become affiliates after the notice is provided to the consumer. If each affiliate covered by the notice shares a common name, such as ''ABC,'' then the notice may indicate that it applies to multiple companies with the ABC name or multiple companies in the ABC group or family of companies, for example, by stating that the notice is provided by ''all of the ABC companies,'' ''the ABC federal credit union, credit card, insurance brokerage, and securities brokerage companies,'' or by listing the name of each affiliate providing the notice. But if the affiliates covered by the notice do not all share a common name, then the notice must either separately identify each covered affiliate by name or identify each of the common names used by those affiliates, for example, by stating that the notice applies to ''all of the ABC and XYZ companies'' or to ''the ABC federal credit union and credit card companies and the XYZ insurance brokerage company'';

(3) A general description of the types of eligibility information that may be used to make solicitations to the consumer;

(4) That the consumer previously elected to limit the use of certain information to make solicitations to the consumer;

(5) That the consumer's election has expired or is about to expire;

(6) That the consumer may elect to renew the consumer's previous election;

(7) If applicable, that the consumer's election to renew will apply for the specified period of time stated in the notice and that the consumer will be allowed to renew the election once that period expires; and

(8) A reasonable and simple method for the consumer to opt out.

(c) *Timing of the renewal notice.* (1) *In general.* A renewal notice may be provided to the consumer either—

(i) A reasonable period of time before the expiration of the opt-out period; or

(ii) Any time after the expiration of the opt-out period but before solicitations that would have been prohibited by the expired opt-out are made to the consumer.

(2) *Combination with annual privacy notice.* If you provide an annual privacy notice under the Gramm-Leach-Bliley Act, 15 U.S.C. 6801 et seq., providing a renewal notice with the last annual privacy notice provided to the consumer before expiration of the opt-out period is a reasonable period of time before expiration of the opt-out in all cases.

(d) *No effect on opt-out period.* An opt-out period may not be shortened by sending a renewal notice to the consumer before expiration of the opt-out period, even if the consumer does not renew the opt out.

§ 717.28 Effective date, compliance date, and prospective application.

(a) *Effective date.* This subpart is effective January 1, 2008.

(b) *Mandatory compliance date.* Compliance with this subpart is required not later than October 1, 2008.

(c) *Prospective application.* The provisions of this subpart shall not

prohibit you from using eligibility information that you receive from an affiliate to make solicitations to a consumer if you receive such information prior to October 1, 2008. For purposes of this section, you are deemed to receive eligibility information when such information is placed into a common database and is accessible by you.

4. Appendixes A and B to part 717 are added and reserved, a new Appendix C to part 717 is added to read as follows:

Appendix C To Part 717—Model Forms for Opt-Out Notices

a. Although use of the model forms is not required, use of the model forms in this Appendix (as applicable) complies with the requirement in section 624 of the Act for clear, conspicuous, and concise notices.

b. Certain changes may be made to the language or format of the model forms without losing the protection from liability afforded by use of the model forms. These changes may not be so extensive as to affect the substance, clarity, or meaningful sequence of the language in the model forms. Persons making such extensive revisions will lose the safe harbor that this Appendix provides. Acceptable changes include, for example:

1. Rearranging the order of the references to ''your income,'' ''your account history,'' and ''your credit score.''

2. Substituting other types of information for ''income,'' ''account history,'' or ''credit score'' for accuracy, such as ''payment history,'' ''credit history,'' ''payoff status,'' or ''claims history.''

3. Substituting a clearer and more accurate description of the affiliates providing or covered by the notice for phrases such as ''the [ABC] group of companies,'' including without limitation a statement that the entity providing the notice recently purchased the consumer's account.

4. Substituting other types of affiliates covered by the notice for ''credit card,'' ''insurance brokerage,'' or ''securities brokerage'' affiliates.

5. Omitting items that are not accurate or applicable. For example, if a person does not limit the duration of the opt-out period, the notice may omit information about the renewal notice.

6. Adding a statement informing consumers how much time they have to opt out before shared eligibility information may be used to make solicitations to them.

7. Adding a statement that the consumer may exercise the right to opt out at any time.

8. Adding the following statement, if accurate: ''If you previously opted out, you do not need to do so again.''

9. Providing a place on the form for the consumer to fill in identifying information, such as his or her name and address:

C–1 Model Form for Initial Opt-out Notice (Single-Affiliate Notice)
C–2 Model Form for Initial Opt-out Notice (Joint Notice)
C–3 Model Form for Renewal Notice (Single-Affiliate Notice)
C–4 Model Form for Renewal Notice (Joint Notice)
C–5 Model Form for Voluntary ''No Marketing'' Notice

C–1—Model Form for Initial Opt-out Notice (Single-Affiliate Notice)—[Your Choice To Limit Marketing]/[Marketing Opt-out]

• [Name of Affiliate] is providing this notice.

• [Optional: Federal law gives you the right to limit some but not all marketing from our affiliates. Federal law also requires us to give you this notice to tell you about your choice to limit marketing from our affiliates.]

• You may limit our affiliates in the [ABC] group of companies, such as our [credit card, insurance brokerage, and securities brokerage] affiliates, from marketing their products or services to you based on your personal information that we collect and share with them. This information includes your [income], your [account history with us], and your [credit score].

• Your choice to limit marketing offers from our affiliates will apply [until you tell us to change your choice]/[for x years from when you tell us your choice]/[for at least 5 years from when you tell us your choice]. [Include if the opt-out period expires.] Once that period expires, you will receive a renewal notice that will allow you to continue to limit marketing offers from our affiliates for [another x years]/[at least another 5 years].

• [Include, if applicable, in a subsequent notice, including an annual notice, for consumers who may have previously opted out.] If you have already made a choice to limit marketing offers from our affiliates, you do not need to act again until you receive the renewal notice.

To limit marketing offers, contact us [include all that apply]:

• By telephone: 1–877–###–####
• On the Web: *www.---.com*
• By mail: Check the box and complete the form below, and send the form to:

[Company name]
[Company address]

__Do not allow your affiliates to use my personal information to market to me.

C–2—Model Form for Initial Opt-out Notice (Joint Notice)—[Your Choice To Limit Marketing]/[Marketing Opt-out]

• The [ABC group of companies] is providing this notice.

• [Optional: Federal law gives you the right to limit some but not all marketing from the [ABC] companies. Federal law also requires us to give you this notice to tell you about your choice to limit marketing from the [ABC] companies.]

• You may limit the [ABC] companies, such as the [ABC credit card, insurance brokerage, and securities brokerage] affiliates, from marketing their products or services to you based on your personal information that they receive from other [ABC] companies. This information includes your [income], your [account history], and your [credit score].

• Your choice to limit marketing offers from the [ABC] companies will apply [until you tell us to change your choice]/[for x years from when you tell us your choice]/[for at least 5 years from when you tell us your choice]. [Include if the opt-out period expires.] Once that period expires, you will receive a renewal notice that will allow you to continue to limit marketing offers from the [ABC] companies for [another x years]/[at least another 5 years].

• [Include, if applicable, in a subsequent notice, including an annual notice, for consumers who may have previously opted out.] If you have already made a choice to limit marketing offers from the [ABC] companies, you do not need to act again until you receive the renewal notice.

To limit marketing offers, contact us [include all that apply]:

• By telephone: 1–877–###–####
• On the *Web: www.---.com*
• By mail: Check the box and complete the form below, and send the form to:

[Company name]
[Company address]

__Do not allow any company [in the ABC group of companies] to use my personal information to market to me.

C–3—Model Form for Renewal Notice (Single-Affiliate Notice)—[Renewing Your Choice To Limit Marketing]/[Renewing Your Marketing Opt-out]

• [Name of Affiliate] is providing this notice.

• [Optional: Federal law gives you the right to limit some but not all marketing from our affiliates. Federal law also requires us to give you this notice to tell you about your choice to limit marketing from our affiliates.]

• You previously chose to limit our affiliates in the [ABC] group of companies, such as our [credit card, insurance brokerage, and securities brokerage] affiliates, from marketing their products or services to you based on your personal information that we share with them. This information includes your [income], your [account history with us], and your [credit score].

• Your choice has expired or is about to expire.

To renew your choice to limit marketing for [x] more years, contact us [include all that apply]:

• By telephone: 1–877–###–####
• On the Web: *www.---.com*
• By mail: Check the box and complete the form below, and send the form to:

[Company name]
[Company address]

__Renew my choice to limit marketing for [x] more years.

C–4—Model Form for Renewal Notice (Joint Notice)—[Renewing Your Choice To Limit Marketing]/[Renewing Your Marketing Opt-out]

• The [ABC group of companies] is providing this notice.

• [Optional: Federal law gives you the right to limit some but not all marketing from the [ABC] companies. Federal law also requires us to give you this notice to tell you about your choice to limit marketing from the [ABC] companies.]

• You previously chose to limit the [ABC] companies, such as the [ABC credit card, insurance brokerage, and securities

brokerage] affiliates, from marketing their products or services to you based on your personal information that they receive from other ABC companies. This information includes your [income], your [account history], and your [credit score].

• Your choice has expired or is about to expire.

To renew your choice to limit marketing for [x] more years, contact us [include all that apply]:

• By telephone: 1–877–###–####
• On the Web: *www.---.com*
• By mail: Check the box and complete the form below, and send the form to:

[Company name]
[Company address]

__Renew my choice to limit marketing for [x] more years.

C–5—Model Form for Voluntary ''No Marketing'' Notice—Your Choice To Stop Marketing

• [Name of Affiliate] is providing this notice.

• You may choose to stop all marketing from us and our affiliates.

To stop all marketing, contact us [include all that apply]:

• By telephone: 1–877–###–####
• On the Web: *www.---.com*
• By mail: Check the box and complete the form below, and send the form to:

[Company name]
[Company address]

__Do not market to me.

Dated: October 12, 2007.

John C. Dugan,

Comptroller of the Currency.

By order of the Board of Governors of the Federal Reserve System, October 23, 2007.

Jennifer J. Johnson,

Secretary of the Board.

By order of the Board of Directors,

Dated at Washington, DC., this 16th day of October, 2007.

FEDERAL DEPOSIT INSURANCE CORPORATION

Robert E. Feldman,

Executive Secretary.

Dated: September 27, 2007.

By the Office of Thrift Supervision,

John M. Reich,

Director.

By order of the National Credit Union Administration Board, October 15, 2007.

Mary F. Rupp,

Secretary of the Board.

[FR Doc. 07–5349 Filed 11–6–07; 8:45 am]

BILLING CODE 4810–33–P; 6210–01–P; 6714–01–P; 6720–01–P; 7535–01–P

Federal Register

Wednesday,
November 7, 2007

Part III

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Revised Proposed Rule To Amend the Listing for the Preble's Meadow Jumping Mouse (*Zapus hudsonius preblei*) To Specify Over What Portion of Its Range the Subspecies Is Threatened; Proposed Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AV64

Endangered and Threatened Wildlife and Plants; Revised Proposed Rule To Amend the Listing for the Preble's Meadow Jumping Mouse (*Zapus hudsonius preblei)* To Specify Over What Portion of Its Range the Subspecies Is Threatened

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Revised proposed rule.

SUMMARY: Under the authority of the Endangered Species Act of 1973, as amended (Act), we, the U.S. Fish and Wildlife Service (Service), revise our February 2, 2005 (70 FR 5404), proposed rule to remove the Preble's meadow jumping mouse (*Zapus hudsonius preblei*) (Preble's) from the List of Endangered and Threatened Wildlife. We now propose to amend the listing for the Preble's meadow jumping mouse to specify over what portion of its range the subspecies is threatened. The best scientific and commercial data available demonstrates that: The Preble's meadow jumping mouse is a valid subspecies and should not be delisted based upon taxonomic revision; the subspecies is not threatened throughout all of its range; and the portion of the current range of the subspecies located in Colorado represents a significant portion of the current range where the Preble's meadow jumping mouse is likely to become endangered within the foreseeable future, and the subspecies in that portion of its range should retain its threatened status. We seek comments from the public regarding this revised proposal. Comments previously submitted need not be resubmitted as they have already been incorporated into the public record and will be fully considered in the final determination.

DATES: *Written Comments:* We will consider comments on this revised proposed rule that we receive by the close of business on January 22, 2008. Any comments we receive after the closing date may not be considered in our final decision on the proposal.

Open House and Public Hearing: We will hold an open house and public hearing on this revised proposed rule in Colorado on December 10, 2007 and in Wyoming on December 12, 2007. Each open house will run from 4 p.m. to 5 p.m., with brief presentations about this revised proposed rule given at 4 p.m., and each public hearing will run from 6 p.m. to 8 p.m.

ADDRESSES: *Written Comments:* If you wish to comment on this revised proposed rule, you may submit your comments and materials by any one of several methods:

(1) *By mail to:* Susan Linner, Field Supervisor, Colorado Field Office, Ecological Services, P.O. Box 25486, MS–65412, Denver Federal Center, Denver, CO 80225.

(2) *By hand-delivery to:* Susan Linner, Colorado Field Office at 134 Union Blvd., Suite 670, Lakewood, CO 80228.

(3) *By fax to:* (303) 236–4005.

(4) *By electronic mail (e-mail) to: FW6_PMJM@fws.gov*. Please see the Public Comments Solicited section below for other information about electronic filing.

(5) *By the Federal eRulemaking Portal at: http://www.regulations.gov*. Follow the instructions on that Web site for submitting comments.

Open House and Public Hearing: We will hold an open house and public hearing at the Colorado Field Office, 134 Union Boulevard, Room 100A—Eagle Conference Room, Lakewood, CO 80228 and at the First State Bank Conference Center, 1405 16th Street, Wheatland, WY 82201.

FOR FURTHER INFORMATION CONTACT: Susan Linner, Field Supervisor, U.S. Fish and Wildlife Service, Colorado Field Office at 134 Union Blvd., Suite 670, Lakewood, CO 80228; telephone (303) 236–4773; facsimile (303) 236–4005. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at (800) 877–8339.

SUPPLEMENTARY INFORMATION:

Public Comments Solicited

We intend that any final action resulting from this proposal will be as accurate and as effective as possible. Therefore, we solicit data, comments, new information, or suggestions from the public, other concerned governmental agencies, the scientific community, industry, or any other interested party concerning this revised proposed rule. Generally, we seek information, data, and comments concerning:

(1) Survey results for Preble's meadow jumping mouse, as well as any studies that may show distribution, status, population size, or population trends;

(2) Pertinent aspects of life history, ecology, and habitat use of Preble's meadow jumping mouse, especially those pertaining to its relationship to the western jumping mouse *(Zapus princeps)*;

(3) Current and foreseeable threats faced by the Preble's meadow jumping mouse in relation to the five factors (as defined in section 4(a)(1) of the Act (16 U.S.C. 1531 et seq.));

(4) Effects of current and foreseeable land management practices on Preble's meadow jumping mouse status, including conservation efforts;

(5) Our analysis and conclusions regarding the conservation status of the Preble's meadow jumping mouse throughout all of its range, in particular information relative to the long-term security of existing populations of the subspecies in Wyoming.

(6) Our analysis and conclusions regarding ''significant portion of its range'' in light of the March 14, 2007, Department of the Interior, Solicitor Memorandum opinion available at *http://www.doi.gov/solicitor/M37013.pdf;*

(7) The contribution of both the Wyoming and Colorado portions of the range to the status of the subspecies;

(8) The range of the subspecies as defined in this proposal and the areas where the protections of the Act should remain in place (see ''*Significant Portion of the Range Where the Subspecies is Threatened'' for specific information solicited*) and

(9) The Sustainable Ecosystems Institute (SEI) report ''Evaluation of scientific information regarding Preble's meadow jumping mouse'' (available at *http://www.fws.gov/mountain-prairie/species/mammals/preble/*) and other information concerning the taxonomic status of Preble's meadow jumping mouse.

You may submit your comments and materials concerning this revised proposed rule by one of several methods (see **ADDRESSES**). If you use e-mail to submit your comments, please submit them in ASCII file format and avoid the use of special characters and encryption. Please include ''Attn: Preble's meadow jumping mouse'' in your e-mail subject header, preferably with your name and return address in the body of your message. If you do not receive a confirmation from the system that we have received your e-mail, contact us directly by calling our Colorado Field Office at (303) 236–4773. Please note that we must receive comments by the date specified in the **DATES** section in order to consider them in our final determination and that we will close out the e-mail address *FW6_PMJM@fws.gov* at the termination of the public comment period.

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. We will always make submissions from organizations and businesses, and from individuals identifying themselves as representatives or officials of organizations and businesses, available for public inspection in their entirety.

Comments and materials we receive, as well as supporting documentation we used in preparing this revised proposed rule, will be available for public inspection, by appointment, during normal business hours at the U.S. Fish and Wildlife Service Colorado Field Office, 134 Union Blvd., Suite 670, Lakewood, CO 80228, (telephone (303) 236–4773) . We will take into consideration all substantive comments and any pertinent information we receive during the comment period on this revised proposed rule during the preparation of a final rulemaking. Accordingly, the final decision may differ from this proposal.

Open Houses and Public Hearings

We will hold open houses and public hearings on the dates listed in the **DATES** section, and at the addresses listed in the **ADDRESSES** section, of this document. Anyone wishing to make an oral statement for the record at either of the public hearing is encouraged to provide a written copy of his or her statement and present it to us at the hearing. Persons wishing to make an oral statement at the public hearing may sign up only at the open house or at the public hearing; we will not reserve speaking time in advance of the open house. In the event that there is a large attendance, the time allotted for oral statements may be limited. Oral and written statements receive equal consideration. There are no limits on the length of written comments submitted to us. If you have any questions concerning the open house or public hearing, please contact Sharon Rose at (303) 236–4580. Persons needing reasonable accommodations in order to attend and participate in the open house or public hearing should contact Sharon Rose as soon as possible in order to allow sufficient time to process requests. Please call no later than 1 week before the hearing date. Information regarding this revised proposal is available in alternative formats upon request.

Previous Federal Actions

We listed Preble's meadow jumping mouse as threatened under the Act on May 13, 1998 (63 FR 26517). We designated critical habitat for Preble's meadow jumping mouse on June 23, 2003 (68 FR 37275). On May 22, 2001 (66 FR 28125), we adopted a final section 4(d) special rule for the Preble's meadow jumping mouse that provides exemptions from section 9 take prohibitions for certain rodent control activities, ongoing agricultural activities, maintenance and replacement of existing landscaping, and existing uses of water. On October 1, 2002 (67 FR 61531), we amended this rule to provide exemptions for certain noxious weed control and ditch maintenance activities. The special rule, as amended, was scheduled to sunset May 22, 2004, but was made permanent on May 20, 2004 (69 FR 29101).

In June 2000, the Service established the Preble's Meadow Jumping Mouse Recovery Team composed of scientists and stakeholders. In June 2003, the Recovery Team provided their recommendations to the Service in the form of a draft recovery plan. This technical working draft was revised by the Service in November 2003. The Preliminary Draft Recovery Plan suggested long-term protection of: One large population (with June abundances of 2,500 or more individuals), two medium populations (with June abundances of 500–2,499 individuals), and six small populations (with evidence of occupancy; possibly 150 mice) within the North Platte River basin two large, three medium, and eighteen small populations within the South Platte River basin and one large population, and six small populations within the Arkansas River basin (Service 2003b, p. 19–23). Recovery planning efforts were halted in December 2003 after new information became available questioning the taxonomic validity of the subspecies. While the availability of this document (hereafter referred to as the Preliminary Draft Recovery Plan (Service 2003b)) has not yet been announced in the **Federal Register**, it represents the best available information on the recovery needs of the subspecies.

On December 23, 2003, we received two nearly identical petitions, from the State of Wyoming's Office of the Governor and Coloradans for Water Conservation and Development, seeking to remove Preble's meadow jumping mouse from the Federal List of Endangered and Threatened Wildlife (Freudenthal 2003; Sonnenberg 2003). The petitions maintained that Preble's meadow jumping mouse should be delisted based on the taxonomic revision suggested by Ramey *et al.* (2003) and new distribution, abundance, and trends data which suggested the subspecies was no longer threatened or endangered (Freudenthal 2003, p. 1; Sonnenberg 2003, p. 1).

On March 31, 2004, we published a notice announcing a 90-day finding that the petitions presented substantial information indicating that the petitioned action may be warranted (69 FR 16944). On February 2, 2005, we published a 12-month finding that the petitioned action was warranted, and a proposed rule to remove Preble's meadow jumping mouse from the Federal List of Endangered and Threatened Wildlife, and opened a 90-day public comment period (70 FR 5404). The proposed delisting was based upon a taxonomic revision suggested by Ramey *et al.* (2004a (a revision of Ramey *et al.* 2003)), which concluded that Preble's meadow jumping mouse should be synonymized with a neighboring subspecies (Ramey *et al.* 2004a, pp. 1, 13). Although this report remained unpublished and had received mixed peer reviews, we concluded that a lack of distinct genetic and morphologic differences suggested that Preble's meadow jumping mouse was likely not a valid subspecies of meadow jumping mouse (*Zapus hudsonius*). Considering the weight that we gave Ramey *et al.* (2004a) in the proposed delisting, verifying the results of this study prior to making a final decision on the proposal was a high priority of the Service (Williams 2004; Morgenweck 2005). As such, we contracted with the U.S. Geological Survey (USGS) to conduct additional genetic analysis of Preble's meadow jumping mouse and four neighboring subspecies of meadow jumping mice (U.S. Geological Survey 2005, pp. 1–4).

On January 25, 2006, USGS released its report concluding that Preble's meadow jumping mouse should not be synonymized with neighboring subspecies of meadow jumping mice (King *et al.* 2006a, pp. 2, 29). On February 17, 2006, the Service extended the rulemaking process an additional 6 months as allowed under section 4(b)(6)(B)(i) of the Act because this USGS study indicated that there was substantial disagreement regarding the sufficiency or accuracy of the available data relevant to the determination contained in our proposed rule (71 FR 8556). We reopened the comment period for an additional 60 days and announced that we intended to assemble a panel of experts to carefully review and assess the two studies.

On March 30, 2006, we published a notice of availability of the King *et al.* (2006a) and Ramey *et al.* (2005) data and extended the comment period on the proposed delisting rule an additional 30 days (71 FR 16090). We then contracted with Sustainable Ecosystems Institute (SEI) to organize a scientific review panel to analyze, assess, and weigh the reasons why the data, findings, and conclusions of King *et al.* differ from the data, findings, and conclusions of Ramey *et al.* (as written in this sentence, and hereafter, ''Ramey *et al.*'' or ''King *et al.*'' without a modifying date refers to the overall work of these authors instead of a specific publication) (Service 2006, p. 14). On July 21, 2006, SEI delivered a final report to the Service (SEI 2006a).

On September 26, 2006, the State of Wyoming submitted a 60-day notice of intent to sue over our failure to publish a final determination on our 2005 proposed delisting rule within the timeframes allowed by the Act. On January 24, 2007, the State of Wyoming filed a petition for review with the court. On June 22, 2007, the Service and the State of Wyoming reached a settlement agreement which required that, by October 31, 2007, we submit to the **Federal Register** for publication either (1) a withdrawal of our 2005 proposed delisting regulation; or (2) a new proposed regulation considering the Preble's meadow jumping mouse's taxonomy and the subspecies' threatened status in light of all current distribution, abundance, and trends data (*State of Wyoming* v. *U.S. Department of the Interior*, No. 07CV025J (District of Wyoming 2007)). If a new proposed regulation is deemed necessary, the Service is required to submit a final determination to the **Federal Register** no later than June 30, 2008.

Public Comments on the 2005 Proposed Rule

From February 2, 2005, through May 3, 2005 (70 FR 5404, February 2, 2005), and from February 17, 2006, through May 18, 2006 (71 FR 8556, February 17, 2006; 71 FR 16090, March 30, 2006), we solicited, from all interested parties, comments and information that might contribute to the final delisting determination for the Preble's meadow jumping mouse. We received a total of 67 written comments, including 28 comments during the initial comment period and 39 during the reopened comment period. These included comments from: The Governor of the State of Wyoming; the Attorney General of the State of Wyoming; the Colorado Department of Natural Resources; U.S. Forest Service, Rocky Mountain Region; 6 comments from local governments; and 57 comments from individuals or groups. During the reopened comment period we also received a challenge under the Information Quality Act (44 U.S.C. 3516) to influential information disseminated by the Service during this rulemaking process. This challenge and our response are available at *http://www.fws.gov/informationquality/*. This response has been appealed and the appeal is currently under review by the Service. Because we received the original challenge during the open public comment period, these issues are considered public comments on our proposed rule.

In accordance with our July 1, 1994, Interagency Cooperative Policy for Peer Review in Endangered Species Act Activities (59 FR 34270), we solicited five expert peer reviews of our proposed rule (70 FR 5404, February 2, 2005). We selected peer reviewers for expertise in genetics, systematics (the science of dealing with the diversity of organisms), and small mammals. We excluded previous peer reviewers of Ramey et al. and King et al. from this solicitation. Three of the experts approached provided comments (Hoekstra 2005; Kelt 2005; Spencer 2005). After reopening the public comment period on February 17, 2006 (71 FR 8556), we contacted the same five experts and invited them to provide additional comments given the availability of new information (i.e., King et al. 2006a). Two of these reviewers provided comments (Kelt 2006; Spencer 2006a).

All previously submitted comments have been included in the public record and will be considered in the final determination regarding this proposal. Comments previously submitted need not be resubmitted. Additionally, all of the previously submitted comments and reviews relevant to the taxonomy discussion were made available to the SEI panel for its consideration. Substantive comments will be addressed in a series of issues and responses in our final determination.

General Information

Meadow jumping mice (*Zapus hudsonius*) are small rodents with long tails, large hind feet, and long hind legs. Total length of an adult is approximately 187 to 255 millimeters (7 to 10 inches), with the tail comprising 108 to 155 millimeters (4 to 6 inches) of that length (Krutzsch 1954, p. 420; Fitzgerald et al. 1994, p. 291).

Across their range, meadow jumping mice typically occur in moist habitats, including low undergrowth consisting of grasses, forbs, or both, in open wet meadows and riparian corridors, or where tall shrubs and low trees provide adequate cover (Krutzsch 1954, p. 351; Armstrong 1972, p. 248; Jones et al. 1983, p. 238). Trainor et al. (2007, pp. 471–472) found that high use areas for Preble's meadow jumping mouse tended to be close to creeks and were positively associated with the percentage of shrubs, grasses, and woody debris. Hydrologic regimes that support Preble's meadow jumping mouse habitat range from large perennial rivers such as the South Platte River to small drainages only 1 to 3 meters (m) (3 to 10 feet (ft)) in width.

Meadow jumping mice are primarily nocturnal or crepuscular (active during twilight), but also may be active during the day. The Preble's meadow jumping mouse uses uplands at least as far out as 100 m (330 ft) beyond the 100-year floodplain (Shenk and Sivert 1999a, p. 11; Ryon 1999, p. 12; Schorr 2001, p. 14; Shenk 2004; Service 2003b, p. 26). While the Preble's meadow jumping mouse dispersal capabilities are thought to be limited, in one instance a Preble's meadow jumping mouse was documented moving as far as 1.1 kilometers (km) (0.7 mile (mi)) in 24 hours (Ryon 1999, p. 12). The Preble's meadow jumping mouse typically enters hibernation between September and October and emerges the following May (Whitaker 1963, p. 5; Meaney et al. 2003).

For additional information on the biology of this subspecies, see the May 13, 1998, final rule to list the Preble's meadow jumping mouse as threatened (63 FR 26517) and the June 23, 2003, final rule designating critical habitat (68 FR 37275).

Taxonomy

The Preble's meadow jumping mouse is a member of the family *Dipodidae* (jumping mice) (Wilson and Reeder 1993, p. 499), which contains four extant genera. Two of these, *Zapus* (jumping mice) and *Napaeozapus* (woodland jumping mice), are found in North America (Hall 1981, p. 841; Wilson and Ruff 1999, pp. 665–667).

In his 1899 study of North American jumping mice, Edward A. Preble concluded the *Zapus* genus consisted of 10 species (Preble 1899, pp. 13–41). According to Preble (1899, pp. 14–21), *Z. hudsonius* (the meadow jumping mouse) included five subspecies. Preble (1899, pp. 20–21) classified all specimens of the meadow jumping mouse from North Dakota, Montana, South Dakota, Wyoming, Nebraska, Colorado, and Missouri as a single subspecies, *Z. hudsonius campestris.* Cockrum and Baker (1950, pp. 1–4) later designated specimens from Nebraska,

Kansas, and Missouri as a separate subspecies, *Z. h. pallidus.*

Krutzsch (1954, pp. 352–355) revised the taxonomy of the *Zapus* genus after studying morphological characteristics of 3,600 specimens. This revision reduced the number of species within this genus from 10 to 3, including *Z. hudsonius* (the meadow jumping mouse), *Z. princeps* (the western jumping mouse), and *Z. trinotatus* (the Pacific jumping mouse). According to Krutzsch (1954, pp. 385–453), the meadow jumping mouse included 11 subspecies.

Krutzsch (1954, pp. 452–453) described and named the subspecies Preble's meadow jumping mouse (*Zapus hudsonius preblei*) based on geographic separation and morphological (physical form and structure of an organism) differences. Krutzsch (1954, pp. 452–453) discussed the presence of physical habitat barriers and the lack of known intergradation (merging gradually through a continuous series of intermediate forms or populations) between the Preble's meadow jumping mouse, known only from eastern Colorado and southeastern Wyoming, and other identified subspecies of meadow jumping mice ranging to the east and north. Additionally, Krutzsch (1954, pp. 452–453) evaluated the morphometric characteristics of 4 adult and 7 non-adult specimens. Acknowledging the small number of samples upon which his conclusion was based, Krutzsch (1954, p. 453) nonetheless concluded that the differences between Preble's meadow jumping mouse and neighboring meadow jumping mice was considerable and enough to warrant a subspecific designation.

In Krutzsch's analysis, the subspecies neighboring Preble's meadow jumping mouse included *Z. h. campestris* in northwestern Wyoming, southwestern South Dakota, and southeastern Montana; *Z. h. intermedius* in North Dakota, and northwestern, central, and eastern South Dakota; and *Z. h. pallidus* (Cockrum and Baker 1950) in Nebraska, Kansas, and Missouri (Krutzsch 1954, pp. 441–442, 447–452). Among recognized subspecies, Krutzsch (1954, p. 452) found that Preble's meadow jumping mouse most closely resembled *Z. h. campestris* from northeastern Wyoming, but documented differences in coloration and skull characteristics.

In 1981, Hafner et al. (1981, p. 501) identified *Zapus hudsonius luteus* from Arizona and New Mexico as the 12th subspecies of meadow jumping mouse. This population had previously been assumed to be a subspecies of western jumping mouse (Krutzsch 1954, pp. 406–407; Hall and Kelson 1959, pp. 774–776; Jones 1981, p. iv).

Krutzsch's description (1954) as modified by Hafner et al. (1981, p. 501), with 12 subspecies of meadow jumping mice, was generally accepted by most small mammal taxonomists for the past half-century (Hall and Kelson 1959, pp. 771–774; Long 1965, pp. 664–665; Armstrong 1972, pp. 248–249; Whitaker 1972, pp. 1–2; Hall 1981, pp. 841–844; Jones et al. 1983, pp. 238–239; Clark and Stromberg 1987, p. 184; Wilson and Reeder 1993, p. 499; Hafner et al. 1998, pp. 120–121; Wilson and Ruff 1999, pp. 666–667).

Other Taxonomic Information Available Prior to Listing

As part of a doctoral dissertation, Jones (1981, pp. 4–29, 229–303, 386–394, 472) analyzed the morphology of 9,900 specimens within the *Zapus* genus from across North America, including 39 Preble's meadow jumping mouse specimens. Jones's dissertation (1981, p. 144) concluded that the Pacific jumping mouse was not a valid taxon and suggested reducing the number of species in the genus to two (the western jumping mouse and the meadow jumping mouse). At the subspecific level, Jones (1981, pp. V, 303) concluded that no population of meadow jumping mouse was sufficiently isolated or distinct to warrant subspecific status. Regarding the Preble's meadow jumping mouse, Jones (1981, pp. 288–289) wrote that ''No named subspecies is geographically restricted by a barrier, with the possible exception of *Z. h. preblei* [Preble's meadow jumping mouse]'' which ''appears to be isolated,'' but that ''no characteristics indicate that these populations have evolved into a separate taxon.'' Jones did not compare the Preble's meadow jumping mouse to *Z. h. campestris*, a neighboring subspecies, nor did he conduct statistical tests of morphology between the Preble's meadow jumping mouse and any other subspecies. Jones's (1981) findings were not published in a peer-reviewed journal and were not incorporated into the formal jumping mouse taxonomy, leaving his conclusions difficult to evaluate.

Prior to listing, the Colorado Division of Wildlife (CDOW) contracted for a genetic analysis of the Preble's meadow jumping mouse (Riggs et al. 1997). Riggs et al. (1997, p. 1) examined a small number of base-pairs (433) in one region of the mitochondrial deoxyribonucleic acid (mtDNA) (maternally inherited genetic material) across 5 subspecies of meadow jumping mouse (92 specimens). This study concluded that the Preble's meadow jumping mouse specimens formed a homogenous group recognizably distinct from other nearby populations of meadow jumping mice (Riggs et al. 1997, p. 12). At the request of the Service, Hafner (1997, p. 3) reviewed the Riggs study, inspected Riggs' original sequence data, and agreed with its conclusions. The Riggs et al. (1997) results were not published in a peer-reviewed journal. Prior to listing, this study was the only available information concerning the genetic uniqueness of the Preble's meadow jumping mouse.

Our original listing determined that Krutzsch's (1954) revision of the meadow jumping mouse species, including the description of the Preble's meadow jumping mouse, was widely supported by the scientific community as indicated by the available published literature (63 FR 26517, May 13, 1998). Our 1998 determination weighed the information in unpublished reports, such as Jones (1981), and public comments on the rule and found that they did not contain enough scientifically compelling information to suggest that revising the existing taxonomy was appropriate (63 FR 26517, May 13, 1998). Our 1998 conclusion was consistent with Service regulations that require us to rely on standard taxonomic distinctions and the biological expertise of the Department and the scientific community concerning the relevant taxonomic group (50 CFR 424.11).

Taxonomic Information Solicited After Listing

In July 2003, we entered into a cooperative agreement with the Denver Museum of Natural Science (DMNS) to determine if the Preble's meadow jumping mouse was a unique subspecies relative to other nearby subspecies of meadow jumping mice (Service 2003a, pp. 1–2). This task was a priority of the Recovery Team (Service 2003a, pp. 1–2; Service 2003b, pp. iv, 38, 43, 76). In December 2003, we received a draft report from the DMNS examining the uniqueness of the Preble's meadow jumping mouse relative to other nearby subspecies of meadow jumping mice (Ramey et al. 2003). In August 2005, an expanded version of this original report was published in the journal ''Animal Conservation'' (Ramey et al. 2005). This publication included an examination of morphometric differences, mtDNA, and microsatellite DNA (a short, noncoding DNA sequence, usually 2 to 5 base-pairs, that is repeated many times within the genome of an organism). Ramey et al. (2005, pp. 339–341) also examined the literature for evidence of

ecological exchangeability among subspecies (a test of whether individuals can be moved between populations and can occupy the same ecological niche).

Ramey et al.'s morphometric analysis tested 9 skull measurements of 40 Preble's meadow jumping mice, 40 *Z. h. campestris*, and 37 *Z. h. intermedius* specimens (Ramey et al. 2005, p. 331). Their results did not support Krutzsch's (1954, p. 452) original description of the Preble's meadow jumping mouse as ''averaging smaller in most cranial measurements'' (Ramey et al. 2005, p. 334). Ramey et al. (2005, p. 334) found that only one cranial measurement was significantly smaller, while two cranial measurements were significantly larger.

Ramey et al. examined a small number of base-pairs (346) in 1 region of the mtDNA across 5 subspecies of meadow jumping mice (205 specimens) (Ramey et al. 2005, pp. 331–332, 335). Ramey et al. (2005, p. 335, 338) found low levels of difference between the Preble's meadow jumping mouse and neighboring subspecies. Their data demonstrated that all of the mtDNA haplotypes (alternate forms of a particular DNA sequence or gene) found in the Preble's meadow jumping mouse were also found in *Z. h. campestris.* The mtDNA data demonstrated evidence of recent gene flow between the Preble's meadow jumping mouse and neighboring subspecies (Ramey et al. 2005, p. 338).

Ramey et al. (2005, pp. 333–334, 338) analyzed a small number (5) of microsatellite loci (the specific position of a gene or other chromosomal marker) across 5 subspecies of meadow jumping mice (195 specimens). Ramey et al. (2005, p. 340) concluded that these results were consistent with morphometric and mtDNA results.

Based on morphometrics, mtDNA, and microsatellites data, and a lack of recognized adaptive differences, Ramey et al. (2005, p. 340) suggested synonymizing the Preble's meadow jumping mouse and *Z. h. intermedius* with *Z. h. campestris.*

Prior to publication of Ramey et al. (2005) in ''Animal Conservation,'' the CDOW and the Service solicited 16 peer reviews of the 2004 draft report provided to the Service (Ramey et al. 2004a). Fourteen of these reviewers provided comments (Armstrong 2004; Ashley 2004; Bradley 2004; Conner 2004; Crandall 2004; Douglas 2004; Hafner 2004; Meaney 2004; Mitton 2004; Oyler-McCance 2004; Riddle 2004; Sites 2004; Waits 2004; White 2004). In 2005, the Service approached the same 16 experts to review Ramey et al. 2004b (an expansion of Ramey et al. 2004a). Eleven of these reviewers provided comments (Ashley 2005; Baker and Larsen 2005; Bradley 2005; Crandall 2005; Douglas 2005; Hafner 2005; Maldonado 2005; Mitton 2005; Oyler-McCance 2005; Waits 2005; White 2005). In August 2006, ''Animal Conservation'' published two critiques of Ramey et al. (2005) (Martin 2006; Vignieri et al. 2006) and two responses (Crandall 2006b; Ramey et al. 2006a).

While many of the reviewers supported the findings of Ramey et al. (Baker and Larsen 2005; Bradley 2004, 2005; Crandall 2004, 2005; Hafner 2004; Maldonado 2005; Meaney 2004; Mitton 2004, 2005; Riddle 2004; Sites 2004; Waits 2004, 2005), the reviews raised a number of important issues. Some of the most significant issues identified included: (1) Reliance upon museum specimens which can be prone to contamination (Douglas 2004, 2005; Maldonado 2005); (2) the reliability of, and failure to validate, specimens' museum tag locality (and thus subspecies) identification (Ashley 2005; Douglas 2004, 2005; Hafner 2004; Oyler McCance 2004, 2005); (3) reliance upon a small portion of mtDNA (Ashley 2004, 2005; Baker and Larsen 2005; Crandall 2004, 2005; Douglas 2004, 2005; Hafner 2005; Maldonado 2005; Oyler-McCance 2004, 2005; Riddle 2004; Sites 2004; Waits 2004, 2005); (4) the small number of microsatellite DNA loci examined (Vignieri et al. 2006, p. 241); (5) the criteria used and factors considered to test taxonomic validity as well as alternative interpretations of the data (Ashley 2004; Conner 2004; Douglas 2004, 2005; Hafner 2005; Oyler-McCance 2004, 2005; Vignieri et al. 2006, pp. 241–242; White 2004); (6) whether the authors used an appropriate outgroup (a closely related group that is used as a rooting point of a phylogenetic tree) (Douglas 2004); (7) the sampling regime and its impact on the analysis (Maldonado 2005; Oyler-McCance 2004); (8) failure to test all of the morphological characters examined by Krutzsch (1954) (Vignieri et al. 2006, p. 238); (9) an inadequate evaluation of ecological exchangeability and habitat differences among subspecies (Ashley 2004; Conner 2004; Douglas 2004; Meaney 2004; Mitton 2004; Oyler-McCance 2004, 2005; Sites 2004; Vignieri et al. 2006, p. 238; Waits 2004, 2005); and (10) failure to consider the Preble's meadow jumping mouse's geographic isolation (Vignieri et al. 2006, pp. 237–238). Collectively, these critiques indicated that delisting based on the conclusions of Ramey et al. alone might be premature.

Because the proposed rule to delist the Preble's meadow jumping mouse relied solely upon an unpublished report (Ramey et al. 2004a) that had received mixed peer reviews (see above), verifying these results was a high priority of the Service (Morgenweck 2005; Williams 2004). Thus, in 2006, the Service contracted with USGS to conduct an independent genetic analysis of several meadow jumping mouse subspecies (U.S. Geological Survey 2005, pp. 1–4). The USGS study concluded that the Preble's meadow jumping mouse should not be synonymized with neighboring subspecies (King et al. 2006a, pp. 2, 29). An expanded version of this report was published in the journal ''Molecular Ecology'' (King et al. 2006b). This publication included an examination of microsatellite DNA, 2 regions of mtDNA, and 15 specimens critical to the conclusions of Ramey et al. (2005).

King et al.'s (2006b, p. 4336) microsatellite analysis examined approximately 4 times the number of microsatellite loci (21) and 1½ times more specimens (348 specimens) than Ramey et al. (2005) across the same 5 subspecies of meadow jumping mice. King et al. (2006b, p. 4337) concluded that their microsatellite data demonstrated a strong pattern of genetic differentiation between the Preble's meadow jumping mouse and neighboring subspecies. King et al. (2006b, pp. 4336–4341) also reported that multiple statistical tests of the microsatellite data verified this differentiation.

In their evaluation of mtDNA, King et al. (2006b, p. 4341) examined approximately 4 times the number of base-pairs across 2 regions (374 control region and 1,006 cytochrome-B region base-pairs) and 1½ times more specimens (320 specimens for the control region analysis and 348 for the cytochrome-B analysis) than Ramey et al. (2005) across the same 5 subspecies of meadow jumping mice. King et al. (2006b, p. 4341) concluded that these data suggested strong, significant genetic differentiation among the five subspecies of meadow jumping mice surveyed. Additionally, their results indicated that the Preble's meadow jumping mouse did not share haplotypes with any neighboring subspecies (King et al. 2006b, p. 4341). Such haplotype sharing had led Ramey et al. to previously conclude that the Preble's meadow jumping mouse was not unique; specifically, Ramey et al. concluded that because all of the Preble's meadow jumping mouse haplotypes were found in *Z. h. campestris*, the Preble's meadow jumping mouse was a less genetically variable population of *Z. h. campestris*

(Ramey et al. 2004a, pp. 1, 9; 2005, p. 335). Because of these conflicting results, King et al. (2006b, pp. 4355–4357) reexamined 15 specimens from the University of Kansas Museum collection relied upon by Ramey et al. in determining that neighboring subspecies shared haplotypes. Among the specimens reported to contain the Preble's meadow jumping mouse's haplotypes by Ramey et al. (2005, pp. 335–336), King et al. (2006b, p. 4357) found that the results could not be repeated. If these specimens were removed from the analysis, neither study would illustrate haplotype sharing between the Preble's meadow jumping mouse and neighboring subspecies. King et al. (2006b, p. 4357) concluded that ''these findings have identified the presence of a systemic error in the control region data reported by Ramey et al. (2005)'' and ''calls into question all of the results of Ramey et al. (2005) based on the mtDNA genome and prevents analysis of the combined data.'' King et al. (2006, p. 4357) noted that possible reasons for the difference in sequences included contamination, mislabeling of samples, or other procedural incongruity.

Overall, King et al. (2006b, p. 19) concluded that there was considerable genetic differentiation among all five subspecies and found no evidence to support the proposal to synonymize the Preble's meadow jumping mouse, *Z. h. campestris*, and *Z. h. intermedius*.

Prior to its release, King et al. (2006a) underwent an internal peer review per USGS policy (U.S. Geological Survey 2003, pp. 3, 6, 12, 28–33). In an effort to provide consistent, comparable reviews, we solicited peer reviews from the same 16 reviewers asked to review Ramey et al. (2004a, 2004b). Nine of the experts provided comments (Armstrong 2006; Ashley 2006; Bradley 2006; Crandall 2006a; Douglas 2006; Hafner 2006; Maldonado 2006; Oyler-McCance 2006; Riddle 2006). Some of the most significant issues raised included the sampling regime and its impact on the analysis (Armstrong 2006; Ashley 2006; Crandall 2006a; Douglas 2006; Oyler-McCance 2006; Riddle 2006); and the criteria used and factors considered to test taxonomic validity and alternative interpretations of the data (Bradley 2006; Crandall 2006a).

Given the discrepancies between the Ramey et al. and King et al. reports, we contracted for a scientific review to analyze, assess, and weigh the reasons why the data, findings, and conclusions of the two studies differed (Service 2006, p. 14). Following an open and competitive bid process, we selected SEI as the contractor (Service 2006).

SEI assembled a panel of experts with the necessary scientific expertise in genetics and systematics (SEI 2006a, p. 7). The panelists reviewed, discussed, and evaluated all of the literature relevant to this issue, including published literature, unpublished reports, third-party critiques, and other materials suggested by interested parties (SEI 2006a, pp. 48–55). Additionally, the panel examined and reanalyzed the raw data (SEI 2006a, pp. 8, 21) used by Ramey et al. and King et al., including the mtDNA data, microsatellite DNA data, and original sequence chromatograms (automated DNA sequence data output recordings) (SEI 2006a, pp. 8, 23). The scientific review panel was open to the public and allowed for interactions among panel members, Dr. King, Dr. Ramey, other scientists, and the public.

In July 2006, SEI delivered a report outlining their conclusions to the Service (SEI 2006a). Although the panelists were not obligated to reach a consensus, they did not disagree on any substantive or stylistic issues (SEI 2006a, p. 9). Thus, the report represented the consensus of all three panelists, as well as the individual opinions of each panelist. The panel organized its evaluation into four sections corresponding with the different types of scientific evaluations performed, including morphology, ecological exchangeability, mtDNA, and microsatellite DNA. The panel's findings with regard to each are summarized briefly below. The full report is available for review at *http://www.fws.gov/mountain-prairie/species/mammals/preble/Prebles_SEI_report.pdf*.

Morphology: Although Ramey et al. (2005) examined two of the seven morphological characters identified by Krutzsch (1954, pp. 452–453), the panel found that all seven of these characters should have been reexamined in order to support the proposed taxonomic revision. The panel also concluded that the type specimen (a single specimen designated as the type by the original author at the time of publication of the original description of a taxon) of each taxon should have been included in the analysis. The panel's conclusion was that an insufficient test of the morphological definition of the Preble's meadow jumping mouse had been conducted to support the synonymy of the Preble's meadow jumping mouse with other subspecies (SEI 2006a, p. 41).

Ecological Exchangeability: The panel concluded that no persuasive evidence was presented regarding ecological exchangeability, and that the ecological exchangeability of the subspecies remains unknown (SEI 2006a, p. 41).

MtDNA: The panel noted that data provided by Ramey et al. (2005) and King et al. (2006b) differed in geographic sampling strategy, amount of sequence data examined, aspects of the analysis, and quality (SEI 2006a, p. 41). All of these could help explain why the two studies came to differing conclusions. However, the panel noted that the most significant difference between the two studies in terms of mtDNA was whether the Preble's meadow jumping mouse shared any mtDNA haplotypes with other subspecies of meadow jumping mice. Upon review of the raw data, the panel found evidence of contamination within some of the key sequences reported by Ramey et al. The panel concluded that there was no reliable evidence of any haplotype sharing (SEI 2006a, p. 42). The panel further determined that if these conflicting mtDNA sequences were removed from consideration, the two studies' mtDNA data would largely agree (SEI 2006a, p. 32). The panel also suggested that because the western jumping mouse and the meadow jumping mouse are distantly related, western jumping mouse may perform poorly as an outgroup, leading to poor resolution of relationships among meadow jumping mouse subspecies. While both Ramey et al. and King et al. used this outgroup, unrooted analysis showed clearer structuring between the subspecies (SEI 2006a, p. 42).

Microsatellite DNA: The panel found that the two microsatellite datasets contain similar information. The panel pointed out that both the Ramey et al. (2005) and King et al. (2006) microsatellite data, as well as Crandall and Marshall's (2006) reanalysis of these data, strongly support a statistically significant independent cluster that corresponds to the Preble's meadow jumping mouse, providing support for a distinct subspecies (SEI 2006a, pp. 42–43). The panel indicated that while the microsatellite data alone did not make a strong case for evolutionary significance, in concert with the mtDNA data (discussed above), the two datasets corroborate the distinctness of the Preble's meadow jumping mouse (SEI 2006a, pp. 43).

The panel's overall conclusion was that the available data are broadly consistent with the current taxonomic status of the Preble's meadow jumping mouse as a valid subspecies and that no evidence was presented that critically challenged its status (SEI 2006a, p. 4). In August 2006, Ramey et al. (2006c) submitted a statement to the Service disputing the findings and conclusions

of the SEI report. No new data or analyses were presented in this statement, and the panel previously considered most of the contentions (Ramey et al. 2003, 2004a, 2004b, 2005, 2006a, 2006b; SEI 2006a, 2006b, 2006c). Other evaluations of the available literature and data include Ramey et al. (in press), King et al. (in review), Crandall and Marshall (2006), Spencer (2006b), and Cronin (2007).

Taxonomic Conclusions

When listed in 1998, the Preble's meadow jumping mouse was widely recognized as a valid subspecies by the scientific community (Hall and Kelson 1959, pp. 771–774; Long 1965, pp. 664–665; Armstrong 1972, pp. 248–249; Whitaker 1972, pp. 1–2; Hall 1981, pp. 841–844; Jones et al. 1983, pp. 238–239; Clark and Stromberg 1987, p. 184; Wilson and Reeder 1993, p. 499; Hafner et al. 1998, pp. 120–121; Wilson and Ruff 1999, pp. 666–667). At the time of listing, Krutzsch (1954) represented the best available information on the taxonomy of the Preble's meadow jumping mouse (63 FR 26517, May 13, 1998). Our 1998 conclusion was consistent with Service regulations that require us to rely on standard taxonomic distinctions and the biological expertise of the Department and the scientific community concerning the relevant taxonomic group (50 CFR 424.11). However, when the best available science indicates that the generally accepted taxonomy may be in error, the Service must rely on the best available science (*Center for Biological Diversity, et al.*, v. *Robert Lohn, et al.*, 296 F. Supp. 2d. 1223 W.D. Wash. 2003). Such considerations led to our February 2, 2005, proposal to delist Preble's based upon information which questioned the subspecies' taxonomic validity (70 FR 5404).

We now determine the best scientific and commercial data available support the conclusion that the Preble's meadow jumping mouse is a valid subspecies. Specifically, the Preble's meadow jumping mouse's geographic isolation from other subspecies of meadow jumping mice (Krutzsch 1954, pp. 452–453; Long 1965, pp. 664–665; SEI 2006a, p. 34) has resulted in the accretion of considerable genetic differentiation (King et al. 2006b, pp. 4336–4348; SEI 2006a, pp. 41–43). The available data suggest that the Preble's meadow jumping mouse meets or exceeds numerous, widely accepted subspecies definitions (Mayr and Ashlock 1991, pp. 43–45; Patten and Unitt 2002, pp. 26–34; SEI 2006a, p. 44). In reaching this conclusion, we do not use a presumption that we must rely on the established taxonomy in the absence of conclusive data to the contrary (see SEI report at p. 39). In Therefore, after a review of all available information, we have determined that the taxonomic revision for the Preble's meadow jumping mouse suggested in our proposed delisting rule (70 FR 5404, February 2, 2005) is no longer appropriate.

Historical Range and Recently Documented Distribution

Generally, the Preble's meadow jumping mouse range includes portions of the North Platte, the South Platte, and the Arkansas River basins (Long 1965, p. 665; Armstrong 1972, pp. 248–249; Clark and Stromberg 1987, p. 184; Fitzgerald et al. 1994, p. 293; Clippinger 2002, p. 20).

At the time of listing, we described the historical range in Wyoming as including five counties (Albany, Laramie, Platte, Goshen, and Converse), but cited only two sites with recent reports of jumping mice likely to be the Preble's meadow jumping mouse. We cited a study by Compton and Hugie (1993, p. 6) suggesting the subspecies might be extirpated in Wyoming and comments by the Wyoming Game and Fish Commission that the Preble's meadow jumping mouse had likely been extirpated from most or all of its historical range in Wyoming (Wichers 1997).

At the time of listing, we assumed that most of the subspecies' current range was in Colorado. Within Colorado, the final listing rule described a presumed historical range including portions of ten counties (Adams, Arapahoe, Boulder, Denver, Douglas, El Paso, Elbert, Jefferson, Larimer, and Weld) and cited recent trapping efforts that documented the subspecies in seven of these ten counties (Boulder, Douglas, El Paso, Elbert, Jefferson, Larimer, and Weld).

Since we listed the Preble's meadow jumping mouse in 1998, knowledge about distribution of the subspecies has grown substantially. Numerous trapping surveys conducted during the last 9 years in Wyoming and Colorado have documented the subspecies' presence or likely absence at locations of suitable habitat. While many recent trapping efforts have been at locations with no record of historical surveys, most have been within the presumed historical range of the Preble's meadow jumping mouse or in adjacent drainages where habitat and elevation appeared suitable. Thus, the recent increase in sites of Preble's meadow jumping mouse occurrence likely represents an improvement in our understanding of the subspecies range as a result of increased trapping effort rather than any actual expansion of the range of the Preble's meadow jumping mouse.

In Wyoming, recent captures and confirmed identification have expanded our knowledge of the distribution of the Preble's meadow jumping mouse from the two sites documented at the time of listing to include over two dozen new plains, foothills, and montane sites east of the Laramie Mountains in the North Platte River basin, and presence in the Upper Laramie River drainage in Albany County (Taylor 1999; Service 2007). Post-listing activities have identified many additional sites occupied by the subspecies. These data also reveal that the Preble's meadow jumping mouse occurs in four of the five counties described as the likely historical range at the time of listing including Albany, Laramie, Platte, and Converse Counties.

At the time of listing, we discussed how increased trapping efforts in Colorado had recently documented distribution in Elbert, Larimer, and Weld Counties. We also suggested other sites where trapping should occur to determine if the Preble's meadow jumping mouse were present. Additional trapping since listing has expanded the documented distribution of the Preble's meadow jumping mouse in Colorado to include: additional foothill and montane sites along the Front Range in Larimer, Boulder, Jefferson, and Douglas Counties; previously untrapped rural prairie and foothill streams in southern Douglas County and adjacent portions of Elbert County; and additional prairie and foothill streams in northwestern El Paso County. Although we have identified some additional sites occupied by the Preble's meadow jumping mouse, over 80 percent of such trapping efforts throughout Colorado have failed to capture Preble's meadow jumping mice (as illustrated in Figure 1 below) (Service 2007).

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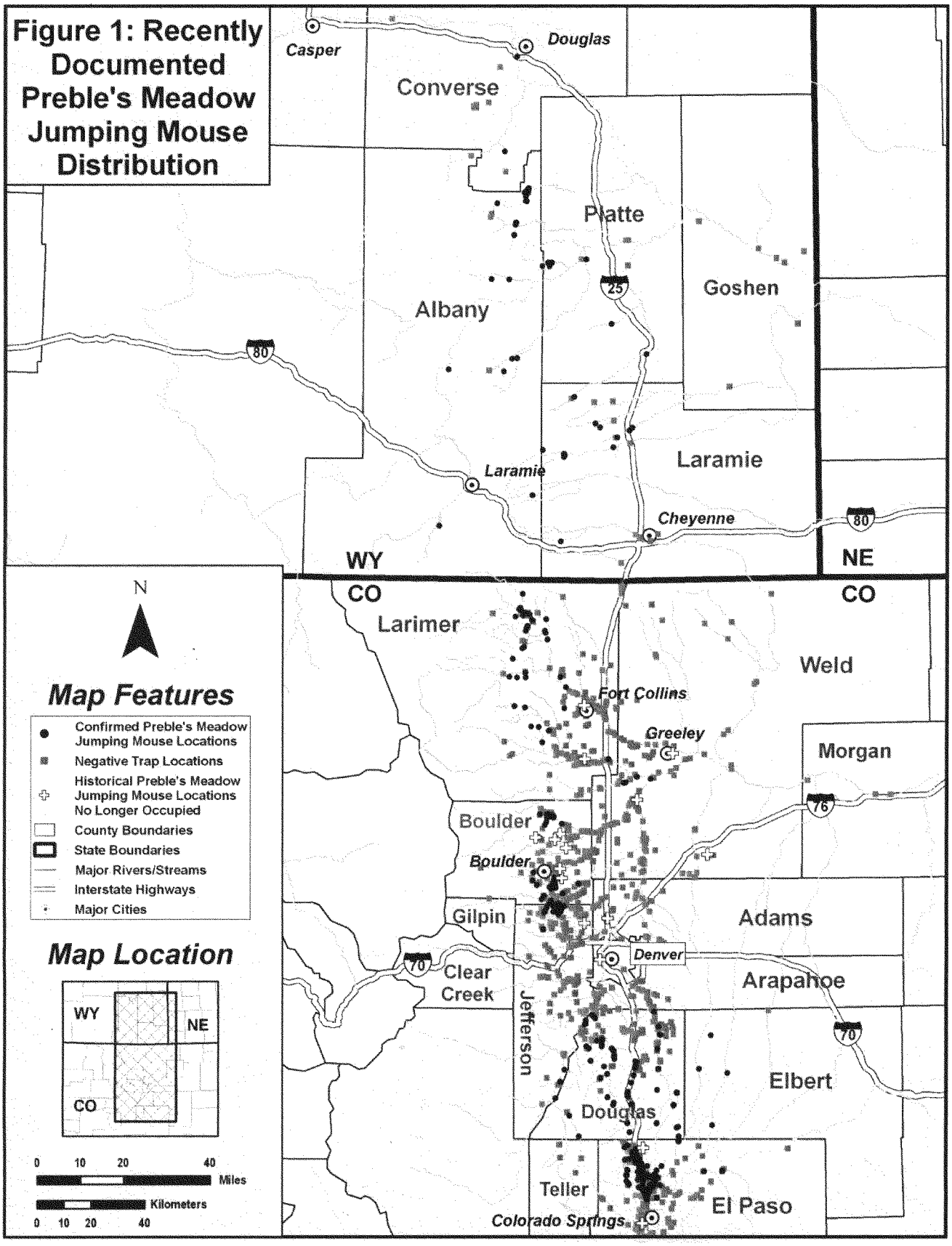

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These negative trap results suggest that the subspecies is rare or possibly extirpated from many portions of the subspecies' historical range in Colorado.

Areas where the subspecies is presumed extirpated is discussed in the Factor A discussion below.

The Preble's meadow jumping mouse has now been recently documented in portions of Albany, Laramie, Platte, and Converse Counties in Wyoming; and in portions of Boulder, Douglas, El Paso, Elbert, Jefferson, Larimer, and Weld Counties in Colorado (Figure 1). The North Platte River at Douglas, Wyoming, marks the northernmost confirmed location for the Preble's meadow jumping mouse. Specimens from Colorado Springs, Colorado, mark the southernmost documented location of the Preble's meadow jumping mouse.

The Preble's meadow jumping mouse is generally found at elevations between 1,420 m (4,650 ft) and 2,300 m (7,600 ft), although elevations vary across the range of the subspecies. At the lower end of this elevation gradient, the semi-arid climate of southeastern Wyoming and eastern Colorado limits the extent of riparian corridors and restricts the range of the Preble's meadow jumping mouse (Beauvais 2001, p. 3). The Preble's meadow jumping mouse is likely an Ice Age relic; once the glaciers receded from the Front Range of Colorado and the foothills of Wyoming and the climate became drier, the Preble's meadow jumping mouse was confined to riparian systems where moisture was more plentiful (Fitzgerald *et al.* 1994, p. 1994; Smith *et al.* 2004, p. 293). The eastern boundary for the subspecies is likely defined by the dry shortgrass prairie, which may present a barrier to eastward expansion (Beauvais 2001, p. 3). In Wyoming, the Preble's meadow jumping mouse has not been found east of Cheyenne, Laramie County (Beauvais 2001, p. 3). Habitat modeling and trapping suggest the subspecies may not occur in Wyoming's Goshen, Niobrara, and eastern Laramie Counties (Keinath 2001, p. 7). In Colorado, the Preble's meadow jumping mouse has not been found on the extreme eastern plains (Clippinger 2002, pp. 20–21).

At the higher elevations, discerning the status of the Preble's meadow jumping mouse is complicated by the overlap in the ranges of the Preble's meadow jumping mouse and the western jumping mouse (Long 1965, pp. 665–666; Clark and Stromberg 1987, pp. 184–187; Schorr 1999, p. 3; Bohon *et al.* 2005; Schorr *et al.* 2007, p. 5). Field differentiation between the Preble's meadow jumping mouse and the western jumping mouse is difficult (Conner and Shenk 2003a, p. 1456). Generally, the western jumping mouse occurs in the montane and subalpine zones and the Preble's meadow jumping mouse occurs lower, in the plains and foothills (Smith *et al.* 2004, p. 10). Using this as a guide, many jumping mice were trapped and released without being conclusively identified as either a Preble's meadow jumping mouse or a western jumping mouse. Because western jumping mice have been verified at elevations well below the upper elevation limit of the Preble's meadow jumping mouse (Smith *et al.* 2004, p. 11), this leads to difficulty in making assumptions regarding identification based on elevation. Drainages where overlapping ranges have been verified include the Glendo Reservoir, Lower Laramie, Upper Laramie, and Horse Creek drainages in Wyoming (Conner and Shenk 2003b, pp. 31–35; Meaney 2003; King 2006a; King 2006b; King *et al.* 2006b, pp. 4351–4353); and the Cache La Poudre, Big Thompson, and Upper South Platte River drainage in Colorado (Bohon *et al.* 2005; King 2005; King 2006a; King *et al.* 2006b, pp. 4351–4353; Schorr *et al.* 2007).

Size, external morphology, dentition, skull measurements, and genetic analysis can all be used to differentiate meadow jumping mice (including the Preble's meadow jumping mouse) from western jumping mice (Krutzsch 1954, pp. 351–384; Klingenger 1963, p. 252; Riggs *et al.* 1997, pp. 2–8; Conner and Shenk 2003a; Ramey *et al.*; King *et al.*). The following description of the Preble's meadow jumping mouse's current documented distribution and status is based primarily on individuals positively identified as Preble's meadow jumping mice, with emphasis on locations where individual mice have been identified by genetic analysis or discriminant function analysis (DFA) (analysis of cranial measurements and an anterior medial toothfold characteristic) (Conner and Shenk 2003a). Information regarding individual mice and capture locations can be found in Riggs *et al.* (1997, pp. 8–11, A2–A5), Conner and Shenk (2003b, pp. 31–35), and King *et al.* (2006b, pp. 4351–4353). Positive identification of individual mice is most important in areas where both the Preble's meadow jumping mouse and the western jumping mouse occur. Overlap appears to occur in most of Wyoming's occupied drainages. In Colorado, with few exceptions, jumping mice below 2,050 m (6,700 ft) have been positively identified as Preble's meadow jumping mice. Above 2,050 m (6,700 ft) in Colorado, Preble's meadow jumping mice and western jumping mice are known to have an overlapping distribution in the Cache La Poudre, Big Thompson, and Upper South Platte River drainages.

Below is a summary of recent (since 1980) trapping data by drainage (as defined by 8-digit USGS hydrologic units), within both Wyoming (e.g., the North and South Platte River basins) and Colorado (e.g., the South Platte River and Arkansas River basins). Although trapping data is important because it absolutely confirms the occurrence of jumping mice at particular locations, as discussed in detail below, trapping data is one of several lines of evidence we use to estimate the actual current range of the subspecies. Records have been compiled by the Service (2007) in coordination with the Wyoming Natural Diversity Database, State of Wyoming, and CDOW. In addition, Figure 1 above illustrates all recent Preble's meadow jumping mouse specimens, historical (pre-1980) locations no longer believed to be occupied, and recent negative trapping efforts. Given wide areas of overlapping range in Wyoming, we require all Wyoming specimens to be confirmed as Preble's meadow jumping mice in order to be considered below. In Colorado, jumping mice are considered Preble's meadow jumping mice when identification is confirmed or if they occur in areas where western jumping mice are not known.

North Platte River Basin, Wyoming. In the North Platte River basin, occurrence of the Preble's meadow jumping mouse has been confirmed in four Wyoming counties (Converse, Platte, Albany, and Laramie) as reported by drainage below.

The Middle North Platte drainage represents the northern extent of the reported Preble's meadow jumping mouse range; however, trapping surveys have been quite limited and generally at high elevations. Although several jumping mice have been trapped in this drainage, these specimens have not been confirmed as Preble's meadow jumping mice.

In the Glendo Reservoir drainage, the Preble's meadow jumping mouse is known from several locations, including along the North Platte River at Douglas (King 2006b), Cottonwood Creek and its tributaries (Meaney 2003; King 2006a; King 2006b; King et al. 2006b), and the Horseshoe Creek area (Krutzsch 1954, p. 453). While the western jumping mouse has also been confirmed from the Glendo Reservoir drainage, the Preble's meadow jumping mouse appears more common.

In the Lower Laramie drainage, the Preble's meadow jumping mouse has been confirmed from the Laramie River and its tributaries, including the North Laramie River, and Sturgeon, Wyman,

Rabbit, and Luman Creeks; as well as several locations along Chugwater Creek and its tributaries (King 2006b; King et al. 2006b). Both Preble's meadow jumping mice and western jumping mice occur in the Sybille Creek, Friend Creek and the Friend Park areas (Conner and Shenk 2003b; King 2006a; King 2006b; King et al. 2006b). The Lower Laramie drainage appears to support coexisting Preble's meadow jumping mice and western jumping mice in multiple locations.

In the Horse Creek drainage, the Preble's meadow jumping mouse has been widely documented west of Interstate Highway 25 (I–25) and at one site east of I–25. The majority of these recent captures have been made in Bear Creek and its tributaries, and in headwaters of Horse Creek and its tributaries. Both Preble's meadow jumping mice and western jumping mice inhabit multiple sites on both creeks (Conner and Shenk 2003b; Meaney 2003; King 2006b; King et al. 2006b).

In the Upper Laramie drainage, the Preble's meadow jumping mouse has been confirmed at Hutton Lake National Wildlife Refuge (NWR) and from a site north of Laramie (Meaney 2003). Other specimens at these same sites have been confirmed as western jumping mice (Meaney 2003; King 2006a). Therefore, it appears both Preble's meadow jumping mice and western jumping mice are present in this drainage. Based on positive identification of the Preble's meadow jumping mouse from the sites mentioned above, Smith et al. (2004, p. 12) suggested the range of the Preble's meadow jumping mouse may extend into the Upper Laramie River, Little Laramie River, Rock Creek, and possibly the Medicine Bow River.

South Platte River Basin, Wyoming. Within the Wyoming portion of the South Platte River basin, trapping efforts have confirmed Preble's meadow jumping mouse occurrence, albeit possibly in low numbers, within two drainages in Laramie and Albany Counties.

In the Upper Lodgepole drainage, jumping mice have been found from several locations at and upstream of Highway 211. While at least one Preble's meadow jumping mouse has been confirmed (Riggs et al. 1997), most of the captured mice have been identified as western jumping mice (Meaney 2003; King 2006a). Therefore, while this drainage supports the Preble's meadow jumping mouse, its distribution may be limited.

Although historically reported from the Crow Creek drainage at Cheyenne, Preble's meadow jumping mouse occurrence in this drainage remains uncertain. Specimens from Warren Air Force Base were assumed to be Preble's meadow jumping mice based on the elevation of 1,900 m (6,150 ft), but subsequent analyses identified only western jumping mice (Riggs et al. 1997; Conner and Shenk 2003b; King 2006a). The only trapping evidence confirming Preble's meadow jumping mouse occurrence in this drainage comes from a specimen from the South Crow Creek Reservoir area originally identified as a western jumping mouse by the DMNS and then re-identified as a Preble's meadow jumping mouse based on a DFA analysis considering dental characteristics (Meaney 2003). Additional specimens have only verified western jumping mice from Middle Crow Creek, the South Fork of Middle Crow Creek, and South Crow Creek Reservoir (Meaney 2003; King 2006a). No jumping mice have been reported trapped downstream of Cheyenne.

The Lone Tree Creek drainage was previously assumed to be inhabited by the Preble's meadow jumping mouse based on the field identification of low elevation captures of jumping mice (1,900 m (6,200 ft)). However, DFA analysis of existing museum specimens (Conner and Shenk 2003b) and genetic analysis of specimens obtained from trapping efforts (Riggs et al. 1997; King 2006a), have only confirmed presence of western jumping mice in this drainage.

South Platte River Basin, Colorado. Recent presence of the Preble's meadow jumping mouse in Colorado has been documented within the South Platte River basin in seven counties: Larimer, Weld, Boulder, Jefferson, Douglas, Elbert, and El Paso. From the Wyoming State line south through the Denver area, little recent documentation of the Preble's meadow jumping mouse exists from sites east of the foothills where most of the subspecies' historical recordings occurred. This area largely corresponds to the Front Range urban corridor, an area experiencing continued human population growth and development (Clippenger 2002, pp. 22–26; Colorado Demography Office 2007). At higher elevation plains and foothills sites south of the Denver area, the Preble's meadow jumping mouse has been documented at a number of locations where riparian habitats are still largely intact. With rare exception, all jumping mouse records verified below 2,050 m (6,700 ft) in the South Platte River drainage of Colorado have been Preble's meadow jumping mice.

In the Cache La Poudre River drainage, jumping mice have been documented on sites upstream of Fort Collins, Larimer County, at elevations consistent with known Preble's meadow jumping mouse distribution. These sites include the main stem Cache La Poudre River and its tributaries, including Young Gulch and Stove Prairie Creek, and the North Fork Cache La Poudre River and its tributaries, including Stonewall, Rabbit, and Lone Pine Creeks. Shenk and Eussen (1999, pp. 11–12) cautioned that both Preble's meadow jumping mice and western jumping mice were likely present in some of these areas. Subsequent genetic analysis confirmed both Preble's and the western jumping mouse in Cherokee Park at 2,260 m. (7,480 ft) (King 2005, 2006b), but only Preble's meadow jumping mice have been confirmed from lower elevations, including Rabbit and Lone Pine Creeks, the Livermore Mountain area, and the North Fork of the Cache La Poudre River (Riggs et al. 1997; King et al. 2006b). Despite a number of trapping efforts, no jumping mice have been recently documented within the Fort Collins, Larimer County, area or downstream on the Cache La Poudre River to its confluence with the South Platte River at Greeley, Weld County (Service 2007).

Within the Big Thompson drainage, the Preble's meadow jumping mouse has been documented in foothills sites along Buckhorn Creek and certain of its tributaries, and on Dry Creek, in Larimer County. Genetic analysis of mice from three tributaries of Buckhorn Creek up to 2,240 m (7,360 ft) support identifications as Preble's meadow jumping mice; however, both Preble's meadow jumping mice and western jumping mice were confirmed from the Lakey Canyon site at 2,170 m (7,120 ft) and a mouse from the North Fork of the Big Thompson River at 2,170 m (7,120 ft) was identified as a western jumping mouse (King 2006a). Despite a number of trapping efforts, the Preble's meadow jumping mouse has not been documented on the Big Thompson and Little Thompson Rivers through the Front Range urban corridor, but has been found on both rivers east of I–25, in Weld County.

In the Saint Vrain drainage, the Preble's meadow jumping mouse has been documented along the Saint Vrain River, its tributaries and water conveyance ditches upstream of the town of Hygiene, on two tributaries of Boulder Creek west of the City of Boulder, and along South Boulder Creek, all in Boulder County; and on upper reaches of Coal and Rock Creeks, Jefferson County. On Rocky Flats NWR, Jefferson County, the Preble's meadow jumping mouse has been documented on Rock Creek as well on nearby Walnut

and Woman Creeks (within the Middle South Platte-Cherry Creek drainage). Several of these locations include mice confirmed as Preble's meadow jumping mice by genetic analysis or DFA (Riggs et al. 1997; Conner and Shenk 2003b). The Preble's meadow jumping mouse occurrence has not been confirmed by trapping efforts along eastern parts of the drainage, the Saint Vrain River from Hygiene, Boulder County, downstream to its confluence with the South Platte River, along Boulder Creek from the City of Boulder east to its confluence with the Saint Vrain River, or downstream of Rocky Flats NWR on Walnut, Woman, or Dry Creeks.

In the Clear Creek drainage, the Preble's meadow jumping mouse has been verified in the foothills on Ralston Creek (Riggs et al. 1997), and unidentified jumping mice have been captured on two tributaries of Clear Creek at elevations of potential Preble's meadow jumping mouse occurrence (below 2,300 m (7,600 ft)). No jumping mice have been captured on either creek downstream through the urban corridor to the South Platte River.

In the Upper South Platte drainage, the Preble's meadow jumping mouse has been documented immediately upstream of Chatfield Reservoir on the South Platte River, and also well upstream on the South Platte River and its tributaries in Jefferson and Douglas Counties to near the Teller County-Douglas County line. The U.S. Forest Service provided a summary of Preble's meadow jumping mouse trapping efforts at 15 sites in the Upper South Platte drainage in the Pike National Forest. Based on examination of voucher specimens, Preble's meadow jumping mice were confirmed at six sites up to 2,300 m (7,600 ft) and western jumping mice were confirmed from six sites, the lowest of which, at 2,030 m (6,660 ft), was lower than five Preble's meadow jumping mouse sites (Bohon et al. 2005). Schorr et al. (2007) also summarized co-occurrence of Preble's and the western jumping mouse in the same area. Also in the Upper South Platte drainage, the Preble's meadow jumping mouse has been widely documented upstream of Chatfield Reservoir on Plum Creek, including occurrences on East Plum Creek, West Plum Creek, and various tributaries, all in Douglas County (Riggs et al. 1997; Conner and Shenk 2003b; King et al. 2006b). Western jumping mice have also been identified in this drainage at 1,800 m (5,900 ft) and 1,950 m (6,400 ft) (Conner and Shenk 2003b). Pague and Schuerman (1998, p. 5) assessed Preble's meadow jumping mouse habitat throughout the Plum Creek watershed, randomly trapped suitable habitat, and estimated 64 km (40 mi) of streams occupied by the Preble's meadow jumping mouse. On the downstream portion of this drainage, below Chatfield Reservoir, there is no recent documentation of Preble's meadow jumping mouse's presence on the South Platte River through Denver.

In the Middle South Platte, Cherry Creek drainage, Preble's meadow jumping mice have been found on Cherry Creek and its tributaries from approximately the Arapahoe County-Douglas County line, upstream to the headwaters of East and West Cherry Creeks near the Palmer Divide in El Paso County. Also within Middle South Platte-Cherry Creek drainage, limited trapping efforts have documented the Preble's meadow jumping mouse on Running Creek and a tributary, Hay Creek, in Elbert County. Based on limited genetic analysis and DFA, western jumping mice have not been confirmed from this drainage. The Preble's meadow jumping mouse occurrence has not been confirmed by trapping downstream along Cherry Creek through Arapahoe County and Denver to the South Platte River. Because of numerous negative trapping efforts and lack of contiguous suitable habitat, we no longer consider the greater Denver area (including most of Denver County and portions of Adams, Arapahoe, Boulder, Broomfield, Douglas, and Jefferson Counties) to be occupied. On the South Platte River downstream from the Denver area, a single Preble's meadow jumping mouse was recently captured from near the South Platte River in Milliken, Weld County, not far from the confluence of the Big Thompson River and South Platte River (Savage and Savage 2001).

Farther east, there are two records of a Preble's meadow jumping mice on Kiowa Creek, Elbert County. Additional trapping in Elbert County would be useful to document whether the Preble's meadow jumping mouse is present along significant reaches of the Middle South Platte-Cherry Creek and Kiowa Creek drainages, and on the Bijou Creek drainage, Elbert County, which has not been trapped.

Arkansas River Basin, Colorado. In the Arkansas River basin, confirmed current occurrence of the Preble's meadow jumping mouse is limited largely to the Fountain Creek drainage and specifically to Monument Creek and its tributaries north of Colorado Springs. Genetic analysis and DFA have thus far confirmed no western jumping mice from within the Preble's meadow jumping mouse's range in this drainage (Conner and Shenk 2003b; King et al. 2006b). The Preble's meadow jumping mouse has been well studied at the U.S. Air Force Academy (Academy) on Monument Creek and its tributaries, and has been documented farther upstream on Monument Creek and on tributaries to the east and north toward the Palmer Divide. Numerous records of Preble's meadow jumping mouse captures on streams in northwestern El Paso County are the result of extensive trapping that has taken place in conjunction with proposed development projects. Downstream of the Academy, numerous trapping surveys indicate that the Preble's meadow jumping mouse has little likelihood of occurrence along Monument Creek through the downtown portions of Colorado Springs. Similarly, extensive trapping surveys suggest that the Preble's meadow jumping mouse may be extirpated from Cottonwood Creek and its tributaries.

In the Chico Creek drainage, jumping mice (assumed to be Preble's meadow jumping mice as explained above) have been documented on the upper reaches of Black Squirrel Creek and on a tributary, both in El Paso County. Limited trapping efforts in potential Preble's meadow jumping mouse habitat farther to the east in the Chico Creek drainage and in the Big Sandy Creek drainage have not confirmed Preble's meadow jumping mouse occurrence. Downstream, to the east and south, these drainages appear to have little habitat suitable for the Preble's meadow jumping mouse.

Within the Arkansas River basin south of the documented Preble's meadow jumping mouse locations, trapping efforts targeting the Preble's meadow jumping mouse conducted in southern El Paso County, Pueblo County, and Fremont County, including surveys funded and carried out by the Department of the Army at Fort Carson, have not resulted in capture of jumping mice (Bunn et al. 1995; Werner 2003).

In conclusion, the Preble's meadow jumping mouse appears to be widespread in the North Platte River basin were trapping efforts confirm the subspecies' distribution across at least four drainages. The Preble's meadow jumping mouse appears scarce within the Wyoming portion of the South Platte River basin, where trapping efforts to date provide few confirmed occurrences of the subspecies and suggest that the western jumping mouse is much more widespread. Trapping efforts within the Colorado portion of the South Platte River Basin indicate the Preble's meadow jumping mouse has little likelihood of occurrence in portions of some drainages that coincide with the

Front Range development corridor (areas around I–25 from Fort Collins south through the Denver metropolitan area), is more widespread in foothills and some montane areas within these same drainages, and generally present in rural portions of drainages south of Denver. In the Arkansas River basin in Colorado, Preble's meadow jumping mouse distribution appears very limited, with trapping efforts confirming occurrence largely in upper Monument Creek and some headwater tributaries.

Data limitations, such as limited trapping data, do not allow us to equate documented distribution with range. For example, the subspecies has been documented in several places along Hay Creek in Elbert County, and it is reasonably likely to occur further downstream in Arapahoe County, but no trapping has occurred to confirm or deny this assertion (See figure 1). Similarly, on Trout Creek a Preble's meadow jumping mouse was found in Douglas County near the Teller County line and it is reasonable to assume the subspecies may also occur in Teller County. Given the data limitations, ''range'' (relative to the March 14, 2007, Department of the Interior, Solicitor Memorandum opinion) is defined in the Conclusion of the 5-Factor Analysis section of this rule below.

Abundance

Intensive trapping studies designed to estimate populations of the Preble's meadow jumping mouse have occurred on only a few sites. Because not all appropriate habitat has been surveyed for Preble's meadow jumping mouse occurrence and because population estimates are available for only a few selected sites, no regional, Statewide, or rangewide population estimates for the Preble's meadow jumping mouse have been developed. Population density and trends are not well known in Wyoming (Wyoming Game and Fish Department 2005, p. 36). There are a few population estimates but little trend information for Preble's meadow jumping mouse populations in Colorado. In addition, because jumping mouse populations in a given area vary significantly from year to year (Quimby 1951, pp. 91–93; Whitaker 1972, p. 4), short-term studies may not accurately characterize abundance. In an ongoing trapping study, population highs of 24 Preble's meadow jumping mice per site were estimated for two control sites in 1998 and 1999; subsequent trapping in 2002, during regional drought conditions, estimated no Preble's meadow jumping mice present at either site (Bakeman 2006, p. 11). Meaney et al. (2003, p. 620) estimated Preble's meadow jumping mouse populations on study sites over 4 years, noted absence of the Preble's meadow jumping mouse at certain sites during some seasons, and suggested that 10 or more years of study might be necessary to assess the full extent of population variation.

White and Shenk (2000, p. 9) summarized abundance estimates from nine sites in Colorado for field work conducted during 1998 and 1999 (Meaney et al. 2000; Kaiser-Hill 2000; Ensight Technical Services 1999, 2000, 2001; Shenk and Sivert 1999b; Schorr 2001). Since Preble's meadow jumping mice are found in linear riparian communities, abundances were estimated in number of individuals per km (or mi) of stream corridor. Estimates of linear abundance ranged widely, from 4 to 67 mice/km (6 to 107 mice/mi) with a mean of 33 +/− 5 mice/km (53 +/− 8 mice/mi) (White and Shenk 2000, p. 9). The subsequent addition of new sites and 2 more years of data (2000–2001) provided a range of 2 to 67 mice/km (3 to 107 mice/mi) and a mean of 27 +/− 4 mice/km (44 +/− 6 mice/mi) (Shenk 2004).

The above estimates, coupled with sufficient knowledge of occupied stream miles, can provide a rough indicator of Preble's meadow jumping mouse numbers within a stream reach or drainage. For example, the Preble's meadow jumping mouse Recovery Team used the above estimate (Shenk 2004) to approximate stream miles required to support varying sized populations of the Preble's meadow jumping mouse (Service 2003b, p. 25). Hayward (2002) cautioned that reliance on an average number of mice per length of stream to predict population sizes would result in the overestimation of actual population size for about half of all sites. Of additional concern in any assessment of Preble's meadow jumping mouse population size is the potential for including western jumping mice in the estimate (Bohon et al. 2005; Schorr et al. 2007, p. 4). This is of particular importance in areas where both Preble's meadow jumping mice and western jumping mice are known to occur, including higher elevation Colorado sites and at most sites in Wyoming.

Another potential source of error is that the Preble's meadow jumping mouse population estimates above do not include estimates for riparian corridors along mountain streams or any sites in Wyoming. In Pike National Forest, Colorado, site inspection of many streams previously mapped as Preble's meadow jumping mouse habitat revealed poorly developed or intermittent riparian vegetation surrounded by sparse uplands dominated by pine forest (Bohon et al. 2005). Poor trapping success even in suitable habitat suggested low population densities in Pike National Forest compared to those at lower elevations (Bohon et al. 2005; Hansen 2006, p. 168). In studies targeting the Preble's meadow jumping mouse at 11 higher elevations (1,890 to 2,420 m (6,200 to 7,940 ft)) riparian sites in Douglas, Jefferson, and Teller Counties, Schorr et al. (2007, p. 4) reported a 0.6 percent capture rate of jumping mice over 19,500 trap nights. Since coexistence of both the Preble's meadow jumping mouse and the western jumping mouse was confirmed in these studies, the capture rate of the Preble's meadow jumping mouse was probably much lower. In comparable trapping effort in high quality habitat at lower elevations, Schorr (2001, p.18) reported a 3.5 percent capture rate of Preble's meadow jumping mice over 14,700 trap nights at the Academy, and Meaney et al. (2003, p. 616) reported a 3.4 percent capture rate of Preble's meadow jumping mice over 21,174 trap nights along South Boulder Creek, Boulder County. We believe that more research is needed before conclusions can be drawn regarding Preble's meadow jumping mouse abundance and security along montane streams and headwaters.

Trends

Without comprehensive population estimates for the subspecies, the only basis for trend assessment is presence or absence surveys in historical habitat (Smith et al. 2004, p. 29). This presence/absence information paints a very different picture for Wyoming compared to Colorado.

In Wyoming, we now have much more information regarding Preble's meadow jumping mouse distribution than we had at time of listing, when we described only two occupied sites. Much of what we noted in the listing to be historical range of the Preble's meadow jumping mouse in Wyoming has now been definitively found to support Preble's. But, while many jumping mice have been confirmed as Preble's meadow jumping mice in the North Platte River basin, the subspecies appears uncommon in the South Platte River basin, with only western jumping mice previously confirmed at several locations believed to be within Preble's meadow jumping mouse range.

In Colorado, historical trapping records establish that the Preble's meadow jumping mouse was present in a range that included major plains streams from the base of the Colorado Front Range east to at least Greeley, Weld County (Armstrong 1972, p. 249;

Fitzgerald et al. 1994, p. 293, Clippenger 2002, p. 18). Recent trapping efforts have documented that the Preble's meadow jumping mouse is rare or, perhaps, absent from these same areas today (Ryon 1996, p. 2; Clippinger 2002, p. 22; Service, 2007). This pattern is especially apparent along prairie riparian corridors directly or indirectly impacted by human development. This issue is discussed further in Factor A below.

Summary of Factors Affecting the Subspecies

Section 4 of the Act and its implementing regulations (50 CFR part 424) set forth the procedures for listing, reclassifying, or removing species from listed status. ''Species'' is defined by the Act as including any species or subspecies of fish or wildlife or plants, and any distinct vertebrate population segment of fish or wildlife that interbreeds when mature (16 U.S.C. 1532(16)). Once the ''species'' is determined we then evaluate whether that species may be endangered or threatened because of one or more of the five factors described in section 4(a)(1) of the Act. We must consider these same five factors in delisting determinations. Under 50 CFR 424.11(d), we may remove the protections of the Act if the best available scientific and commercial data substantiate that the species is neither endangered nor threatened for the following reasons: (1) the species is extinct; (2) the species has recovered and is no longer endangered or threatened; or (3) the original scientific data used at the time the species was classified were in error. Data error only applies when subsequent investigations show that the best scientific or commercial data available when the species was listed, or the interpretation of such data, were in error.

We may delist a species for any of the above reasons only if such data substantiate that the species is neither endangered nor threatened. Determining whether a species meets these definitions requires consideration of the same five categories of threats specified in section 4(a)(1) of the Act. For species that are already listed as endangered or threatened, this analysis of threats is an evaluation of both the threats currently facing the species and the threats that are reasonably likely to affect the species in the foreseeable future following the delisting or downlisting and the removal or reduction of the Act's protections.

Under section 3 of the Act, a species is ''endangered'' if it is in danger of extinction throughout all or a ''significant portion of its range'' and is ''threatened'' if it is likely to become endangered within the foreseeable future throughout all or a ''significant portion of its range.'' The word ''range'' in the phrase ''significant portion of its range'' refers to the range in which the species currently exists. Range is discussed further in the Conclusion of the 5-Factor Analysis section of this proposal below.

For the purposes of this analysis, we will evaluate whether the currently listed subspecies is threatened or endangered. This determination is a multiple-step analysis. If we determine that the subspecies is endangered throughout all of its range, we list it as endangered throughout its range and no further analysis is necessary. If not, we then evaluate if the subspecies meets the definition of threatened throughout all of its range. If the subspecies is threatened in all of its range, we list as threatened and consider if any significant portions of the range warrants consideration as endangered. If we determine that the subspecies is not threatened or endangered in all of its range, we consider whether any significant portions of the subspecies' range warrant consideration as threatened or endangered. We would then only list that significant portion of its range as threatened or endangered and not list the remaining portion of its range.

Foreseeable future is determined by the Service on a case-by-case basis, taking into account a variety of species-specific factors such as lifespan, genetics, breeding behavior, demography, threat-projection timeframes, and environmental variability. For the purposes of this proposal, we define foreseeable future based upon a threat-projection timeframe because future development intensity and patterns are likely to be the single greatest factor contributing to the subspecies' future conservation status. As described in more detail below, human-population-growth projections extend out to 2035 in Colorado and 2036 in Wyoming. Similarly, water requirements are estimated through 2030 in Colorado and 2035 in Wyoming. A Center for the West model predicting future land-use patterns projects development changes within the range of Preble's through 2040. Such projections frame our analysis as they help us understand what factors can reasonably be anticipated to meaningfully affect the subspecies' future conservation status. In our view, the foreseeable future for this subspecies, based on the currently available data, does not extend beyond 2040. While it is likely some of the above estimates could be extrapolated out into the more distant future, development projections beyond this point are of increasingly lower value as uncertainty escalates.

The following analysis examines all five factors currently affecting, or that are likely to affect, the Preble's meadow jumping mouse within the foreseeable future.

A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range

Introduction. Decline in the extent and quality of Preble's meadow jumping mouse habitat has been considered the primary factor threatening the subspecies (Bakeman 1997, p. 78; Hafner et al. 1998, p. 122; Pague and Grunau 2000). In our 1998 final rule to list Preble's meadow jumping mouse as threatened (63 FR 26517, May 13, 1998), we stated that Colorado east of the Front Range and adjacent areas of southeastern Wyoming had changed, over time, from predominantly prairie habitat intermixed with perennial and intermittent streams and associated riparian habitats to an agricultural and increasingly urban setting.

In our listing decision, we stated that Preble's meadow jumping mouse populations had experienced a decline and faced continued threats linked to widespread loss and fragmentation of the subspecies' required riparian habitat from human land uses including: urban, suburban, and recreational development; highway and bridge construction; water development; instream changes associated with increased runoff and flood control efforts; aggregate (sand and gravel) mining; and overgrazing (63 FR 26517, May 13, 1998). These human land-use activities affect the Preble's meadow jumping mouse by directly destroying its protective cover, nests, food resources, and hibernation sites; disrupting behavior; or acting as a barrier to movement. We noted that such impacts reduced, altered, fragmented, and isolated habitat to the point where Preble's meadow jumping mouse populations may no longer persist. We also noted that patterns of capture suggested that Preble's meadow jumping mouse populations fluctuate greatly over time at occupied sites, raising questions regarding security of the many currently documented populations which are isolated and affected by human development.

Historical records in Colorado (pre-1980) illustrate areas of Preble's meadow jumping mouse occupancy along the Front Range within both foothill and prairie riparian corridors

(Armstrong 1972, p. 249; Fitzgerald et al. 1994, p. 293). Between 1980 and 2005, the human population of Colorado counties within the Preble's meadow jumping mouse range increased by nearly 60 percent, from 1.7 million to 2.7 million (Colorado Demography Office, 2007). As explained further below, the apparent absence of the Preble's meadow jumping mouse in areas of substantial development, where trapping had previously confirmed subspecies presence, supports the conclusion that human land uses adversely affect Preble's meadow jumping mouse populations.

Ryon (1996) evaluated the condition of eight historical Preble's meadow jumping mouse capture sites in six Colorado counties based on vegetation structure, dominant plant species, and trapping results. Ryon reported no Preble's meadow jumping mouse captures at any of the seven sites trapped (one site no longer contained suitable habitat) (1996, p. 25). In addition, he reported that the historical sites contained fewer native species in plant communities and were lacking the multi-strata vegetation structure he observed at sites where trapping had recently confirmed Preble's meadow jumping mouse presence (Ryon 1996, p. 30). Investigations into land-use changes at the historical sites suggested that most had been directly altered in terms of habitat or had been influenced by habitat fragmentation (Ryon, 1996, p. 30). Clippinger (2002, pp. 14–29) mapped and compared past (through 1972) and current (post-1972) distribution records of the Preble's meadow jumping mouse in central Colorado and southeastern Wyoming based on museum specimens, published accounts, and unpublished reports. Clippinger reported that his distribution maps illustrated a loss of Preble's populations in expanding urban and suburban areas, especially around Cheyenne, Denver, and Colorado Springs, and in general along the eastern extent of historical range (Clippinger 2002, p. 22). Note that Clippinger's reference to historical range is based on the few existing records (through 1972) documenting Preble's meadow jumping mouse occurrence. These records are focused around what is now the I–25 urban corridor and based upon our current knowledge of the subspecies do not truly represent the extent of the range of the subspecies. The apparent loss of historically occupied sites (those sites where the subspecies was documented to occur prior to 1980) also provides some insight into this relationship. Based on Service records, consisting of intensive trapping efforts and assessments of habitat quality, only 1 of 17 of these documented historical sites of Preble's meadow jumping mouse occurrence in Colorado (Bear Creek, Boulder County) is thought to currently support the Preble's meadow jumping mouse.

Recent trapping records maintained by the Service indicate that Preble's meadow jumping mouse populations have little likelihood of occurrence along large portions of major river and stream reaches within the subspecies' historical described range in Colorado including:

- The Cache La Poudre River within Fort Collins and downstream to its confluence with the South Platte River at Greeley, 60 km (37 mi);
- The Big Thompson River and Little Thompson River through the Front Range urban corridor, approximately 50 km (32 mi);
- The Saint Vrain River from Hygiene to its confluence with the South Platte River, 35 km (22 mi);
- Boulder Creek from Boulder east to its confluence with the Saint Vrain River, approximately 35 km (22 mi);
- Walnut, Woman, and Dry Creeks downstream from Rocky Flats National Wildlife Refuge (NWR) to the confluence of Dry Creek and beyond to the South Platte River, 40 km (25 mi);
- Ralston Creek and Clear Creek through the urban corridor to the South Platte River, approximately 40 km (25 mi);
- The South Platte River downstream of Chatfield Reservoir through Denver to Brighton, 60 km (38 mi);
- The South Platte River downstream from Brighton to Greeley, approximately 55 km (34 mi) (one recent Preble's capture);
- Cherry Creek from the Arapahoe County-Douglas County line downstream through Denver to the South Platte River, 30 km (19 mi);
- Monument Creek downstream from its confluence with Cottonwood Creek through Colorado Springs, approximately 15 km (9 mi).

In total, Preble's meadow jumping mouse populations appear to have little likelihood of occurrence along 420 km (260 mi) in and downstream of areas with concentrated human development. However, despite apparent local extirpations, many of these streams continue to support Preble's meadow jumping mouse populations in their upstream reaches or tributaries.

Historical losses relative to ongoing threats are relevant in predicting whether the subspecies is likely to become endangered in all or a significant portion of its current range within the foreseeable future. It appears unlikely that the Preble's meadow jumping mouse can be returned to the historical localities within the Front Range urban corridor; however, we find that the subspecies' apparent local extirpation from areas of human development provides useful perspective about the potential impacts of future development within the remaining range of the Preble's meadow jumping mouse. If the protections of the Act are removed, we expect these threat factors, discussed in more detail below, would continue to affect the subspecies in large portions of its current range into the foreseeable future.

For the purposes of this revised proposed rule, we reviewed and considered the best available information regarding threats within the range of the Preble's meadow jumping mouse, including Ryon (1996), Shenk (1998), Bakeman (1997), Pague and Granau (2000), Clippinger (2002), and Service (2003b). We summarize these accounts below.

Following listing, The Nature Conservancy, under a contract with the Colorado Division of Natural Resources, formed a Preble's Meadow Jumping Mouse Science Team (Pague 1998). With guidance from the Science Team and following numerous meetings with scientists and stakeholders, Pague and Grunau (2000) developed a conservation planning handbook that addressed each of seven Colorado counties containing Preble's meadow jumping mouse populations. The document provided ''issues and stresses'' for all presumed threat factors operating in known or suspected Preble's meadow jumping mouse habitat, and assigned a qualitative risk assessment level to each of the identified issues. The work of Pague and Granau (2000) continues to provide important, science-based insight into threats to, and potential conservation strategies for, the Preble's meadow jumping mouse in Colorado on a county-by-county basis. Habitat-related ''issues'' identified as high or very high priority in one or more counties included habitat conversion through housing, commercial, and industrial construction; travel corridor (i.e., roadway) construction; travel corridor maintenance; fragmentation of habitat and corridors; hydrological flow impairment; habitat conversion to a reservoir; bank stabilization; high impact livestock management; rock and sand extraction; invasive weeds; and catastrophic fire (Pague and Granau 2000, pp. 1–15, 2–12, 3–13, 4–14, 5–14, 6–15, 7–14). Pague (2007) provided observations updating the 2000 report. No comparable document exists for the

four Wyoming counties where the subspecies occurs.

Colorado's Comprehensive Wildlife Conservation Strategy lists the meadow jumping mouse (including both the Preble's meadow jumping mouse and *Zapus hudsonius luteus* which occurs in extreme south-central Colorado) as a ''Species of Greatest Conservation Need,'' citing threats to habitat and range including habitat conversion (due to housing, urban, and exurban development) and habitat degradation (due to altered native vegetation and altered hydrological regime) (CDOW 2006, p. 102).

The Wyoming Comprehensive Wildlife Plan (WCWP) also lists meadow jumping mouse (including both the Preble's meadow jumping mouse and *Zapus hudsonius campestris* which occurs in northeastern Wyoming) as a ''Species of Greatest Conservation Need.'' This plan identifies ecoregions in the State and provides a summary of ''mean habitat quality'' scores for each ecological system (or habitat) within the ecoregion (WGFD 2005, pp. 19–25). Within the three Wyoming ecoregions that include Preble's meadow jumping mouse range (Central Shortgrass Prairie, Northern Great Plains Steppe, and Southern Rocky Mountains), the two ecological systems most likely to support the Preble's meadow jumping mouse (Rocky Mountain Lower Montane Foothill Riparian and Shrubland, Western Great Plains Riparian/Western Great Plains Floodplain) ranked in the lowest 20 percent in mean habitat quality relative to the State's other ecosystems (WGFD 2005, pp. 19–25). Among threats to habitat in these ecoregions are invasive plants, residential development radiating from the Cheyenne area, and recreation in the Southern Rocky Mountain region (WGFD 2005, pp. 53, 55, 56).

The direct impacts of development on the Preble's meadow jumping mouse and its habitat have likely slowed since our 1998 listing because of protection afforded to the Preble's meadow jumping mouse and its critical habitat rangewide under the Act. One indication of continuing impacts to the Preble's meadow jumping mouse and its habitat is the number of formal consultations performed to date under section 7 of the Act and the number of section 10 permits issued to date in conjunction with approved Habitat Conservation Plans (HCPs). Section 7 of the Act requires Federal agencies to consult with the Service to ensure that their actions do not jeopardize the continued existence of the subspecies or cause destruction or an adverse modification of critical habitat. Thus far, the section 7 process has been successful in avoiding adverse effects, from Federal actions, that would be likely to jeopardize the continued existence of the species or result in the destruction or adverse modification of critical habitat.

Section 10(a)(1)(B) of the Act authorizes the Service to issue permits for non-Federal actions that result in the incidental taking of listed wildlife. Incidental take permit applications must be supported by an HCP that identifies conservation measures that the permittee agrees to implement for the species to avoid, minimize, and mitigate the impacts of the requested incidental take.

As of August 2007, we have conducted 124 formal section 7 consultations (109 in Colorado, 15 in Wyoming) and issued 19 HCP related incidental take permits (all in Colorado) for projects affecting the Preble's meadow jumping mouse. We have authorized take for actions that did not result in jeopardy but nevertheless resulted in permanent impacts to over 320 hectares (ha) (800 acres (ac)) of Preble's meadow jumping mouse habitat, and temporary impacts to more than twice that amount of land. These projects have incorporated conservation measures or mitigation to avoid or minimize adverse impacts to the Preble's meadow jumping mouse.

However, even with the protections afforded to the species under section 7, habitat overall has continued to decline in quality and quantity, especially in Colorado. In the absence of listing, projects in Preble's meadow jumping mouse habitat would otherwise go forward with little Federal oversight. Other Federal, as well as State and local regulatory mechanisms, that may provide protection for the Preble's meadow jumping mouse and its habitat are evaluated under Factor D below.

Residential and Commercial Development. Clippinger (2002) assessed the impacts of residential development on the Preble's meadow jumping mouse. He analyzed Colorado land-cover data compared to positive and negative trapping results for the Preble's meadow jumping mouse in a geographic information system analysis and concluded that the likelihood of successful trapping of Preble's meadow jumping mice was reduced by either low-or high-density residential developments when the developments were within 210 m (690 ft) of the trapping sites (Clippinger 2002, pp. iv, 94). Clippinger (2002, p. iv) noted that the Preble's meadow jumping mouse can be a useful indicator of environmental integrity in riparian areas and associated upland areas in the Colorado Piedmont. These data demonstrate that nearby development increases the risk of extirpation of Preble's meadow jumping mice from occupied sites.

Theobold et al. (1997) emphasized both housing density and spatial patterns in evaluating effects of residential development on wildlife habitat. They concluded that while clustered development can decrease habitat disturbance (Theobold et al. 1997, p. 34), much of the Rocky Mountain West is experiencing what has been termed ''rural sprawl'' where rural areas are growing at a faster rate than urban areas (Theobold et al. 2001, p. 4). In Colorado, residential demand and State law encourage developers to design subdivisions with lots of at least 14 ha (35 ac) each with one house, to avoid detailed county subdivision regulations (Riebsame et al., p. 420). The Larimer County Master Plan (Larimer County Planning Division 1997) cites a trend toward residential properties with relatively large lots, which leads to scattered development and more agricultural land taken out of production. Where public and private lands are intermingled, private land ownership typically follows valley bottoms (Theobald et al. 2001, p. 5), thus rural development is likely to disproportionately affect valley-bottom riparian areas (Riebsame et al., p. 402), the favored habitat of the Preble's meadow jumping mouse. Beyond direct impact to habitat, when ranches are subdivided, subsequent residential construction and associated disturbance can result in the disruption of wildlife movement along stream corridors (Riebsame et al., p. 402). Rural development disproportionately occurs around edges of undisturbed public lands and affects the conservation value of the undisturbed public lands (Hansen et al. 2005, p. 1900).

Human development often causes subtle effects on riparian habitat as well. Indirect effects of human settlement have resulted in declines in native trees and shrubs, greater canopy closure, and a more open understory with reduced ground cover within riparian habitat (Miller et al. 2003, p. 1055). An open understory does not favor the Preble's meadow jumping mouse, which prefers dense ground cover of grasses and shrubs and is less likely to use open areas where predation risks are assumed to be higher (Trainor et al. 2007, pp. 472–476; Clippinger 2002, pp. 69, 72).

Fragmentation is another indirect impact of development in proximity to Preble's meadow jumping mouse

habitat. The Preble's meadow jumping mouse is closely associated with narrow riparian systems that represent a small percentage of the landscape within the subspecies' range. Fragmentation of these linear habitats limits the extent and size of Preble's meadow jumping mouse populations. As populations become fragmented and isolated, it becomes more difficult for them to persist (Caughley and Gunn 1996, pp. 165–189). Major risks associated with small populations include—demographic stochasticity (an increased risk of decline in small populations due to variability in population growth rates arising from random differences among individuals in survival and reproduction within a season); environmental stochasticity (an increased risk of decline in small populations due to variation in birth and death rates from one season to the next in response to weather, disease, competition, predation, or other factors external to the population); and loss of genetic variation (a reduction in the amount of diversity retained within populations and an increased chance that deleterious recessive alleles may be expressed; the loss of diversity can limit a population's ability to respond adaptively to future environmental changes) (Caughley and Gunn 1996, pp. 165–189). These issues are discussed in greater detail in Factor E below. The Recovery Team determined that small, fragmented units of habitat will not be as successful in supporting the Preble's meadow jumping mouse in the long term as larger areas of habitat (Service 2003b, p. 21). On a landscape scale, maintenance of dispersal corridors linking patches of Preble's meadow jumping mouse habitat may be critical to the subspecies' conservation (Shenk 1998, p. 21).

One indicator of the level of development pressure since listing is the number of development-related section 7 consultations and HCPs completed by the Service. Of the 109 formal consultations and 19 HCPs completed in Colorado, 17 section 7 consultations and 10 HCPs were specifically for residential and commercial developments with direct adverse effects to the Preble's meadow jumping mouse or its habitat. Approved projects allowed for adverse impacts (permanent or temporary) in excess of 180 ha (450 ac) of Preble's habitat. While conservation measures or mitigation in various forms have been incorporated into all permitted projects, implementation of these habitat restoration and enhancement measures has been limited by factors such as droughts or floods. Recent development pressure has been most concentrated south of Denver, Colorado, in Douglas and El Paso Counties; eight section 7 consultations and three HCPs have occurred in the Middle South Platte-Cherry Creek drainage, all south of Denver, and six section 7 consultations and four HCPs have occurred in the Fountain Creek drainage. We have also worked with other Federal agencies and a substantial number of landowners and developers to avoid adverse impacts to Preble's meadow jumping mouse habitat, thus avoiding formal consultation. Additional planned residential and commercial development projects that would adversely affect Preble's meadow jumping mouse habitat in Colorado are continually being reviewed by the Service. Since listing, protections afforded under the Act have slowed, but not eliminated, the loss of Preble's meadow jumping mouse habitat due to residential and commercial development in Colorado. We believe that in the absence of the protections under the Act, Preble's meadow jumping mouse habitat in Colorado and the populations it supports would be lost at a greatly increased rate.

Continued rapid development is expected along Colorado's Front Range as the human population continues to grow. The State of Colorado expects the population of counties supporting the Preble's meadow jumping mouse to increase by an additional 1.5 million people by 2035, including: 99,000 in Boulder County; 272,000 in Douglas County; 42,000 in Elbert County; 369,000 in El Paso County; 143,000 in Jefferson County; 201,000 in Larimer County; and 323,000 in Weld County (Colorado Demography Office 2007). These expected increases support Pague and Grunau's (2000) conclusion that habitat conversion is a very high priority issue to the Preble's meadow jumping mouse in Larimer, Weld, and El Paso Counties, and a high priority issue for the remaining counties supporting the Preble's meadow jumping mouse in Colorado.

In contrast to the situation in Colorado, no formal section 7 consultations or HCPs have been sought for residential or commercial development in Wyoming. This reduced level of consultations reflects the general lack of development pressure within Preble's meadow jumping mouse habitat. This lack of development pressure is predicted to continue into the foreseeable future as described below.

Wyoming estimates that the population of the counties supporting the Preble's meadow jumping mouse will increase by about 11,000 people from 2005 to 2020, including: an increase of 800 in Albany County; an increase of 1,500 in Converse County; an increase of 9,100 in Laramie County; and a decrease of 400 in Platte County (Wyoming Department of Administration and Information 2007). Commercially available estimates suggest counties supporting the Preble's meadow jumping mouse will increase by about 18,400 people from 2006 through 2036, including: a decline of 3,700 in Albany County; an increase of 3,500 in Converse County; an increase of 18,300 in Laramie County; and an increase of 300 in Platte County (Economy.com 2007 as provided by Lui 2007).

While population growth rates provide valuable insight into development pressures, they may not provide a complete picture. For example, human population increases in Cheyenne, Fort Collins, Greeley, Longmont, the immediate Denver metropolitan area, and much of Colorado Springs are likely to have little direct impact on the Preble's meadow jumping mouse because the subspecies appears to have little likelihood of occurrence within and downstream from these cities. Conversely, substantial human population increases in the Laramie Foothills of Larimer County, Colorado, or southern portions of Douglas County, Colorado, are likely to have a high impact to the Preble's meadow jumping mouse. In Wyoming, given the small projected increases in the human population, we expect rural development will continue to have only small, localized impacts.

Modeling exercises can also provide some insights into future land-use development patterns. While these models have weaknesses, such as an inability to accurately predict economic upturns or downturns, uncertainty regarding investments in infrastructure that might drive development (such as roads, airports, or water projects), and an inability to predict open-space acquisitions, we nevertheless believe such models are useful in adding to our understanding of likely patterns. For example in 2005, Center for the West produced a series of maps predicting growth through 2040 for the west including the Colorado Front Range and Wyoming (Travis et al. 2005, pp. 2–7). The projections for the Colorado Front Range (available at: *http://www.centerwest.org/futures/frtrng/2040.html*) illustrate significant increases in urban/suburban, low-density suburban, and exurban land uses across virtually all private lands

within the Colorado portion of the Preble's meadow jumping mouse range. Only small isolated patches of Preble's meadow jumping mouse habitat in public ownership, including headwater areas in Federal ownership, would avoid the direct impacts of residential and associated commercial development. Although similar maps for Wyoming are less refined (available at: *http://www.centerwest.org/futures/west/2040.html*), they suggest only limited increases in development, primarily around Cheyenne.

Based upon known impacts to the Preble's meadow jumping mouse associated with development and best available projections for future development (as described above and in Factor D below), we conclude that residential and commercial development constitutes a substantial threat to the Preble's meadow jumping mouse in Colorado, now and into the foreseeable future. In Wyoming, residential and commercial development is likely to be limited with only small, localized impacts to the Preble's meadow jumping mouse expected. While some development is projected in the vicinity of Cheyenne, trapping efforts to date have not confirmed presence of Preble's meadow jumping mice in this area.

Transportation, Recreation, and Other Rights of Way Through Habitat. At the time of listing, the Service concluded that roads, trails, or other linear development through the Preble's meadow jumping mouse's riparian habitat could act as partial or complete barriers to dispersal (63 FR 26517, May 13, 1998). These forms of development have continued to affect and fragment Preble's meadow jumping mouse habitat. Since listing, the Service has conducted 38 formal consultations under section 7 of the Act for road or bridge projects (32 in Colorado and 6 in Wyoming) resulting in permitted impacts to approximately 50 ha (125 ac) of Preble's meadow jumping mouse habitat. In addition, a formal 2005 programmatic section 7 consultation with the Federal Highway Administration for the Wyoming Statewide Transportation Improvement Program could result in 19 future highway projects with impacts to 42 ha (104 ac) of Preble's meadow jumping mouse habitat (Service 2005). Under the Douglas County (Colorado) Regional HCP for the Preble's meadow jumping mouse, completed in May 2006, 67 approved road and bridge construction projects by Douglas County, and the cities of Parker and Castle Rock, may affect up to 122 ha (302 ac) of Preble's meadow jumping mouse habitat over a 10-year period (Service 2006).

One of the largest road projects is a proposed improvement to I–25 in El Paso County, Colorado. The proposed construction would affect 10 of the 11 to 14 eastern tributaries of Monument Creek thought to support Preble's (Bakeman and Meaney 2001, p. 21). Impacts to Preble's would include habitat fragmentation and modification, change in population size, and behavioral impacts (Bakeman and Meaney 2001, pp. 18–20). While measures to avoid, minimize, and mitigate impacts were identified, the project would have significant cumulative effects on Preble's meadow jumping mice in the Monument Creek drainage, especially east of I–25 (Bakeman and Meaney 2001, pp. i, ii, 22–27).

With an increased human population, a high level of road construction and maintenance projects will occur; in the absence of the Act's protective measures, impacts to Preble's and its habitat would likely be substantial. While the Act rarely stops such projects, it does promote measures to avoid, minimize, or compensate for impacts and helps control the level of negative impacts to the Preble's meadow jumping mouse and its habitat. Pague and Grunau (2000) considered ''travel corridor construction'' to be a high priority issue to Preble's meadow jumping mouse populations in Weld, Douglas, Elbert, and El Paso Counties in Colorado.

Human-caused impacts associated with recreation include backcountry roads, trails, and campgrounds, which are often located along streams and near water (Wyoming Game and Fish Department 2005, p. 56). Recreational trail systems are frequently located within riparian corridors (Meaney et al. 2002, p. 116). The development of trail systems can affect the Preble's meadow jumping mouse by modifying its habitat, nesting sites, and food resources in both riparian and upland areas. Use of these trails by humans or pets can alter wildlife activity and feeding patterns (Theobold et al. 1997, p. 26). Meaney et al. (2002, pp. 131–132) suggest fewer Preble's meadow jumping mice were found on sites with trails than on sites without trails. While temporal and spatial variation in Preble's meadow jumping mouse numbers resulted in low precision of population estimates and weak statistical support for a negative trail effect, the authors considered the magnitude of the potential effect sufficient to encourage careful management and additional research (Meaney et al. 2002, pp. 115, 131–132). Since the listing of the Preble's meadow jumping mouse in 1998, a dozen recreational trail projects with proposed impacts to Preble's meadow jumping mouse habitat in Larimer, Boulder, Douglas, and El Paso Counties, Colorado, have been addressed through section 7 consultations or HCPs. An additional 24 trail projects have been permitted under the Douglas County Regional HCP. As human populations continue to increase (as discussed above), we anticipate increased demand for recreational development in public open space and on conservation properties. Without protections afforded by the Act, Preble's meadow jumping mouse populations on properties free from residential and commercial development threats will still be subject to widespread threats from future recreational development and increased human use.

Many utility lines (sewer, water, gas, communication, and electric lines, and municipal water ditches) cross Preble's meadow jumping mouse habitat. Current and future utility rights-of-way through these habitats will cause habitat destruction and fragmentation from periodic maintenance and new construction. Since the listing of the Preble's meadow jumping mouse, 18 utilities projects adversely affecting the Preble's meadow jumping mouse and its habitat have been evaluated through section 7 consultations (3 in Wyoming, 15 in Colorado). In addition, an approved HCP with Denver Water permits impacts to 34 ha (84 ac) of Preble's meadow jumping mouse habitat at multiple sites in Colorado. While often more costly than trenching, avoidance measures such as directional drilling under riparian crossings can reduce or avoid impacts to the Preble's meadow jumping mouse. If the Preble's meadow jumping mouse were to be delisted, we do not anticipate that project operators would voluntarily directionally drill to avoid Preble's meadow jumping mouse habitat.

Overall, we believe threats related to transportation, recreation, and other rights of way through habitat are directly related to human population pressures. Thus, we expect these issues will have substantial impacts to Preble's meadow jumping mouse populations in Colorado, but only minimal impacts to Preble's meadow jumping mouse populations in Wyoming.

Hydrologic Changes. Establishment and maintenance of riparian plant communities are dependent on the interactions between surface-water dynamics, groundwater, and river-channel processes (Gregory et al. 1991, pp. 542–545). Changes in hydrology can

alter the channel structure, riparian vegetation, and valley-floor landforms (Gregory et al. 1991, pp. 541–542; Busch and Scott 1995, p. 287). Thus, changes in the timing and abundance of water can be detrimental to the persistence of the Preble's meadow jumping mouse in these riparian habitats due to resultant changes in vegetation (Bakeman 1997, p. 79). Changes in hydrology may occur in many ways, but two of the more prevalent are the excessively high and excessively low runoff cycles in watersheds with increased areas of paved or hardened surfaces, and disruption of natural flow regimes downstream of dams, diversions, and alluvial wells (Booth and Jackson 1997, pp. 3–5; Katz et al. 2005, pp. 1019–1020).

Urbanization can dramatically increase frequency and magnitude of flooding while decreasing base flows (the portion of stream flow that is not surface runoff and results from seepage of water from the ground into a channel slowly over time; base flow is the primary source of running water in a stream during dry weather) (Booth and Jackson 1997; pp. 8–10; National Research Council 2002, pp. 182–186). Infiltration of precipitation is greatly reduced by increases in impervious surfaces. The magnitude of peak flows increases in urban areas as water runs off as direct overland flow. Increased peak flows can exceed the capacity of natural channels to transport flows, trigger increased erosion, and degrade habitat (Booth and Jackson 1997, pp. 3–5). Changes in hydrology associated with urbanization can result in channel downcutting, lowering of the water table in the riparian zone, and creation of a ''hydrologic drought,'' which in turn alters vegetation, soil, and microbial processes (Groffman et al. 2003, p. 317). Meanwhile, reduced infiltration results in reduced groundwater recharge, reduced groundwater contributions to stream flow, and, ultimately, reduced base flows during dry seasons (National Research Council 2002, p. 182; Groffman et al. 2003, p. 317). Established methods of mitigating downstream impacts of urban development, such as detention basins, have only limited effectiveness; downstream impacts are probably inevitable without limiting the extent of watershed development (Booth and Jackson 1997, p. 17).

In response to altered hydrology, stormwater-management, flood-control, and erosion-control efforts occur along many streams within the former and current range of the Preble's meadow jumping mouse. The methods used include channelization; construction of detention basins, outfall structures, drop structures, riprap banks, impervious cement channels; and other structural stabilization. Structural stabilization methods designed to manage runoff and control erosion can increase the rate of stream flow, shorten channel length, narrow riparian areas, destroy riparian vegetation, and prevent or prolong the time required for vegetation reestablishment (Booth and Jackson 1997, p. 4). These impacts may affect plant composition, soil structure, and physiography of riparian systems to the point where habitat supporting the Preble's meadow jumping mouse is so altered that populations can no longer persist. Pague and Grunau (2000) considered ''bank stabilization'' to be a high-priority issue for the Preble's meadow jumping mouse in Weld and El Paso Counties. Since the listing of the Preble's meadow jumping mouse, 22 stormwater management, stream stabilization, or outfall structure projects with impact to Preble's meadow jumping mouse habitat have been addressed through formal section 7 consultations in Colorado; none have occurred in Wyoming.

The Preble's meadow jumping mouse's apparent absence downstream from most areas of extensive urbanization (including Cheyenne, Wyoming, and Fort Collins, Longmont, Boulder, Golden, Denver, Parker, and Colorado Springs, Colorado) may be attributable to such changes in hydrology. Corn et al. (1995, p. 14) and Schorr (2001, p. 30) expressed concern over the integrity of protected riparian habitats on Monument Creek and its tributaries through the U.S. Air Force Academy (Academy) because of development activities upstream. In 2007, all eastern tributaries of Monument Creek on the Academy experienced adverse impacts to occupied Preble's meadow jumping mouse habitat due to erosive head cutting, channel degradation, and impacts to vegetation that were attributable to regional stormwater management, and commercial and residential development (Mihlbachler 2007).

Efforts to restore degraded riparian habitats have occurred in Colorado, in part to benefit the Preble's meadow jumping mouse. Efforts to restore Preble's meadow jumping mouse habitat through a 0.86 km (0.54 mi) urban stream reach of East Plum Creek, Douglas County appear to have increased vegetation cover and Preble's meadow jumping mouse numbers (Bakeman 2006, pp. 4, 8). Similarly, recent projects on Cherry Creek, Douglas County, have attempted to restore groundwater levels and downcut channels in or near Preble's meadow jumping mouse habitat by employing rock or sheet pile drop structures.

If we were to delist the Preble's meadow jumping mouse, we believe that runoff-related impacts to riparian habitats within and downstream of development may increase in areas of high development, such as along Colorado's Front Range urban corridor, and that restoration of impacted riparian systems would be less likely to occur.

At the time of listing, we stated that the Preble's meadow jumping mouse depended on vegetative habitat that was in turn dependent on physical factors including surface flows and groundwater. Water development and management in its various forms alters vegetation composition and structure, riparian hydrology, and flood-plain geomorphology directly, as well as through alterations to habitat located downstream; these alterations often, but not always, have adverse impacts to the Preble's meadow jumping mouse (63 FR 26517 May 13, 1998). The creation of irrigation reservoirs at the expense of native wetlands is a factor that negatively affected Preble's meadow jumping mouse populations over the previous century (Fitzgerald et al. 1994, p. 293). Reservoirs with barren shorelines can create barriers to Preble's meadow jumping mouse movement and fragment populations along stream corridors. Current and future reservoir construction is necessary to respond to municipal water needs. By 2030, municipal and industrial demand for water in Colorado will increase 60 percent, by 578 million cubic meters (m^3) (469,000 acre-feet (af)) yearly in the South Platte River drainage and by 41 percent, 133 million m^3 (108,000 af) yearly in the Arkansas River drainage (Colorado Water Conservation Board 2004). Even under the most optimistic scenarios, the Colorado Water Conservation Board (2004, p. 13–17) estimated a shortfall relative to municipal and industrial demands of 111 million m^3 (90,000 af) of water in the South Platte drainage and 22 million (m^3) (18,000 af) in the Arkansas drainage by 2030. Pague and Grunau (2000) considered hydrological impacts (water quality, flow regime, and groundwater) to be a high-priority issue to the Preble's meadow jumping mouse in all Colorado counties supporting populations.

Three water projects currently being considered may significantly affect Preble's meadow jumping mouse habitat including: The proposed expansions of existing Halligan and Seaman reservoirs in the Cache La Poudre drainage,

Larimer County, Colorado, and storage reallocation at Chatfield Reservoir, in the Upper South Platte drainage, Jefferson and Douglas Counties, Colorado. Options being considered at Halligan Reservoir could inundate up to 4.0 km (2.5 mi) of Preble's meadow jumping mouse habitat and affect Preble's critical habitat at the site of the proposed dam. At Seaman Reservoir, the currently favored option would inundate about 4.0 km (2.5 mi) of Preble's meadow jumping mouse critical habitat, while another option being considered would inundate about 11 km (7 mi). Options being investigated at Chatfield Reservoir have generated a preliminary estimate that up to 130 ha (330 ac) of existing Preble's meadow jumping mouse habitat, including almost 28 ha (70 ac) of critical habitat, would be inundated.

In Wyoming, estimates of projected water use in the Platte River Basin through 2035, range from a 38 million m^3 (31,000 af) decrease (2 percent) to a 90 million m^3 (73,000 af) increase (6 percent) (Wyoming Water Development Commission 2006, p. 10). No significant reservoir projects are currently planned within Preble's habitat in Wyoming. While the Platte River Plan identifies ''upper Laramie River storage'' as a future storage opportunity (Wyoming Water Development Commission 2006, p. 31), potential impacts to Preble's meadow jumping mouse are uncertain based on limited knowledge of the subspecies' occurrence in the drainage and uncertainty regarding the location of any future water projects.

Beyond direct effects to the Preble's meadow jumping mouse and its habitat through construction or inundation, changes in flows related to water diversion, storage, and use also affect riparian habitats downstream in a variety of ways. As flows are captured or diverted, or as groundwater supplies are depleted through wells, natural flow patterns are changed, and more xeric plant communities replace the riparian vegetation. Sediment transport is disrupted by on-stream reservoirs. Loss of sediment encourages channel downcutting, which in turn affect groundwater levels (Katz et al. 2005, p. 1020). The resulting conversion of habitats from moist or mesic, shrub-dominated systems to drier grass-or forb-dominated systems make the area less suitable for the Preble's meadow jumping mouse.

Given the projected future demands for water, we believe that major water development projects affecting the Preble's meadow jumping mouse in Colorado would likely occur regardless of whether the subspecies remains listed. Measures to minimize and compensate for impacts specific to the Preble's meadow jumping mouse and its habitat are less likely to be incorporated into project plans if the subspecies were to be delisted. Fewer and smaller projects are likely to occur in Wyoming.

Aggregate Mining. At the time of listing, we cited alluvial aggregate mining as a threat to the Preble's meadow jumping mouse. Aggregate mining is focused on floodplains, where these mineral resources most commonly occur, and specifically on the same gravel deposits that may provide important hibernation sites (63 FR 26517, May 13, 1998). Alluvial aggregate mining continues to be a threat to the Preble's meadow jumping mouse in Colorado. Alluvial aggregate extraction may produce long-term changes to Preble's meadow jumping mouse habitat by removing (often permanently) shrub and herbaceous vegetation, and by altering hydrology. Often, mined pits are constructed with impervious liners and converted to water reservoirs after aggregate is removed. This conversion precludes restoration of riparian shoreline vegetation and alters adjacent groundwater flow.

Since listing, we have conducted formal consultation under section 7 of the Act regarding impacts to the Preble's meadow jumping mouse at two aggregate mines in Colorado and we have worked to avoid impacts at others. At Rocky Flats National Wildlife Refuge (NWR), private aggregate mining activities could affect Preble's meadow jumping mouse habitat directly or through alteration of hydrology along Rock Creek. While aggregate mining continues to affect floodplains in the Colorado Front Range, many project sites are along downstream reaches of larger streams and rivers where Preble's meadow jumping mouse populations appear absent. Pague and Grunau (2000) considered ''rock and sand extraction'' to be a high-priority issue in Weld, Jefferson, and Douglas Counties. In Wyoming, aggregate mining has not been an issue in Preble's meadow jumping mouse habitat and we have no information on any proposed mines in this portion of its range.

Overall, we believe threats related to aggregate mining are likely to be more intense in areas in close proximity to residential and commercial development. Thus, we expect this issue will have an impact on Preble's meadow jumping mouse populations in Colorado. In Wyoming, we expect aggregate mining will have little, if any, effect on Preble's meadow jumping mouse populations as future development is projected to be far less.

Agriculture. At the time of listing we cited conclusions by Compton and Hugie (1993a; 1993b) that human activities, including conversion of grasslands to farms and livestock grazing, had adversely impacted Preble's meadow jumping mouse. They concluded that development of irrigated farmland had a negative impact on Preble's meadow jumping mouse habitat, and that any habitat creation it produced was minimal (Compton and Hugie 1993a; Compton and Hugie 1993b). In general, negative trapping results suggest that the Preble's meadow jumping mouse does not occur in areas cultivated for row crops. Historically, the rapid rate of native habitat conversion to row crops likely had a significant adverse impact on the Preble's meadow jumping mouse. Because conversion of native habitat to row crops has become increasingly rare in both Colorado and Wyoming (U.S. Department of Agriculture 2000, Tables 2, 3, & 9), such conversions are unlikely to present a similar threat in the future in any portion of the subspecies range.

The Preble's meadow jumping mouse uses native grass and alfalfa hayfields when they are in or adjacent to suitable riparian habitat. This juxtaposition is often the case, since hay production requires large amounts of water. Mowing of hay may directly kill or injure Preble's meadow jumping mice, reduce food supply (since many plants will not mature to produce seed), and remove cover. Late season mowing may be especially problematic, because Preble's meadow jumping mice are approaching hibernation and their nutritional needs are high (Clippinger 2002, p. 72). Additionally, hay production may preclude growth of willows and other shrubs that are important as hibernation habitat for the Preble's meadow jumping mouse. Hayfields often are irrigated through ditch systems. The Preble's meadow jumping mouse uses overgrown water conveyance ditches and pond edges, and may use agricultural ditches as dispersal routes (Meaney et al. 2003, pp. 612–613). Ditch maintenance activities may kill individual Preble's meadow jumping mice and periodically alter their habitat. Existing special regulations at 50 CFR 17.40(l) exempt certain ditch maintenance operations from take prohibitions of the Act in recognition that habitat the ditches provide is dependent on the ditches retaining their function. Preble's meadow jumping mouse populations have persisted in areas hayed for many years (Taylor 1999). Haying operations that allow dense riparian vegetation to

remain in place are likely compatible with persistence of Preble's meadow jumping mouse populations.

Impacts to riparian habitat from livestock are well documented in the scientific literature (Kauffman and Krueger 1984, pp. 431–435; Armour et al. 1991, pp. 7–11; Fleischner 1994, pp. 629–638; Belsky et al. 1999, pp. 419–431; Freilich et al. 2003, pp. 759–765). Livestock have damaged 80 percent of stream and riparian ecosystems in the western United States (Belsky et al. 1999, p 419.). Adverse impacts of grazing include changes to stream channels (downcutting, trampling of banks, increased erosion), to flows (increased flow and velocity, decreased late-season flow), to the water table (lowering of the water table), and to vegetation (loss to grazing, trampling, and through altered hydrology) (Kauffman and Krueger 1984, pp. 432–435).

Impacts from cattle grazing to other jumping mice subspecies have been documented by Frey (2005), Giuliano and Homyack (2004), and Medin and Clary (1989). Ryon (1996, p. 3) cited livestock grazing as a contributor to the lack of structural habitat diversity he observed on historical Preble's meadow jumping mouse sites in Colorado. On a working ranch in Douglas County, Colorado, Preble's meadow jumping mice were detected within cattle exclosures, but not on grazed areas. Previous trapping had documented Preble's meadow jumping mice upstream and downstream, but not on the ranch (Ensight Technical Services 2004, p. 9). On private lands in Douglas County, Colorado, Pague and Schuerman (1998, pp. 4–5) observed a swift rate of residential land development and significant fragmentation of habitat, but noted that in some cases accompanying secession of grazing had allowed recovery of degraded riparian habitats.

In Colorado, City of Boulder lands endured intensive grazing, farming, or haying regimes until they became part of the Boulder Open Space system. Grazing and haying, used as land management tools, continue on Boulder Open Space sites currently supporting the Preble's meadow jumping mouse. In their study of small mammals on Boulder Open Space, Meaney et al. (2002, p. 133) found no adverse effects of managed grazing on abundance of individual small mammal species or on species diversity.

Cattle can undoubtedly greatly affect herbaceous vegetation, especially in times of drought; grazing practices that assure maintenance of riparian shrub cover may be a key consideration in maintaining Preble's meadow jumping mouse populations (Ensight Technical Services 2004, p. 9). The recent drought, in combination with grazing, may have had an increased effect on Preble's meadow jumping mouse habitat.

Overgrazing threats are not limited to large livestock producing operations. On subdivided ranch properties, often termed ''ranchettes,'' horses and other livestock can heavily affect the small tracts within which they are fenced (Pague and Grunau 2000, pp. 1–14). Pague and Grunau (2000) considered ''high impact livestock grazing'' to be a high-priority issue for the Preble's meadow jumping mouse in Larimer, Weld, Elbert, and El Paso Counties in Colorado, largely due to the projected increase in such ranchettes.

In Wyoming, where large-scale commercial ranching is more prevalent in the Preble's meadow jumping mouse's range than in Colorado, overgrazing is thought to occur sporadically across the landscape, most obviously where cattle congregate in riparian areas in winter and spring. Grazing has occurred within Preble's meadow jumping mouse habitat for many decades, and populations of Preble's meadow jumping mice have been documented on sites with a long history of grazing. For example, jumping mice were trapped at 18 of 21 sites on True Ranches properties (mice from 14 of these sites have since been confirmed as Preble's meadow jumping mice (King et al. 2006b, p. 4351)), primarily within sub-irrigated hay meadows that have been subjected to livestock grazing and hay production for approximately 100 years (Taylor 1999, p. 5).

At the time of listing, we addressed overgrazing by livestock, stating that it may have caused significant impacts to Preble's meadow jumping mouse habitat, but that timing and intensity of grazing were probably important to some degree in maintaining habitat and that maintenance of woody vegetative cover could be key (63 FR 26517, May 13, 1998). Overgrazing was thought to have eliminated the Preble's meadow jumping mouse from much of its former Wyoming range (Clark and Stromberg 1987, p. 185; Compton and Hugie 1993b, p. 4). Trapping efforts since listing have greatly expanded our understanding of the subspecies' range in Wyoming, suggesting that our assertions that grazing eliminated Preble's from these areas were incorrect.

As suggested by Bakeman (1997, p. 79) and Pague and Grunau (2000, p. 1–17), and as supported by the examples above, grazing is compatible with Preble's meadow jumping mouse when timing and intensity are appropriately managed. We now believe that agricultural operations that have maintained habitat supportive of Preble's meadow jumping mouse populations are consistent with conservation and recovery of the subspecies. In recognition of this, we adopted in 2001 special regulations at 50 CFR 17.40(1) which exempted existing agricultural activities, including grazing, plowing, seeding, cultivating, minor drainage, burning, mowing, and harvesting, from the prohibitions of the Act. The exemption does not apply to new agricultural activities or to those that expand the footprint or intensity of the activity. We established the exemption to provide a positive incentive for agricultural interests to participate in voluntary conservation activities and to support surveys and studies designed to determine status, distribution, and ecology of Preble's meadow jumping mouse, which in turn could lead to more effective recovery efforts.

The number of cattle in counties currently known to support the Preble's meadow jumping mouse in Wyoming totaled 270,000 head in 2006 (National Agriculture Statistics Service 2007). Cattle numbers appear stable in Albany, Converse, and Laramie Counties, but higher than the average for the last 20 years in Platte County. Cattle numbers in Colorado counties supporting the Preble's meadow jumping mouse totaled 666,000 head in 2006, but they total only 116,000 head if Weld County, where few Preble's meadow jumping mice are thought to persist, is excluded (National Agriculture Statistics Service 2007). Excluding Weld, all of these Colorado counties have shown a marked downward trend in cattle numbers over the past 20 years, reflecting human development on former agricultural lands (National Agriculture Statistics Service 2007).

Overall, we expect traditional grazing operations to continue in Wyoming. Such operations have generally proven compatible with Preble's meadow jumping mice as timing and intensity have been managed appropriately. This management has taken place without ESA oversight as allowed in the special regulations at 50 CFR 17.40(1). We have no reason to believe the management of these facilities will change significantly in the future.

In Colorado, many large ranch properties are being subdivided into ''ranchettes.'' These small tracts can be heavily affected by concentrated grazing pressures. We believe that this represents a widespread threat to significant areas of Colorado, where an increase in rural development is forecast

in the foreseeable future. Based on growth projections, subdivision of ranches is expected to be minimal in portions of Wyoming where the Preble's meadow jumping mouse exists.

Summary. Within Colorado, human land uses within the Preble's meadow jumping mouse's range have destroyed, degraded, and fragmented habitat and continue to do so. While protections of the Act have avoided, minimized, and helped to compensate for direct human land-use impacts to occupied Preble's meadow jumping mouse habitat, secondary impacts to riparian habitats have likely diminished the areas that are capable of sustaining Preble's populations. Given the projected future growth rates in Colorado, and absent protections associated with Federal activities and listing under the Act, we believe that threats posed by human development activities discussed above would rise dramatically following delisting. Most of the new Preble's meadow jumping mouse sites documented since listing in Colorado are subject to the same level of threats discussed above for the Colorado portion of the range in general and do not change our conclusion as to the current and future conservation status of the subspecies in this portion of its range. Regulatory mechanisms that could help reduce such negative impacts, while currently limited, are discussed under Factor D below.

In Wyoming, the Preble's meadow jumping mouse appears to be much more widely distributed than previously assumed, while current and future threats to habitat and range appear limited. Such impacts to the Wyoming portion of the subspecies' range are likely to be minor with only small and localized effects. Therefore, we believe that present or threatened destruction, modification, or curtailment of the Preble's meadow jumping mouse habitat and range in Wyoming do not suggest that this subspecies is likely to become endangered within the foreseeable future throughout all of its range.

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

The Preble's meadow jumping mouse is not collected for commercial or recreational reasons. Some collection of specimens occurs for scientific and educational purposes, but currently only through permits issued by the Service, CDOW, or WGFD. Although unintentional mortalities have resulted from capture and handling of Preble's meadow jumping mice by permitted researchers, we believe that the level of take associated with this activity does not rise to the level that would affect populations of the subspecies, nor is it likely to do so if we remove the protections of the Act.

C. Disease or Predation

At the time of listing, we had no evidence of disease causing significant impacts to the Preble's meadow jumping mouse (63 FR 26517, May 13, 1998). No further evidence exists that any parasite or disease has caused a significant impact to populations. While plague relationships for most North American rodents are poorly understood, plague may interact synergistically with other natural and human-induced disturbances, increasing risk of local extirpation and rangewide extinction (Biggins and Kosoy 2001, p. 913). Plague has not been documented in the Preble's meadow jumping mouse. However, Pague and Grunau (2000, pp. 1–19) considered disease to be a potentially high-priority issue for the Preble's meadow jumping mouse. They cited unknown resistance of the Preble's meadow jumping mouse to plague and other diseases, and noted that small populations could be especially vulnerable to effects of an epizootic. Should disease materialize into a substantive issue, we believe populations in Colorado would be at higher risk because development pressures in this portion of the range are more likely to result in small, fragmented, and unsustainable populations.

At the time of listing, we addressed potential predators of the Preble's meadow jumping mouse whose densities could increase in the suburban or rural environment, including striped skunk (*Mephitis mephitis*), raccoon (*Procyon lotor*), and the domestic cat (*Felis catus*) (63 FR 26517, May 13, 1998). Increased impacts of native and exotic predators that accompany rural development can affect species viability (Hansen et al. 2005, p. 1899). We noted opinions that free-ranging domestic cats and feral cats locally presented a problem to Preble's meadow jumping mouse populations. Where predator populations are increased through human land uses, they may contribute to the loss or decrease of Preble's meadow jumping mouse. Generally, we have found proponents of new residential developments near Preble's meadow jumping mouse habitat to be receptive to prohibitions on free-ranging cats and dogs (*Canis domesticus*) when negotiating minimization measures through section 7 of the Act. However, enforcement is often through covenants administered by homeowners' associations with uncertain success. If the Preble's meadow jumping mouse were to be delisted and Federal protection under the Act discontinued, similar covenants on new development in and near Preble's meadow jumping mouse habitat would be less likely, and existing covenants may not be as strictly enforced. Beyond previously known or anticipated predators of jumping mice, introduction of non-native bullfrogs (*Rana catesbiana*) in Colorado has resulted in predation on Preble's meadow jumping mice (Trainor 2004, p. 58). However, we have no information to suggest that predation from bullfrogs has affected Preble's meadow jumping mouse populations.

While many uncertainties remain regarding disease and predation, we believe the best available scientific and commercial data suggest that disease is most likely to only be a factor in small and fragmented populations, and that increases in predation will likely only contribute to the reduction, fragmentation, and loss of Preble's meadow jumping mouse populations when such populations are exposed to increased human presence. As noted above, increased human presence is expected to be a significant issue in Colorado and of minimal concern in Wyoming. Thus, we expect these issues have the potential to meaningfully affect Preble's meadow jumping mouse populations in developing areas of Colorado, but comparable impacts in Wyoming are not expected.

D. The Inadequacy of Existing Regulatory Mechanisms

This factor considers the regulatory mechanisms that would remain in place in the absence of the Act's protective measures. Current and likely future protections are considered. If the protections of the Act are removed, the Service has no assurances previous conservation commitments made under sections 7 or 10 of the Act would remain in place.

At the time of listing, we cited the lack or ineffectiveness of laws and regulations protecting the Preble's meadow jumping mouse and its habitat (63 FR 26517, May 13, 1998). Protective measures discussed below include Federal, State, and local protections.

Federal Protections. Existing Federal laws, such as the Clean Water Act (33 U.S.C. 1251 et seq.), Federal Power Act (16 U.S.C. 791a et seq.), Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.), National Forest Management Act (16 U.S.C. 1600 et seq.), Federal Land Policy and Management Act (43 U.S.C. 1701 et seq.), Food Security Act (16 U.S.C. 3801 et seq.), and National Environmental

Policy Act (42 U.S.C. 4321 et seq.), provide limited protection for non-listed species.

Section 404 of the Clean Water Act generally requires avoidance, minimization (when practicable), and mitigation of adverse impacts to jurisdictional wetlands and waters of the United States associated with filling. Human impacts to jurisdictional wetlands may be permitted when alternatives that would avoid wetlands are found not to be practicable. Section 404 of the Clean Water Act does not apply to non-jurisdictional waters or wetlands that include some streams corridors known to support the Preble's meadow jumping mouse (most notably Running Creek and its tributaries in Elbert County, Colorado, but potentially on other streams with intermittent flows or where there is no regular connection to waters of the United States). In these cases, activities effecting these waters or wetlands would not require Federal permits under Section 404 of the Clean Water Act. In addition, Section 404 of the Clean Water Act provides no comparable safeguards for nearby uplands used by the Preble's meadow jumping mouse. Thus, the Clean Water Act provides only limited protection of habitats utilized by the Preble's meadow jumping mouse and is not capable of substantially reducing threats to individual Preble's populations or to the subspecies as a whole.

On lands administered by the U.S. Forest Service and U.S. Bureau of Land Management, the current status of the Preble's meadow jumping mouse as threatened invokes management priorities in accordance with the Act. If delisted, these protections would no longer apply. However, Federal land-management agencies, through their regulations, policies, and management plans, work to ensure long-term protection of all listed species. Of the three National Forests supporting Preble's meadow jumping mouse populations, the Medicine Bow—Routt National Forest has a forest management plan that includes standards and guidelines specific to conservation of the Preble's meadow jumping mouse. The Arapahoe-Roosevelt National Forest and the Pike-San Isabel National Forest have forest plans that predate the listing of the Preble's meadow jumping mouse (Warren 2007). If delisted, the Preble's meadow jumping mouse would likely be considered a subspecies warranting conservation concern by Federal land-holding agencies and, as such, retain some continued degree of conservation priority.

On military installations, the Sikes Act Improvement Act of 1997 (16 U.S.C. 670a et seq.) requires each facility that includes land and water suitable for the conservation and management of natural resources to complete an Integrated Natural Resources Management Plan (INRMP). This plan must integrate implementation of the military mission of the installation with stewardship of the natural resources found there. In both Colorado and Wyoming, this process has provided the opportunity to consider the potential impacts of military actions on the Preble's meadow jumping mouse.

Warren Air Force Base in Laramie County, Wyoming, has an INRMP and a conservation and management plan. However, the base may only support the western jumping mouse. The Air Force Academy in El Paso County, Colorado, has an INRMP in place, a conservation and management plan, and a programmatic consultation under section 7 of the Act, which provides guidance for Air Force management decisions for certain activities that may affect the subspecies. Research on the Preble's meadow jumping mouse is ongoing at the Academy; the conservation and management plan is designed to be updated as new information is collected. Both plans are designed to be in place for 5 years. The emphasis given to conservation of the Preble's meadow jumping mouse in these plans may decline in the future if the subspecies were to be delisted.

The presence of Preble's meadow jumping mouse has been documented at two of the Service's NWRs. We manage the Rocky Flats NWR, near Boulder, Colorado, in a manner consistent with conservation of the Preble's meadow jumping mouse. This management is unlikely to change if the Preble's meadow jumping mouse were to be delisted.

More recently, a single Preble's meadow jumping mouse as well as western jumping mice have been confirmed from Hutton Lake NWR near Laramie, Wyoming. Because this subspecies was only recently documented on Huttom Lake NWR, the subspecies needs are not explicitly addressed in management documents (Timberman 2007). While it is unknown if ongoing management (primarily waterfowl oriented) is consistent with the subspecies' needs, the refuge has expressed a willingness to provide for the needs of the subspecies in the future (Timberman 2007).

Service-approved HCPs and their incidental take permits contain management measures and protections for identified areas that protect, restore, and enhance the value of these lands as habitat for the Preble's meadow jumping mouse. These measures, which include explicit standards to avoid, minimize, and mitigate any impacts to the covered (sub)species and its habitat, are designed to ensure that the biological value of covered habitat for the Preble's meadow jumping mouse is maintained, expanded, or improved. Large regional HCPs expand upon the basic requirements set forth in section 10(a)(1)(B) of the Act and reflect a voluntary, cooperative approach to large-scale habitat and (sub)species conservation planning. The primary goal of such HCPs is to provide for the protection and management of habitat essential for the conservation of the (sub)species while directing development to other areas. In any HCP, permittees may terminate their participation in the agreement and abandon the take authorization set forth in the permit.

To date, we have approved 19 single species HCPs for the Preble's meadow jumping mouse, all in Colorado. Eighteen of the associated permits allow approximately 280 ha (700 ac) of permanent or temporary impact to Preble's meadow jumping mouse habitat, and preserve or enhance habitat to offset impacts. The largest of these, the approved HCP for Douglas County and the Towns of Castle Rock and Parker, allows impacts of up to 170 ha (430 ac), in exchange for the acquisition of 9 km (15 mi) of stream and 455 ha (1,132 ac) of habitat, was acquired and preserved for the long-term benefit of the Preble's meadow jumping mouse.

The remaining HCP, issued in January 2006, is the Livermore Area HCP in Larimer County. The planning area for this HCP includes a large portion of Larimer County, approximately 1,940 square km (750 square mi), including a Preble's meadow jumping mouse ''conservation zone'' estimated at approximately 324 km (201 mi) of stream and 8,570 ha (21,320 ac). The HCP cites protection of 114 km (71 mi) of stream, mostly on CDOW lands; however, it is not clear what proportion of these areas support Preble's. Local landowners and public agencies holding land within the boundaries of this HCP may opt for coverage under the HCP and receive take permits for activities consistent with the HCP. The Livermore Area HCP is designed to support current land uses, including ranching and farming. However, inclusion of landowners is optional, and they may choose to pursue land uses inconsistent with those specified in the HCP. Thus far, we have issued no individual permits under this HCP.

Of the two regional HCPs in the process of being developed, the El Paso

County effort is proceeding slowly and the Boulder County effort appears to be on hold. It is unlikely that these conservation plans will be completed or implemented if the Preble's meadow jumping mouse does not remain listed under the Act.

State Protections. Under the nongame provisions of the CDOW Regulations (Chapter 10, Article IV) the Preble's meadow jumping mouse currently may only be taken legally by permitted personnel for educational, scientific, or rehabilitation purposes. However, if delisted, Colorado could rescind its current State designation of threatened. In Wyoming, continued classification of the meadow jumping mouse as a ''nongame species'' under Section 11 of Chapter 52 (Nongame Wildlife) of the Wyoming Game and Fish Commission regulations would protect the Preble's meadow jumping mouse from takings and sales by allowing the issuance of permits only for the purpose of scientific collection. As mentioned previously in our discussion under Factor B, overutilization for commercial, recreational, scientific, or educational purposes is not now, nor is it likely to become a significant threat to the subspecies, even if the protections afforded the subspecies under Colorado and Wyoming laws are removed.

Numerous State lands (CDOW lands, State Park lands, State Land Board lands) and mitigation properties (such as those of the Colorado Department of Transportation) would continue to provide a measure of protection for the Preble's meadow jumping mouse should it be delisted. While some conservation properties may have management specifically designed to preserve and enhance Preble's meadow jumping mouse habitat, others concentrate more on open-space preservation and general wildlife-habitat conservation.

State programs have been available to help preserve the Preble's meadow jumping mouse through the acquisition, preservation, and management of its habitat. These include the Great Outdoors Colorado Trust Fund and the Species Conservation Trust Fund. In comments to the Service, then Colorado Department of Natural Resources Commissioner, Russell George, stated that State and local initiatives could provide for conservation of the Preble's meadow jumping mouse, independent of Federal oversight. He listed nearly 40 conservation projects in 5 Front Range Colorado counties where the Preble's meadow jumping mouse ''may be present'' (George 2004). The conservation value of many of these projects is uncertain since most were developed without specific regard to the Preble's meadow jumping mouse's distribution and its conservation.

Local Protections. At the time of listing, we pointed out that while a myriad of regional or local regulations, incentive programs, and open-space programs existed, especially in Colorado, few specifically protected the Preble's meadow jumping mouse or its habitat from inadvertent or intentional adverse impacts (63 FR 26517, May 13, 1998). Many local regulations create a process of site-plan review that ''considers'' or ''encourages'' conservation of wildlife, wetlands, and other natural habitats. Effectiveness of local regulations in maintaining naturally functioning riparian corridors varies greatly depending on how these apparently flexible regulations are implemented. Following listing under the Act, development and other projects in and near Preble's meadow jumping mouse habitat have received increased scrutiny from local jurisdictions, often in coordination with Service authorities. Open-space acquisitions and easements have also taken the presence of the Preble's meadow jumping mouse into account. It is not clear what level of interest in Preble's meadow jumping mouse conservation would continue following delisting. Local governments would likely relax review procedures for projects in known or suspected Preble's meadow jumping mouse habitat. Beyond the direct impact to Preble's meadow jumping mouse habitat, secondary impacts of development (including increased recreational use, altered flow regimes and groundwater levels, and increase in domestic predators) are unlikely to be adequately addressed. While certain local regulations are designed to conserve wetlands or floodplains on private lands, it is unlikely they would effectively control land uses (grazing, mowing, cutting, and burning) that may affect the hydrology, vegetation, and hibernacula sites on which Preble's depends. The adequacy of such protective measures is more important within Colorado than Wyoming given the intense development pressures in the Colorado counties where the Preble's meadow jumping mouse occurs.

Douglas County, Colorado, owns 14 properties that encompass 24 km (15 mi) of stream and associated riparian habitats potentially beneficial to the Preble's meadow jumping mouse (Matthews 2004). Of Douglas County streams on non-Federal property within the Riparian Conservation Zone, 105 km (65 mi), or 23 percent, are under some form of permanent protection (Matthews 2004). However, occurrence of the Preble's meadow jumping mouse on many of these properties has not been extensively documented. For example, while there are 23.4 km (14.5 mi) of mapped riparian corridors on the large Greenland Ranch conservation property, the presence of the Preble's meadow jumping mouse has been documented at only two sites. Future conservation efforts to augment protected areas and to link protection over large expanses of connected streams in Douglas County could contribute greatly to maintaining secure Preble's meadow jumping mouse populations in the Upper South Platte and Middle South Platte—Cherry Creek drainages. Should the Preble's meadow jumping mouse be delisted, management priorities on protected lands and direction of future conservation efforts would likely change. In order to ensure long-term management for the Preble's meadow jumping mouse, the Preliminary Draft Recovery Plan suggests the Service and our partners develop and implement long-term management plans and cooperative agreements prior to delisting (Service 2003b, pp. iv, 33, 39, 47–47, 51–52).

Larimer County has acquired or secured easements to considerable lands, including some properties under the Laramie Foothills Project, in partnership with The Nature Conservancy, the City of Fort Collins, and the Legacy Land Trust. While conservation efforts have increased, especially in the Livermore Valley, residential development remains the largest threat to Preble's in the county (Pague 2007). The extent to which Preble's meadow jumping mouse populations are supported by these properties, the fate of remaining private lands in the North Fork Cache La Poudre River and its tributaries, and the ability to link conservation lands and traditional agricultural lands supporting the Preble's meadow jumping mouse along stream reaches are key to protecting the potentially large Preble's meadow jumping mouse population thought to exist in this area.

The City of Boulder, Boulder County, and Jefferson County have extensive lands protected under their open-space programs. While the extent of known Preble's meadow jumping mouse occurrences in these counties is limited compared to that documented in Larimer and Douglas Counties, known populations exist on open space protected from residential and commercial development.

Summary. In the absence of the Act's protective measures, Federal conservation efforts for the Preble's meadow jumping mouse would be

largely limited to Federal properties, where the subspecies may be maintained as a priority subspecies and conserved through existing or future management plans.

While state regulations in both Colorado and Wyoming would regulate killing of Preble's meadow jumping mice, as noted in Factor B above, we do not view this as a significant concern driving the subspecies long-term conservation status. If delisted, State and local regulations would do little to conserve the Preble's meadow jumping mouse or its habitat on private lands. Public land holdings, conservation easements, and other conservation efforts, past and future, could support the Preble's meadow jumping mouse on specific sites.

In Colorado, the extent and pattern of conservation efforts in relation to Preble's meadow jumping mouse distribution, and the appropriate management of Preble's meadow jumping mouse habitat, would largely dictate the long-term viability of Preble's meadow jumping mouse populations. At this time, no large populations and few medium populations, as described in the Preliminary Draft Recovery Plan, are known to exist in Colorado on contiguous stream reaches that are secure from development. Management plans that specifically address threats to the Preble's meadow jumping mouse are few, and management priorities would likely change if we were to delist the subspecies. Much of the intervening private lands would likely be subject to development within the foreseeable future (this issue is described in more detail in Factor A above). If we were to delist the subspecies, given current and projected levels of protections, we believe that most Preble's meadow jumping mouse populations in Colorado would not be secure into the foreseeable future.

In Wyoming, the best available scientific and commercial information suggests that at least one large population and two medium populations occur in the State as recommended in the Preliminary Draft Recovery Plan (Service 2003b, pp. 19, 22). While regulatory measures in Wyoming do not guarantee protection of these populations, such assurances are not needed because threats to the Preble's meadow jumping mouse and the subspecies' habitat are limited for the foreseeable future.

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

At the time of listing, we judged this subspecies susceptible to a number of other factors, including impact from naturally occurring events such as fire and flooding, invasive weeds and weed control programs, pesticides and herbicides, and secondary impacts associated with human-caused development (63 FR 26517, May 13, 1998). For most of these factors, we have little more information than we had at the time of listing. Additional concerns that were not considered at the time of listing include the potential for competition between the Preble's meadow jumping mouse and the western jumping mouse, and future effects of changing climate on the Preble's meadow jumping mouse.

Flooding and fire are natural components of the Wyoming and Colorado foothills and plains, and Preble's meadow jumping mouse habitat naturally waxes and wanes with these events. While these natural events may affect Preble's meadow jumping mouse populations by killing individuals and by destroying riparian and adjacent upland habitat on which they depend, the effects to vegetation are often temporary. Normal flooding and fire events also may help maintain the vegetative communities that provide suitable habitat for the Preble's meadow jumping mouse. Increase in impervious surfaces and denuding of vegetation caused by human activity can result in increased frequency and severity of flood events and prevent the re-establishment of favored riparian communities. An extreme flood event may eliminate an entire Preble's meadow jumping mouse population in an affected stream reach or drainage.

Periodic fire may be of value in maintaining riparian, transitional, and upland vegetation within Preble's meadow jumping mouse habitat. In a review of the effects of grassland fires on small mammals, Kaufman et al. (1990) found a positive effect of fire on meadow jumping mice in one study and no effect on the species in another study. Fire may regenerate decadent willow (*Salix* sp.) stands along streams and encourage higher stem densities considered more favorable to the Preble's meadow jumping mouse.

Long periods of fire suppression result in fuel build-up, especially in forested areas, and can result in catastrophic fires that alter habitat dramatically, change the structure and composition of the vegetative communities, and potentially affect large numbers of Preble's meadow jumping mice or multiple populations. Following more intense fires, precipitation in a burned area may degrade Preble's meadow jumping mouse habitat by causing greater levels of flooding, erosion, and sedimentation along creeks. As habitat redevelops, it will likely be reoccupied by the Preble's meadow jumping mouse, assuming that there are occupied, connected stream reaches where sufficient Preble's meadow jumping mouse populations have continued to persist.

An example of catastrophic fire in Preble's meadow jumping mouse habitat occurred in 2002. The Hayman and Schoonover fires in Jefferson and Douglas Counties, Colorado, encompassed over 3,000 ha (7,500 ac) of potential Preble's meadow jumping mouse habitat, or approximately 20 percent of the potential habitat within the boundaries of Pike National Forest (Mike Elson 2003). Approximately 342 ha (844 ac) of proposed critical habitat were burned. While riparian habitat that was lightly burned was expected to recover relatively quickly, increases in erosion and sedimentation downstream have been severe, and may continue to affect Preble's meadow jumping mouse habitat for several years. Because of severe fire-related impacts, we withdrew from the final critical habitat designation for the Preble's meadow jumping mouse (68 FR 37275, June 23, 2003) a portion of Gunbarrel Creek that we had proposed as critical habitat for the subspecies before the Hayman fire. Even prior to the Hayman and Schoonover fires, Pague and Granau (2000) considered catastrophic fire to be a high-priority issue for Douglas County.

We believe fire has the potential to affect the Preble's meadow jumping mouse populations both directly and indirectly. The intensity, extent, and location of any fire event will likely dictate the severity of the impact to the Preble's meadow jumping mouse. Catastrophic fire events are, by their nature, rare.

Invasive, noxious plants can encroach upon a landscape, displace native plant species, form monocultures of vegetation, and may negatively affect food and cover for the Preble's meadow jumping mouse. The control of noxious weeds may entail large-scale removal of vegetation and mechanical mowing operations, which also may affect the Preble's meadow jumping mouse. The tolerance of the Preble's meadow jumping mouse for invasive plant species remains poorly understood. Leafy spurge (*Euphorbia esula*) may form a monoculture, displacing native vegetation and thus reducing available

habitat (Selleck et al. 1962; Pague and Grunau 2000, p. 1–18). Nonnative species including tamarisk (*Tamarix ramosissima*) and Russian olive (*Elaeagnus angustifolia*) may adversely affect the Preble's meadow jumping mouse (Garber 1995, p. 16; Pague and Grunau 2000, p. 1–18). Existing special regulations at 50 CFR 17.40(1) exempt take incidental to noxious weed control. We instituted this exemption to recognize that control of noxious weeds is likely to produce long-term benefits to native vegetation supportive of the Preble's meadow jumping mouse.

It remains unknown to what extent point and non-point source pollution (sewage outfalls, spills, urban or agricultural runoff) that degrades water quality in potential habitat may affect the abundance or survival of the Preble's meadow jumping mouse. Likewise, it is unknown whether pesticides and herbicides, commonly used for agricultural and household purposes within the range of the Preble's meadow jumping mouse, pose a threat to Preble's meadow jumping mice directly, or through their food supply, including possible bioaccumulation.

Human-caused development creates a range of additional potential impacts (through human presence, noise, increased lighting, introduced animals, and the degradation of air and water quality) that could alter Preble's meadow jumping mouse behavior, increase the levels of stress, and ultimately contribute to loss of vigor or death of individuals, and extirpation of populations. Introduced animals associated with human development may displace, prey upon, or compete with the Preble's meadow jumping mouse. Feral cats and house mice were common in and adjacent to historical capture sites where Preble's meadow jumping mice were no longer found (Ryon 1996, p. 26). While no cause and effect relationship was documented, the Preble's meadow jumping mouse was 13 times less likely to be present at sites where house mice were found (Clippinger 2002, p. 104). We have an incomplete understanding of the mechanisms by which the breadth of human-caused development impacts Preble's meadow jumping mouse populations. However, the absence of Preble's meadow jumping mouse populations in portions of Colorado drainages where riparian habitat appears relatively favorable but human encroachment is pervasive suggests a potential cause-and-effect relationship. A combination of factors in addition to habitat loss may contribute to local extirpations.

Colorado's Comprehensive Wildlife Conservation Strategy lists ''scarcity'' as a threat to meadow jumping mice that may lead to inbreeding depression (CDOW 2006, p. 102). Small populations can be threatened by stochastic, or random, changes in a wild population's demography or genetics (Brussard and Gilpin 1989, pp. 37–48; Caughley and Gunn 1996, pp. 165–189). A stochastic demographic change in small populations, such as a skewed age or sex ratio (for example, a loss of adult females), can negatively affect reproduction and increase the chance of extirpation. Isolation of populations may disrupt gene flow and create unpredictable genetic effects that could impact Preble's meadow jumping mouse persistence in a given area. While the susceptibility of the Preble's meadow jumping mouse to such events has not been researched, the documented tendency for Preble's meadow jumping mouse populations to vary widely over time heightens concern for small and isolated populations. The lowest population numbers of Preble's meadow jumping mice more accurately reflect potential vulnerability than typical or average population numbers present. Although many trapping efforts have targeted Preble's meadow jumping mice in small, isolated reaches of habitat, few have documented presence. As noted above, we believe populations in Colorado would be at higher risk because development pressures in this portion of the range are more likely to result in small, fragmented and unsustainable populations.

The relative ranges, abundance, and relationship between the Preble's meadow jumping mouse and the western jumping mouse are not yet clearly understood, especially in Wyoming. Recent confirmation of extensive range overlap in Wyoming and the apparent predominance of the western jumping mouse in some southern Wyoming drainages with few or no Preble's meadow jumping mice, provide reason for concern. It is unknown whether western jumping mice are actively competing with Preble's meadow jumping mice, affecting Preble's meadow jumping mouse population size and possibly limiting distribution, or if this distribution patterns is unrelated to their interaction. Additional study of this issue would be desirable. Although questions remain, we do not have sufficient information to indicate this is a threat to the Preble's meadow jumping mouse in any portion of its range.

Impacts to the Preble's meadow jumping mouse under predicted future climate change are unclear. A trend of warming in the mountains of western North America is expected to decrease snowpack, hasten spring runoff, and reduce summer flows (Intergovernmental Panel on Climate Change 2007, p. 10). Increased summer heat may increase the frequency and intensity of wildfires (Intergovernmental Panel on Climate Change 2007, p. 14). Stream-flow reductions or seasonal changes in flow due to climate change will probably cause a greater disruption in watersheds with a high level of human development than in those with a lower level of development (Hurd et al. 1999, p. 1402). The three major river basins that support the Preble's meadow jumping mouse have heightened vulnerability to the effects of climate change due to the degree of human development, natural variability in stream-flow, ratio of precipitation lost to evapotranspiration, and groundwater depletion (Hurd et al. 1999, p. 1404). Conflicts between human needs for water and maintenance of existing wetland and riparian habitats will be heightened. Therefore, while it appears reasonable to assume that Preble's meadow jumping mouse may be affected, we lack sufficient certainty to know how climate change will affect the subspecies.

Overall, the impacts associated with other natural or manmade factors affecting the Preble's meadow jumping mouse and the subspecies' habitat remain largely unassessed, and therefore, largely unknown. Although questions remain regarding these factors, we do not have sufficient information to indicate that these factors are a threat to Preble's meadow jumping mouse long-term conservation status. To the extent that meaningful impacts are possible, small and fragmented populations are likely to be more vulnerable.

Conclusion of the 5-Factor Analysis

Is the Subspecies Threatened or Endangered throughout ''All'' of its Range—As required by the Act, we considered the five potential threat factors to assess whether the Preble's meadow jumping mouse is threatened or endangered throughout all or a significant portion of its range. When considering the listing status of the subspecies, the first step in the analysis is to determine whether the subspecies is in danger of extinction throughout all of its range. If this is the case, then we list the subspecies in its entirety. For instance, if the threats to a subspecies are directly acting on only a portion of its range, but they are at such a large scale that they place the entire

subspecies in danger of extinction, we would list the entire subspecies.

Destruction and modification of habitat and the resulting curtailment of range is the most significant factor affecting the future conservation status of the subspecies. Within Wyoming, new distributional data and a better understanding of threats has altered our perception of the subspecies' status in this portion of its range. At the time of listing, data confirming the presence of the Preble's meadow jumping mouse was available for only a few sites in Wyoming. Since listing, additional distributional data has verified that the subspecies is widespread in the North Platte River basin with distribution across at least four drainages. Trapping efforts to date suggest that the subspecies may remain limited in number and distribution within the Wyoming portion of the South Platte River basin. An improved understanding of the subspecies' distribution suggests that historical agricultural activities, such as grazing and haying, have had a minimal impact on the subspecies to date. In short, continuation of these long-standing activities appears supportive of existing Preble's meadow jumping mouse populations. We have no indication these agricultural practices are likely to change in the foreseeable future in ways that would affect the subspecies' long-term conservation status. A low projected human population growth rate is predicted for the four Wyoming counties occupied by the Preble's meadow jumping mouse, suggesting that few development-related threats are likely in this portion of the subspecies' range into foreseeable future.

Within Colorado, riparian habitat has been severely modified or destroyed by human activities. With current and projected human population increases and commensurate increases in urban and rural development, road construction, and water use, the ongoing loss and modification of riparian habitat will continue in much of the Preble's meadow jumping mouse Colorado range. Even with protection under the Act, development in Colorado has continued to affect Preble's meadow jumping mouse habitat, both directly and indirectly. Much of the Preble's meadow jumping mouse current range in Colorado is on private land. In the absence of the Act's protections, most of this habitat would be lost or made unsuitable within the foreseeable future. While appreciable lands in Colorado supporting the Preble's meadow jumping mouse are controlled by Federal or State agencies, or have been set aside as open space by local governments, many of these areas also are likely to experience habitat degradation in the absence of the Act's protections. Some of these areas will experience negative indirect effects from upstream development. Where conservation properties are not extensive, the Preble's meadow jumping mouse populations are likely to be small, fragmented, and unsustainable. Additional recovery efforts are required to provide such extensive contiguous conservation properties in Colorado.

In contrast to Wyoming, our improved understanding of the subspecies' range in Colorado has not changed our conclusion as to the Preble's meadow jumping mouse's status in this portion of the subspecies' range. As noted above, new data have expanded the confirmed distribution of the Preble's meadow jumping mouse to include additional sites in Boulder, Douglas, El Paso, Jefferson, and Larimer Counties. Most of the newly discovered sites are subject to the same level of threats discussed above. Thus, unlike Wyoming, recently documented sites in Colorado do not meaningfully alter the future conservation status of the subspecies in this portion of its range.

Besides ''present or threatened destruction, modification, or curtailment of its habitat or range,'' a variety of other factors were considered including: Overutilization, disease, predation, fire, flooding, invasive weeds, weed control programs, pesticides, herbicides, non-point source pollution, secondary impacts associated with human-caused development, scarcity, the potential for competition between the Preble's meadow jumping mouse and the western jumping mouse, and the future effects of climate change. The threats to the Preble's meadow jumping mouse from these factors are generally poorly understood and difficult to predict. Although questions remain regarding these factors, we do not have sufficient information to indicate that these factors are a threat to the subspecies long-term conservation status. To the extent that meaningful impacts are possible, these factors are likely to be more significant in areas where development pressures have or are likely to destroy or modify habitat resulting in small and fragmented populations. Thus, we expect these issues could be meaningful as cumulative impacts in the Colorado portion of subspecies' range where development pressures are high. In Wyoming, we expect these factors will continue to have only small, localized impacts on the subspecies.

Based on a better understanding of distribution and threats, we find that the available data do not support the conclusion that the Preble's meadow jumping mouse is likely to become endangered in the foreseeable future throughout ''all'' of its range. We determine this because distributional data has verified that the subspecies is more widespread in the North Platte River basin of Wyoming than previously known, and we are not aware of any threats that are likely to have significant affects on the long-term conservation status of populations of Preble's meadow jumping mouse in Wyoming. We expect impacts to the Wyoming portion of the subspecies' range to be minor with only small and localized effects. We believe a lack of present or threatened impacts to the Preble's meadow jumping mouse in Wyoming suggests that this subspecies is neither in danger of extinction, nor likely to become endangered within the foreseeable future in this portion of its range. Threats in the Colorado portions of the subspecies' range, while severe, do not place the entire subspecies in danger of extinction within the foreseeable future. Thus, the Preble's meadow jumping mouse does not merit continued listing as threatened throughout ''all'' of its range.

Is the Subspecies Threatened or Endangered in a Significant Portion of its Range—Having determined that the Preble's meadow jumping mouse does not meet the definition of threatened or endangered in all of its range, we must next consider whether there are any significant portions of the subspecies' range that are in danger of extinction or are likely to become endangered in the foreseeable future. On March 16, 2007, a formal opinion was issued by the Solicitor of the Department of the Interior, ''The Meaning of 'In Danger of Extinction Throughout All or a Significant Portion of Its Range'' (U.S. Department of the Interior 2007). We have summarized our interpretation of that opinion and the underlying statutory language below. A portion of a subspecies' range is significant if it is part of the current range of the subspecies and is important to the conservation of the subspecies because it contributes meaningfully to the representation, resiliency, or redundancy of the subspecies. The contribution must be at a level such that its loss would result in a decrease in the ability to conserve the subspecies.

The first step in determining whether a subspecies is threatened or endangered in a significant portion of its range is to identify any portions of the range of the subspecies that warrant further consideration. The range of a subspecies can theoretically be divided

into portions in an infinite number of ways. However, there is no purpose to analyzing portions of the range that are not reasonably likely to be both significant and either threatened or endangered. To identify those portions that warrant further consideration, we determine whether there is substantial information indicating that (1) the portions may be significant, and (2) the subspecies may be in danger of extinction there or likely to become so within the foreseeable future. In practice, a key part of this analysis is whether the threats are geographically concentrated in some way. If the threats to the subspecies are essentially uniform throughout its range, no portion is likely to warrant further consideration. Moreover, if any concentration of threats applies only to portions of the range that are unimportant to the conservation of the subspecies, such portions will not warrant further consideration.

If we identify any portions that warrant further consideration, we then determine whether in fact the subspecies is threatened or endangered in any significant portion of its range. Depending on the biology of the subspecies, its range, and the threats it faces, it may be more efficient for the Service to address the significance question first, or the status question first. Thus, if the Service determines that a portion of the range is not significant, the Service need not determine whether the subspecies is threatened or endangered there; if the Service determines that the subspecies is not threatened or endangered in a portion of its range, the Service need not determine if that portion is significant.

The terms ''resiliency,'' ''redundancy,'' and ''representation'' are intended to be indicators of the conservation value of portions of the range. Resiliency of a subspecies allows the subspecies to recover from periodic disturbances. A subspecies will likely be more resilient if large populations exist in high-quality habitat that is distributed throughout the range of the subspecies in such a way as to capture the environmental variability found within the range of the subspecies. It is likely that the larger size of a population will help contribute to the viability of the subspecies overall. Thus, a portion of the range of a subspecies may make a meaningful contribution to the resiliency of the subspecies if the area is relatively large and contains particularly high-quality habitat or if its location or characteristics make it less susceptible to certain threats than other portions of the range. When evaluating whether or how a portion of the range contributes to resiliency of the subspecies, it may help to evaluate the historical value of the portion and how frequently the portion is used by the subspecies. In addition, the portion may contribute to resiliency for other reasons; for instance, it may contain an important concentration of certain types of habitat that are necessary for the subspecies to carry out its life-history functions, such as breeding, feeding, migration, dispersal, or wintering.

Redundancy of populations may be needed to provide a margin of safety for the subspecies to withstand catastrophic events. This concept does not mean that any portion that provides redundancy is per se a significant portion of the range of a subspecies. The idea is to conserve enough areas of the range such that random perturbations in the system act on only a few populations. Therefore, we must examine each area based on whether that area provides an increment of redundancy that is important to the conservation of the subspecies.

Adequate representation ensures that the subspecies' adaptive capabilities are conserved. Specifically, we should evaluate a portion to see how it contributes to the genetic diversity of the subspecies. The loss of genetically based diversity may substantially reduce the ability of the subspecies to respond and adapt to future environmental changes. A peripheral population may contribute meaningfully to representation if there is evidence that it provides genetic diversity due to its location on the margin of the subspecies' habitat requirements.

Based on the discussion above, we readily identified the Colorado portion of the current range of the Preble's meadow jumping mouse as warranting further consideration to determine if it is a significant portion of the range that is threatened or endangered. Even with the new information confirming the extent of the range in Wyoming, the range in Colorado still constitutes the bulk of the current range, and the threats are largely concentrated in that portion.

We had to consider the question of how to define the portion of the current range that we would consider further. We concluded that it was appropriate to consider all of the current range in Colorado as a single portion of the range for the purpose of this analysis. We believe the Wyoming/Colorado State line is an appropriate delineation for separating the populations in the two States here because the respective threats to the subspecies appear to be significantly different in the two states. While we could also consider splitting the subspecies into significant portions of the range based on river basins (i.e., only removing protections in the drainages of the North Platte River basin), we believe this would be more difficult to administer with little conservation benefit to the species. We believe removing protections in the Wyoming portion of the South Platte River basin (comprised of the Upper Lodgepole Creek drainage and portions of the Crow Creek and Lone Tree Creek drainages) would be of little biological consequence. While limited trapping data and analysis of museum specimens provide evidence of Preble's meadow jumping mouse occurrence in two of these drainages, trapping data also indicate that the western jumping mouse is much more widespread suggesting that in these drainages the Preble's meadow jumping mouse may simply be uncommon. Thus, given that any additional biological benefit to the subspecies is likely to be minimal and our assertion that the respective threats to the Preble's meadow jumping mouse appear to be significantly different in the two states we are instead proposing State lines as the northern boundary for the Colorado significant portions of range. We are accepting comments on this approach and may consider using river basins in a final rule should the available data demonstrate such an approach is more appropriate.

Within Colorado, threats to the Preble's meadow jumping mouse are comparable between the South Platte River basin and Arkansas River basin. Similarly, threats to the Preble's meadow jumping mouse are comparable north and south of Denver. Because both of these possible partitions have a comparable status, further division of the subspecies' range between these two portions of its range in Colorado is unnecessary.

Another possibility to consider is whether smaller units might be appropriate. For example, one could consider each individual drainage or each individual county. Given the best scientific and commercial information available, we do not believe such subdivisions would result in units that would each meaningfully contribute to the representation, resiliency, or redundancy of the subspecies at a level such that its loss would result in a decrease in the ability to conserve the subspecies. In our view, only when drainages or counties are aggregated are they significant per the above definition. The most logical aggregation of drainages is basins which are already considered above. The most logical aggregation of Counties within Colorado is a north and south of Denver split which is also already considered above.

Therefore, further division of the subspecies' range within Colorado is either not appropriate or unnecessary.

To determine whether the Preble's meadow jumping mouse is threatened in any significant portion of its range, we first consider how the concepts of resiliency, representation, and redundancy apply to the conservation of this particular subspecies. The Preble's Meadow Jumping Mouse Preliminary Draft Recovery Plan provides some perspective. The Preliminary Draft calls for populations across the current range of the subspecies and because the Preble's meadow jumping mouse is a riparian-associated subspecies, contends that river drainages provide an appropriate geographic scale and unit for addressing their conservation. The Preliminary Draft states (Service 2003b, p. 20), ''Species well-distributed across their historical range are less susceptible to extinction and more likely to reach recovery than species confined to a small portion of their range. Distributing populations throughout different drainages reduces the risk that a large portion of the range-wide population will be negatively affected by any particular natural or anthropogenic event at any one time. Spreading the recovery populations across hydrologic units throughout the range of the subspecies also preserves the greatest amount of the remaining genetic variation, and may provide some genetic security to the range-wide population.''

In this case, projected losses of habitat in Colorado would meaningfully affect the representation, resiliency, or redundancy of the subspecies, making this portion of the range a significant portion of the range. The Colorado portion of the range includes:

- Two of the 3 river basins within the subspecies' range, amounting to approximately 65 percent of the subspecies' habitat by river-mile and total acreage (67 FR 47154, July 17, 2002);
- Thirteen (11 for which trapping has confirmed presence) of the 19 drainages comprising the range of the Preble's meadow jumping mouse (each of which should, according to the Preliminary Draft Recovery Plan, contain at least one population in order to achieve representation, resiliency, and redundancy) including 3 of the 4 recommended large populations and 3 of the 5 recommended medium populations (Service 2003b, p. 22); and
- Genetic material substantially unique within the range of the Preble's meadow jumping mouse (King et al. 2006b, pp. 4336–4347).

In conclusion, we believe that loss of the Preble's meadow jumping mouse within Colorado would result in a decrease in the ability to conserve the subspecies. We have determined that, based on its importance to the conservation of the subspecies and because it contributes meaningfully to Preble's meadow jumping mouse representation, resiliency, or redundancy, the Colorado portion of the range constitutes a significant portion of the subspecies' range as described in the Act.

If we identify any portions as significant, we then determine whether in fact the subspecies is threatened or endangered in this significant portion of its range. This determination involves weighing the magnitude and immediacy of the threats. In our view, the cumulative magnitude of threat within Colorado is very high. Immediacy will vary geographically across the range. Some areas will be subject to imminent threats that would, in the absence of the Act's protections, extirpate populations in the near future. In other areas, direct and indirect impacts, in the absence of the Act's protections, will not result in extirpation for some time. Thus, based on the best scientific and commercial information available, we find that the Preble's meadow jumping mouse is likely to become endangered within the foreseeable future throughout the Colorado portion of its range.

In conclusion, the best scientific and commercial data suggest that the Preble's meadow jumping mouse is not likely to become endangered in the foreseeable future throughout all of its range. We base this conclusion primarily on a lack of present or threatened impacts to the Preble's meadow jumping mouse or its habitat in Wyoming. Threats in the Colorado portions of the subspecies' range, while severe, do not place the entire subspecies in danger of extinction within the foreseeable future. However, based on the magnitude of development threats and other pressures to the populations throughout the Colorado portion of the range, and the lack of effective regulatory mechanisms in the absence of the Act's protective measures, we conclude that the significant portion of the subspecies' range within Colorado continues to meet the definition of threatened under the Act, and should remain listed. Therefore, we propose to amend the listing for the Preble's meadow jumping mouse to specify that the subspecies is threatened in the Colorado portion of its range only.

Significant Portion of the Range Where the Subspecies Is Threatened—We propose to amend the list to specify that the Preble's meadow jumping mouse is threatened in a significant portion of its range. Therefore, we must describe that portion because it is the area where the protections of the Act would remain in place. As previously stated the range of a species is the general area in which the species can be found, including migratory corridors, seasonal habitats, and habitats used on a regular, though not necessarily seasonal, basis.

The scale at which one defines the range of a particular species is fact and context dependant. In other words, whether one defines the range at a relatively course or fine scale depends on the life history of the species at issue, the data available, and the purpose for which one is considering range.

The Preble's meadow jumping mouse is secretive, almost never observed without trapping, and relatively rare even where present. Confirmed occupancy is based almost entirely on intensive trapping efforts, requiring hundreds of traps set over multiple nights. Preble's meadow jumping mice are able to move miles along stream corridors over their lifetime (Ryon 1999; Shenk and Sivert 1999a), typically utilizing riparian (river) corridors. Although the subspecies commonly uses riparian vegetation immediately adjacent to a stream, other features that provide habitat for the subspecies include seasonal streams (Bakeman 1997), low moist areas and dry gulches (Shenk 2004), agricultural ditches (Meaney et al. 2003), and wet meadows and seeps near streams (Ryon 1996). Given records of confirmed presence and patterns of existing riparian habitat, we can draw inferences as to what we would consider occupied drainages or portions of these drainages.

To date, aside from some earlier work from Colorado Department of Wildlife and the Colorado Natural Heritage Program, the objective of most trapping surveys has not been to document the limits of occupied habitat in Colorado. While much of the Preble's meadow jumping mouse's distribution is on private lands, most trapping surveys on private lands have been conducted by consultants based on anticipated development of the property by landowners (in compliance with section 7 of the Act). This has resulted in far more trapping within the expanding development corridor than in rural lands where no current development is planned. Therefore, we have less assurance of current presence or potential absence of the Preble's meadow jumping mouse in areas east, south and west of the development corridor.

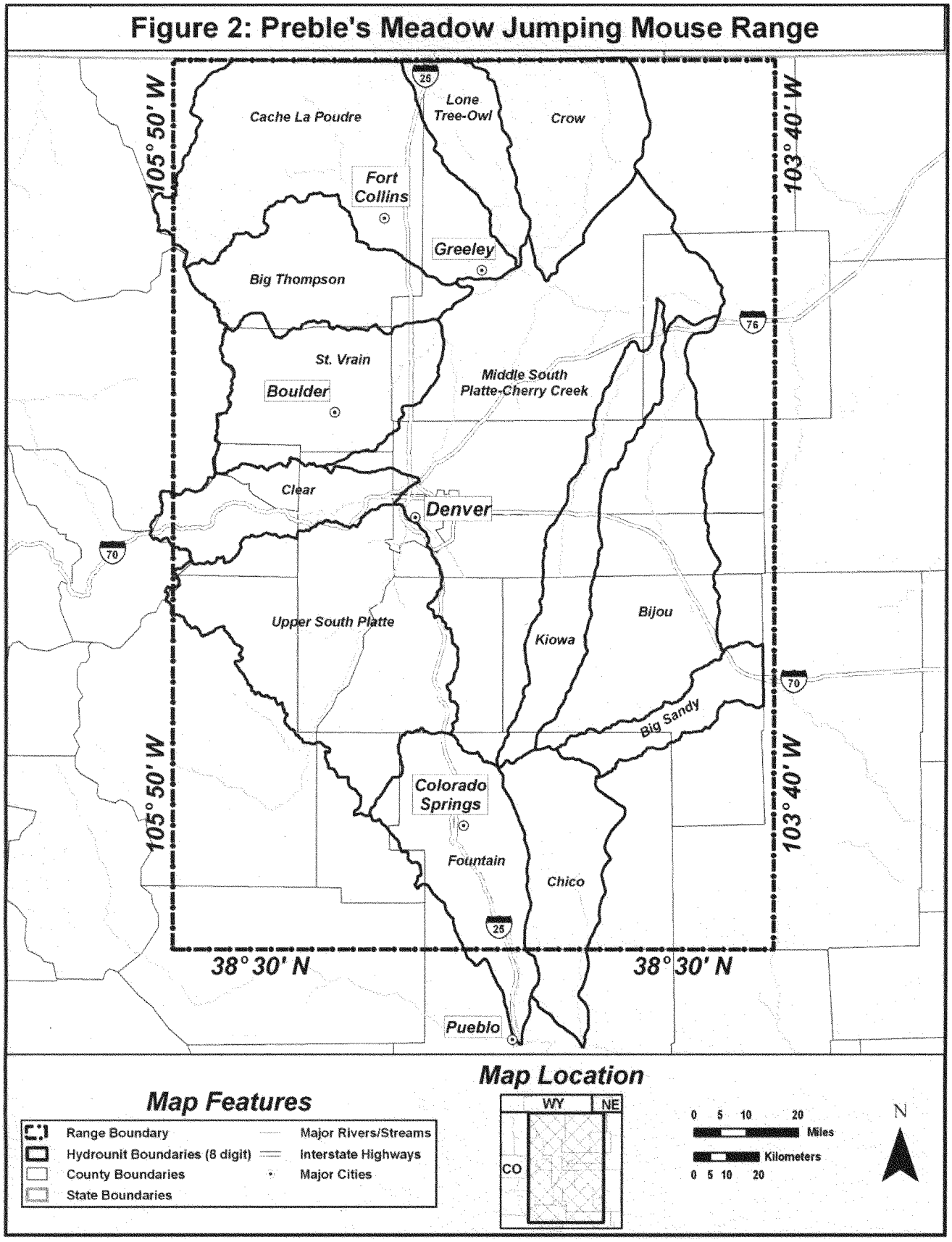
Trapping can only confirm presence, not prove absence. At some sites, researchers have seen dramatic changes in estimated populations from season to season and year to year. A single trapping effort in any presumed occupied site could be unsuccessful if it corresponded to times when few or no animals are present. There is speculation that the Preble's meadow jumping mouse may move in and out of areas (individuals have been shown to move miles along stream corridors over their lifetime). In areas within the range of the subspecies, multiple trap efforts in a drainage or portions of a drainage are needed to provide strong evidence that Preble's meadow jumping mice are likely absent. Again, in many areas outside the Front Range development corridor trapping has been more limited and in some areas where presence has not been confirmed by trapping, we do not believe trapping data is determinative of Preble's presence at particular sites, much less whole drainages of portions thereof .

As with other determinations under the Act, we do not define the current range on the basis of conclusive evidence; rather, we use the best available data. The purpose of defining range (and hence the significant portion of the range) is to set the boundaries of the protections of the Act. Therefore, defining the boundaries too narrowly may lead to the failure to protect some Preble's meadow jumping mice. On the other hand, drawing the boundaries relatively expansively will not lead to unnecessary expense on the part of the Service or the public because, as described in detail below, existing guidance on block clearance zones will remain in place. Therefore, in the context of describing the current range for the purpose of defining the scope of the listing for the Preble's meadow jumping mouse, we have determined that it is appropriate to use a relatively coarse scale to capture all of the areas where the best available data suggests the Preble's meadow jumping mouse is likely to occur.

The Preliminary Recovery Plan suggests maintaining at least one recovery population within each drainage (to provide resiliency, representation, and redundancy) within the existing range of the subspecies. The Preliminary Recovery Plan, which represents the best available science, identifies thirteen drainages that comprise the area significant to the conservation of the subspecies including Big Sandy, Big Thompson, Bijou, Cache La Poudre, Clear Creek, Crow Creek, Fountain Creek Chico, Kiowa, Lone-Tree Owl, Middle South Platte—Cherry Creek, Saint Vrain, and Upper South Platte (as illustrated in figure 2). Recognizing that complete information is currently lacking that would definitively confirm the presence of existing Preble's meadow jumping mouse populations and suitable habitat in some drainages, these drainages have been included in the Preliminary Recovery Plan as representative of the current range of the subspecies on the presumption that at least a small population occurs in each. The intent of the Preliminary Recovery Plan was to preserve populations throughout the existing range to maximize the preservation of the remaining genetic diversity that may be present.

For convenience in distinguishing this boundary on-the-ground we employ latitude and longitude coordinates. We believe the latitude and longitude boundaries below provide an appropriate delineation for the significant portion of the Preble's meadow jumping mouse range in Colorado. These boundaries are inclusive of all areas likely to support Preble's meadow jumping mouse populations in Colorado. As a result, all records confirming Preble's meadow jumping mouse occurrence in Colorado are captured within these boundaries. We believe that it is highly unlikely that there will be discovery of currently existing Preble's meadow jumping mouse populations outside these boundaries in Colorado. Therefore, we believe removing protections outside these boundaries would be of little biological consequence. Thus, based on best available data, we have identified the portion of Colorado west of 103 degrees 40 minutes West, north of 38 degrees 30 minutes North, and east of 105 degrees 50 minutes West as the significant portion of the range of the subspecies (illustrated in figure 2).

BILLING CODE 4310–55–P



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Eastern boundary *(103 degrees, 40 minutes west)*—This boundary is inclusive of all areas within the current survey guidelines (east to a north-south

line through Fort Morgan, Morgan County) and also includes the eastern extent of the Big Sandy drainage (designated in the draft of the recovery plan).

Southern Boundary *(38 degrees, 30 minutes north)*—This boundary is inclusive of all areas within the current survey guidelines (south including all of El Paso County) and also includes the majority of the Fountain Creek and Chico Creek drainages (designated in the draft of the recovery plan). Habitat in the southern portion of El Paso County is limited. The small portions of the Fountain and Chico drainages that fall outside the boundary are outside the current survey guidelines and believed not to support Preble's.

Western boundary *(105 degrees 50 minutes west)*—This boundary is inclusive of elevations to 7,600 feet (2,316 meters) in the Cache La Poudre River, Clear Creek and Upper South Platte drainages and all portions of the Big Thompson and St. Vrain drainages.

Administrative Processes—As part of our management of the subspecies on-the-ground within this significant portion of range area, the Service will continue to utilize block clearance zones to eliminate unnecessary processes (e.g., compliance with section 7 of the Act) while protecting the listed species. In designating a block clearance zone, the Service eliminates the need for individuals or agencies to coordinate with the Service prior to conducting activities at locations within the Preble's meadow jumping mouse range. The establishment of these block clearance zones is based on the likely absence of the subspecies within the area, and little likelihood that any of the area would be of importance to the recovery of the subspecies. Block clearance zones have been approved for the Denver metropolitan area (including most of Denver County and portions of Adams, Arapahoe, Boulder, Broomfield, Douglas, and Jefferson Counties) and along Monument, Cottonwood, and Sand Creeks in the Colorado Springs area. While this substantially reduces the regulatory burden, should an individual Preble's meadow jumping mouse be found in a block-cleared area, it would be fully protected under the Act. In addition, outside of the block clearance zone, but within the SPR, we would continue to identify, on a project-by-project basis, whether surveys for the Preble's meadow jumping mouse are needed based on whether suitable habitat is present within the action area of the project.

We considered excluding block clearance zones from the listing as outside the current range of the subspecies, but we believe that approach would be impractical and ill-advised. For example, Preble's meadow jumping mouse block clearance zones expand on a near annual basis. If a revision to the Code of Federal Regulations was required to achieve this revision, the process would require annual proposed and final rules. This would be both unwieldy from a workload perspective and result in an unnecessary delay in reducing our regulatory oversight as this process typically takes a year to complete. Furthermore, the listing backlog (i.e., a shortfall of funds that preclude the listing of species that are warranted-but-precluded from threatened or endangered status and the designation of critical habitat) would preclude relisting areas even if future information suggests the area was removed prematurely (unless emergency listing was deemed appropriate). This double standard as well as the difficult and time-consuming nature of the process suggests this approach is not realistic, not desirable, and inappropriate. As we have in the past, the Service will consider modification of the current block-clearance zones, or the addition of new zones, when the available data demonstrate such an action is appropriate.

The above discussion relating to specifying a significant portion of the range of the Preble's meadow jumping mouse as threatened represents our current thinking based on the data we now have available. However, this is our first proposal to specify such a portion since issuance of the opinion of the Solicitor's Office on this topic on March 16, 2007. Thus, we note that we will be considering alternative formulations and analyses before issuing a final determination, and the final determination may vary in its particulars from this proposed rule.

We particularly invite data, analyses, and other comments regarding the following issues:

(1) What is the current range of the Preble's meadow jumping mouse? In the absence of confirmation of presence of Preble's meadow jumping mouse by trapping, what information is sufficient for the Service to determine that, based on the best data available, an area is part of the current range of the subspecies?

(2) On how fine or coarse a scale should we define the portion of the range that we may specify as both significant and threatened? Theoretically, the scale could be as coarse as the entire state of Colorado, or as fine as the scale used in critical habitat designations. For the reasons discussed above, this proposed rule is based on an intermediate scale.

(3) How should the boundaries of the portion of the range at issue be defined? By latitude and longitude lines? By drainage boundaries? By county lines? By reference to particular streams? By some other means?

(4) Is it appropriate to use the Colorado/Wyoming border to divide the range of the subspecies? If the Preble's meadow jumping mouse in particular sites within Colorado (particularly those adjacent to the border with Wyoming) are not threatened, should they be included within the significant portion of the range specified as threatened? Likewise, if the Preble's meadow jumping mouse in particular sites within Wyoming (particularly those adjacent to the border with Colorado) are threatened, should they be included within the significant portion of the range specified as threatened?

(5) If we use a relatively coarse scale to define the current range of the subspecies, how should we address an area within that range if we have information suggesting that the subspecies does not currently occupy—or has never actually occupied—that particular area within its overall range? Should those areas be geographically excluded from the significant portion of the range specified as threatened? Or are those areas best addressed through administrative implementation, such as the block clearance zones described above? What impacts to the subspecies, the public, and the Service will result from employing each of the possible strategies?

(6) If we determine to define the portion of the range specified as threatened as excluding areas (at the appropriate scale) that the best data available suggests are not currently occupied by the Preble's meadow jumping mouse, how should we do that? Should such areas (for example, parts of the Denver metropolitan area) be mapped, or excluded by narrative text? What sort of boundaries would be available for defining such areas as not part of the range specified as threatened? What purposes would be served by adding to the complexity of the listing rule? What purposes would be served by reducing the complexity of the listing rule?

(7) Is it appropriate to aggregate all of the current range of the Preble's meadow jumping mouse in Colorado into one portion for the purpose of this analysis? If particular sites within Colorado are not independently significant portions of the range of the Preble's meadow jumping mouse, should they still be considered part of

the portion of the range that is collectively significant?

Depending on the comments received during the public comment period and our further analysis of these issues, the final determination could incorporate any of the possible answers to these questions.

Effects of the Proposed Rule

If finalized, this action would amend the listing for the Preble's meadow jumping mouse by specifying that the subspecies is threatened in the Colorado portion of its range. This action also would eliminate critical habitat (June 23, 2003, 68 FR 37275) in Wyoming. Additionally, the take exemptions of the 4(d) species rule would no longer be necessary, and therefore would no longer apply, in Wyoming (May 22, 2001, 66 FR 28125; October 1, 2002, 67 FR 61531; May 20, 2004, 69 FR 29101). Thus, the prohibitions and conservation measures provided by the Act would no longer apply to this subspecies in Wyoming. Federal agencies would no longer be required to consult with us to insure that any action they authorize, fund, or carry out in Wyoming would not likely jeopardize the continued existence of the subspecies or result in destruction or adversely modify critical habitat in Wyoming. However, to the extent an activity in Wyoming would adversely affect the subspecies or critical habitat within its range listed in Colorado, consultation under section 7 would still be required.

Future Conservation Measures

No specific preservation or management programs exist for the Preble's meadow jumping mouse in Wyoming. We believe that sufficient habitat will remain in Wyoming over the foreseeable future to allow for the continued viability of this subspecies. In the significant portion of the range within Colorado, the Preble's meadow jumping mouse would continue to be protected under the Act.

Peer Review

In accordance with our peer review policy published in the **Federal Register** on July 1, 1994 (59 FR 34270) and the Office of Management and Budget's (OMB) Final Information Quality Bulletin for Peer Review, we seek the expert opinions of appropriate and independent specialists regarding this proposal. In this case, we will seek the comments of two sets of reviewers. First, we will contact the same five experts invited to provide comments on the previous proposed rule (70 FR 5404, February 2, 2005; 71 FR 8556, February 17, 2006; 71 FR 16090, March 30, 2006). The selected reviewers were selected for their expertise in genetics, systematics, and small mammals. We will ask these reviewers to review this proposal's taxonomic discussion. Second, we will contact an additional five experts to review the remainder of this proposal. We will select reviewers for expertise in small-mammal biology, riparian-community ecology and status, population dynamics and extinction risk, and/or development trends and land-use conflicts. The purpose of such review is to ensure that we base our final decision on scientifically sound data, assumptions, and analyses. We will send copies of this proposed rule to these peer reviewers immediately following publication in the **Federal Register**. We will invite these peer reviewers to comment, during the public comment period, on the specific assumptions and conclusions regarding our revised proposal. We will consider all comments and information received during the comment period on this proposed rule during preparation of a final rulemaking. Accordingly, the final decision may differ from this proposed rule.

Clarity of the Rule

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(a) Be logically organized;

(b) Use the active voice to address readers directly;

(c) Use clear language rather than jargon;

(d) Be divided into short sections and sentences; and

(e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

Energy Supply, Distribution, or Use

On May 18, 2001, the President issued an Executive Order (E.O. 13211; Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) on regulations that significantly affect energy supply, distribution, and use. The E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. As this proposed rule is not expected to significantly affect energy supplies, distribution, or use, this action is not a significant energy action and no Statement of Energy Effects is required.

Paperwork Reduction Act

This proposed rule does not contain any new collections of information that require approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This proposed rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act

The Service has determined that Environmental Assessments and Environmental Impact Statements, as defined under the authority of the National Environmental Policy Act of 1969, need not be prepared in connection with regulations adopted pursuant to section 4(a) of the Act. We published a notice outlining the Service's reasons for this determination was published in the **Federal Register** on October 25, 1983 (48 FR 49244).

References

A complete list of all references cited herein is available upon request from the Colorado Field Office (see **ADDRESSES**).

Author

The primary authors of this document are staff located at the Colorado Field Office (see **ADDRESSES**).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and record keeping requirements, Transportation.

Proposed Regulation Promulgation

Accordingly, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations as set forth below.

PART 17—[AMENDED]

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

2. Amend § 17.11(h) by revising the entry for ''Mouse, Preble's meadow jumping'' under ''MAMMALS'' in the

List of Endangered and Threatened Wildlife to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
Mammals							
*	*	*	* *		*	*	
Mouse, Preble's meadow jumping.	*Zapus hudsonius preblei*.	U.S.A. (CO, WY)	U.S.A., north-central CO (that portion of Colorado west of 103 degrees 40 minutes West, north of 38 degrees 30 minutes North, and east of 105 degrees 50 minutes West).	T	636	17.95(a)	17.40(l)
*	*	*	* *		*	*	

3. Amend § 17.40(l) as follows:

a. By revising paragraph (l)(2)(vi)(E) to read as set forth below; and

b. By revising paragraph (l)(4) to read as set forth below.

§ 17.40 Special rules—mammals.

* * * * *

(l) * * *

(2) * * *

(vi) * * *

(E) Any future revisions to the authorities listed in paragraphs (l)(2)(vi)(A) through (D) of this section that apply to the herbicides proposed for use within the species' range as specified in § 17.11(h).

* * * * *

(4) *Where does this rule apply?* The take exemptions provided by this rule are applicable within the range of the Preble's meadow jumping mouse as specified in § 17.11(h).

* * * * *

§ 17.95 [Amended]

4. In § 17.95(a), amend the entry for ''Preble's Meadow Jumping Mouse (*Zapus hudsonius preblei*)'' by removing paragraphs (4) through (7), and by redesignating paragraphs (8) through (13) as (4) through (9), respectively.

Dated: October 30, 2007.

H. Dale Hall,

Director, U.S. Fish and Wildlife Service.

[FR Doc. 07–5486 Filed 11–1–07; 8:45 am]

BILLING CODE 4310–55–P

Federal Register

Wednesday,
November 7, 2007

Part IV

Department of Defense
General Services Administration
National Aeronautics and Space Administration

48 CFR Chapter 1 and Parts 1, 2, et al. Federal Aquisition Regulations; Interim Rules, Final Rules, and Small Entity Compliance Guide

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[Docket FAR–2007–0002, Sequence 6]

Federal Acquisition Regulation; Federal Acquisition Circular 2005–21; Introduction

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Summary presentation of final and interim rules, and technical amendments.

SUMMARY: This document summarizes the Federal Acquisition Regulation (FAR) rules agreed to by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council in this Federal Acquisition Circular (FAC) 2005–21. A companion document, the Small Entity Compliance Guide (SECG), follows this FAC. The FAC, including the SECG, is available via the Internet at *http://www.regulations.gov*.

DATES: For effective dates and comment dates, see separate documents, which follow.

FOR FURTHER INFORMATION CONTACT The analyst whose name appears in the table below in relation to each FAR case. Please cite FAC 2005–21 and the specific FAR case number(s). For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755.

LIST OF RULES IN FAC 2005–21

Item	Subject	FAR case	Analyst
I	SAFETY Act: Implementation of DHS Regulations (Interim)	2006–023	Loeb.
II	Biobased Products Preference Program	2004–032	Clark.
III	FAR Part 27 Rewrite in Plain Language	1999–402	Woodson.
IV	Federal Computer Network (FACNET) Architecture	2006–015	Woodson.
V	Exemption of Certain Service Contracts from the Service Contract Act (SCA) (interim)	2001–004	Woodson.
VI	Local Community Recovery Act of 2006 (Interim)	2006–014	Clark.
VII	Labor Standards for Contracts Containing Construction Requirements-Contract Pricing Method References.	2007–001	Woodson.
VIII	Technical Amendments		

SUPPLEMENTARY INFORMATION:

Summaries for each FAR rule follow. For the actual revisions and/or amendments to these FAR cases, refer to the specific item number and subject set forth in the documents following these item summaries.

FAC 2005–21 amends the FAR as specified below:

Item I—SAFETY Act: Implementation of DHS Regulations (FAR Case 2006–023) (Interim)

This interim rule implements the SAFETY Act in the FAR. The SAFETY Act provides incentives for the development and deployment of anti-terrorism technologies by creating a system of ''risk management'' and a system of ''litigation management.'' The purpose of the SAFETY Act is to ensure that the threat of liability does not deter potential manufacturers or sellers of antiterrorism technologies from developing, deploying, and commercializing technologies that could save lives. Examples of Qualified Anti-Terrorism Technologies (QATT) identified by DHS include—

- Vulnerability assessment and countermeasure and counter-terrorism planning tools;
- First responder interoperability solution;
- Marine traffic management system;
- Security services, guidelines, systems, and standards;
- Vehicle and cargo inspection system;
- X-ray inspection system;
- Trace explosives detection systems and associated support services;
- Maintenance and repair of screening equipment;
- Risk assessment platform;
- Explosive and weapon detection equipment and services;
- Biological detection and filtration systems;
- Passenger screening services;
- Baggage screening services;
- Chemical, biological, or radiological agent release detectors;
- Vehicle barriers;
- First responder equipment; and
- Architectural and engineering ''hardening'' products and services.

Item II—Biobased Products Preference Program (FAR Case 2004–032)

This final rule amends the Federal Acquisition Regulation (FAR) to implement 7 U.S.C. 8102 as enacted by section 9002 of the Farm Security and Rural Investment Act of 2002 (FSRIA), as amended by Sections 205 and 943 of the Energy Policy Act of 2005. Entitled Federal Procurement of Biobased Products, section 7 U.S.C. 8102 requires that a procurement preference be afforded biobased products within items designated by the Secretary of Agriculture. This program applies to acquisitions by Federal agencies using Federal funds for procurement, as well as Government contractors that use USDA-designated items in performance of a Government contract. It will provide increased opportunities for entities, both large and small, that manufacture or sell biobased products, while decreasing opportunities for businesses that manufacture or sell similar non-biobased products or provide components for the manufacturing of such products. A list of USDA-designated items is available at *http://www.usda.gov/biopreferred*.

Item III—FAR Part 27 Rewrite in Plain Language (FAR Case 1999–402)

This final rule clarifies, streamlines, and updates text and clauses on Patents, Data, and Copyrights (FAR Part 27). This effort focused on rewriting the current FAR language into ''plain language,'' with the ultimate goal of making the policies and procedures more understandable to the reader. This rewrite was not intended to include substantive changes to Part 27 policies or procedures, except where necessary to comply with current statutory or regulatory requirements, or to resolve internal inconsistencies within FAR Part 27 and its associated clauses.

Item IV—Federal Computer Network (FACNET) Architecture (FAR Case 2006–015)

This final rule amends the Federal Acquisition Regulation (FAR) to remove FACNET references and provide the opportunity to recognize the evolution of alternative technologies, processes, etc. that Federal agencies are using and will use to satisfy their acquisition needs without removing the use of FACNET for Federal agencies that may use the system. Where necessary in the FAR, the term has been replaced with a more appropriate term that incorporates various electronic data interchange systems. The proposed rule published February 1, 2007 is adopted as final without change.

Item V—Exemption of Certain Service Contracts from the Service Contract Act (SCA) (2001–004) (Interim)

This interim rule amends Federal Acquisition Regulation (FAR) Parts 4, 15, 17, 22, and 52 to implement the U.S. Department of Labor's (DoL) final rule issued January 18, 2001 (66 FR 5327) amending the regulations at 29 CFR part 4 to exempt certain contracts for services meeting specific criteria from coverage under the Service Contract Act. This rule imposes the DoL criteria and does not utilize the term ''commercial services.'' The rule incorporates slight revisions to the current exemption for consistency with the current DoL regulations and clarification of appropriate course of action for the contracting officer.

Item VI—Local Community Recovery Act of 2006 (FAR Case 2006–014) (Interim)

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a second interim rule amending the Federal Acquisition Regulation (FAR) to implement legislative amendments to the Stafford Act at 42 U.S.C. 5150.

The first rule implemented The Local Community Recovery Act of 2006, Pub.L. 109–218, which addressed set-asides for major disaster or emergency assistance acquisitions to businesses that reside or primarily do business in the geographic area affected by the disaster or emergency. This local area set-aside could be done along with a small business set-aside.

After the first rule was published for comments in August, 2006, Congress further amended the same area of the Stafford Act in the Department of Homeland Security Appropriations Act, 2007, Public Law 109–295. The amended statute contains requirements for transitioning work to local firms in the geographic area affected by the disaster or emergency and for justifications for expenditures to entities outside the major disaster or emergency area. This second interim rule encompasses all of these changes.

Item VII—Labor Standards for Contracts Containing Construction Requirements-Contract Pricing Method References (FAR Case 2007–001)

This final rule amends the Federal Acquisition Regulation (FAR) to revise references to published pricing sources available to the contracting officer in FAR 22.404–12(c)(2). The rule removes the reference to ''R.S. Means Cost Estimating System'' as a commercial source for pricing data. The revision will provide greater flexibilities for contracting officers when selecting sources of pricing data.

Item VIII—Technical Amendments

Editorial changes are made at FAR 1.106, 25.003, 52.212–5, 52.219-9, 52.225–5, 52.225–17, 53.213, 53.302–347, and 53.302–348 in order to update references.

Dated: October 31, 2007.

Al Matera,

Director, Office of Acquisition Policy.

Federal Acquisition Circular

Federal Acquisition Circular (FAC) 2005–21 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator for the National Aeronautics and Space Administration.

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 2005–21 is effective November 7, 2007, except for Items II, III, IV, and VII which are effective December 7, 2007.

Dated: October 26, 2007.

Shay D. Assad,

Director, Defense Procurement and Acquisition Policy.

Dated: October 26, 2007.

Molly A. Wilkinson,

Chief Acquisition Officer, Office of Chief Acquisition Officer, General Services Administration.

Dated: October 18, 2007.

Harold V. Jefferson,

Acting Assistant Administrator for Procurement, National Aeronautics and Space Administration.

[FR Doc. 07–5476 Filed 11–6–07; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1, 7, 18, 28, 32, 33, 43, 50, and 52

[FAC 2005–21; FAR Case 2006–023; Item I; Docket 2007–0001, Sequence 8]

RIN 9000–AK75

Federal Acquisition Regulation; FAR Case 2006–023, SAFETY Act: Implementation of DHS Regulations

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Interim rule with request for comments.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on an interim rule amending the Federal Acquisition Regulation (FAR) to implement the Department of Homeland Security (DHS) regulations on the SAFETY Act.

DATES: *Effective Date:* November 7, 2007.

Comment Date: Interested parties should submit written comments to the FAR Secretariat on or before January 7, 2008 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAC 2005–21, FAR case 2006–023, by any of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov*. To search for any document, first select under ''Step 1,'' ''Documents with an Open Comment Period'' and select under ''Optional Step 2,'' ''Federal Acquisition Regulation'' as the agency of choice. Under ''Optional Step 3,'' select ''Rules''. Under ''Optional Step 4,'' from the drop down list, select ''Document Title'' and type the FAR case number ''2006–023''. Click the ''Submit'' button. Please include your name and company name (if any) inside the document.

You may also search for any document by clicking on the ''Search for Documents'' tab at the top of the screen. Select from the agency field ''Federal Acquisition Regulation'', and type ''2006–023'' in the ''Document Title'' field. Select the ''Submit'' button.

- Fax: 202–501–4067.
- Mail: General Services Administration, Regulatory Secretariat

(VIR), 1800 F Street, NW, Room 4035, ATTN: Laurieann Duarte, Washington, DC 20405.

Instructions: Please submit comments only and cite FAC 2005–21, FAR case 2006–023, in all correspondence related to this case. All comments received will be posted without change to *http://www.regulations.gov*. Please include your name and company name (if any) inside the document.

FOR FURTHER INFORMATION CONTACT Mr. Edward Loeb, Procurement Analyst, at (202) 501–0650 for clarification of content. Please cite FAC 2005–21, FAR case 2006–023. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755.

SUPPLEMENTARY INFORMATION:

A. Background

1. **The SAFETY Act and the Department of Homeland Security Regulations.**

As part of the Homeland Security Act of 2002, Public Law 107—296, Congress enacted liability protections for providers of certain anti-terrorism technologies. (The Support Anti-terrorism by Fostering Effective Technologies Act of 2002 (SAFETY Act), 6 U.S.C. 441–444). The SAFETY Act provides incentives for the development and deployment of anti-terrorism technologies by creating a system of ''risk management'' and a system of ''litigation management.'' The purpose of the SAFETY Act is to ensure that the threat of liability does not deter potential manufacturers or sellers of anti-terrorism technologies from developing, deploying, and commercializing technologies that could save lives.

The Department of Homeland Security (DHS) published a final rule (71 FR 33147, June 8, 2006, effective July 10, 2006), at 6 CFR Part 25. Liability limitations are conferred by DHS issuing the seller either a ''SAFETY Act designation'' or ''SAFETY Act certification'' that their technology is Qualified Anti-Terrorism Technology (QATT). Sellers must submit an application to be considered by DHS.

The DHS SAFETY Act certification of a technology as an ''approved product'' (proven to be safe and effective) confers a critical additional benefit over SAFETY Act designation. It confers a rebuttable presumption that sellers are entitled to the ''government contractor defense'' (§ 442(d)). In essence, the ''government contractor defense'' means that any seller of an ''approved product'' cannot be held liable for design defects.

The SAFETY Act applies to a broad range of technologies, including products, services, and software, or combinations thereof, as long as DHS determines that a technology merits Designation. DHS may designate a system containing many component technologies (including products and services) or may designate specific component technologies individually. Further, as the statutory criteria suggest, a QATT need not be newly developed - it may have already been employed (*e.g.*, ''prior United States government use'') or may be a new application of an existing technology.

In DHS's final rule implementing the SAFETY Act, DHS established a streamlined review procedure for providing SAFETY Act coverage for qualified sellers of certain categories of technologies. Those designations or certifications are known as ''block designations'' or ''block certifications.''

DHS also established another streamlined procedure where a contracting agency can seek a preliminary determination of SAFETY Act applicability, a ''pre-qualification designation notice,'' with respect to a technology to be procured by the Government.

2. **FAR Subpart 50.1, Extraordinary contractual actions.**

Existing Part 50 is renumbered as Subpart 50.1, with conforming changes in Parts 1, 18, 28, 32, 33, and 43. The additional coverage at 50.101–1(b) and 50.102–3(f) reflects the transfer and delegation of certain functions to, and other responsibilities vested in, the Secretary of DHS, including the DHS's SAFETY Act responsibilities, based on E.O. 13286.

3. **FAR Subpart 50.2, SAFETY Act.**

The coverage for the SAFETY Act will be new Subpart 50.2.

Policy. One of the most significant sections is new section 50.204. This section provides the overarching policy for implementing the SAFETY Act in Government acquisitions. For example, paragraph (a) provides that agencies should—

- Determine whether the technology to be procured is appropriate for SAFETY Act protections;
- Encourage offerors to seek SAFETY Act protections for their offered technologies, even in advance of the issuance of a solicitation; and
- Not mandate SAFETY Act protections for acquisitions because applying for SAFETY Act protections for a particular technology is the choice of the offeror.

SAFETY Act considerations. New section 50.205–1 ensures that SAFETY Act considerations are made an integral part of each agency's acquisition planning procedures, and that contracting officers give adequate lead time in their acquisition plans to account for DHS's review process of SAFETY Act applications. A reference to the SAFETY Act was also added at 7.105, Contents of written acquisition plan.

Block designation and block certification. In 50.205–1(a), this case includes coverage for block designations and block certifications. The requiring activity must check with DHS as to whether a block designation or block certification exists. If one does, then the requiring activity must inform the contracting officer. The contracting officer will then incorporate the block designations and block certifications, as applicable, in any solicitation or advanced public notice to inform potential offerors.

Pre-qualification designation notice. In accordance with 50.205–2, if a block designation or block certification does not exist, then the requiring activity must request DHS to issue a pre-qualification designation notice and inform the contracting officer if DHS issues the notice. The contracting officer will then incorporate the pre-qualification designation notice in any solicitation or advanced public notice to inform potential offerors of the notice.

4. **New provisions and clause.**

Provisions and a clause have been added to assist agencies and contracting officers in interfacing with DHS on SAFETY Act matters, including coverage concerning block designations and block certifications, and pre-qualification designation notices.

SAFETY Act Coverage Not Applicable. Contracting officers are required to insert FAR 52.250–2, SAFETY Act Coverage Not Applicable, if, after consultation with DHS, the agency has determined that SAFETY Act protection is not applicable for the acquisition, or DHS denies approval of a pre-qualification designation notice.

Basic Provisions. Contracting officers are required to insert 52.250–3, SAFETY Act Block Designation/ Certification, or 52.250–4, SAFETY Act Pre-qualification Designation Notice, in solicitations when DHS has issued a block designation/certification or a pre-qualification designation notice, respectively, for the solicited technologies. These provisions inform offerors of the terms of the block designation/block certification or pre-qualification designation notice. These basic provisions do not permit submission of offers contingent upon SAFETY Act designation or certification of the proposed product(s) or service(s).

Alternate I - Contingent Offers. Alternate I of each basic provision

permits offerors to submit offers contingent on DHS issuing a SAFETY Act designation or certification. Under this first alternate, contracting officers may permit such contingent offers only if—

• DHS has issued, for offers contingent upon SAFETY Act designation, a pre-qualification designation notice or a block designation, or for offers contingent upon SAFETY Act certification, a block certification;

• The Government has not provided advance notice so that potential offerors could have obtained SAFETY Act designations/certifications for their offered technologies before release of any solicitation; and

• Market research shows that there will be insufficient competition without SAFETY Act protections or the subject technology would be sold to the Government only with SAFETY Act protections.

Offerors may also submit an alternate offer that is not contingent on obtaining SAFETY Act protections.

Alternate II - Presumption of SAFETY Act Protections After Award. Alternate II of each basic provision permits offerors to submit offers that presume that DHS will issue a SAFETY Act Designation or Certification after award. Contracting officers may only use this alternate if—

• All of the conditions for permitting contingent offers are met;

• The chief of the contracting office (or other official designated in agency procedures) approves the action; and

• The contracting officer advises DHS of the timelines for potential award and consults DHS as to when DHS could reasonably complete evaluations of offerors' applications for SAFETY Act designations or certifications.

If DHS does not issue a SAFETY Act designation or SAFETY Act certification to the successful offeror by the time of contract award, the contracting officer is then permitted to award the contract with the clause at 52.250–5, SAFETY Act-Equitable Adjustment, which allows for an equitable adjustment in the event DHS denies the contractor's SAFETY Act application.

If DHS has issued a SAFETY Act designation or certification to the successful offeror, then the contracting officer will award the contract without the clause at 52.250–5.

5. **Public Meeting.**

A decision has not been made whether to hold a public meeting. If you would like to request a meeting, please contact Mr. Edward Loeb at (202) 501–0650, within three weeks of the publication of this interim rule.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The interim rule is not expected to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because this rule imposes no burdens on businesses. Instead, it allows businesses to more easily take advantage of a Department of Homeland Security regulation published June 8, 2006, at 6 CFR 25. The Department of Homeland Security certified in their rule that there would be no significant impact on a substantial number of small entities. Therefore, an Initial Regulatory Flexibility Analysis has not been performed. The Councils will consider comments from small entities concerning the affected FAR Parts 1, 7, 18, 28, 32, 33, 43, 50, and 52 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C 601, *et seq.* (FAC 2005–21, FAR case 2006–023), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does apply; however, these changes to the FAR do not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Numbers 1640–0001 through 1640–0006, under applications made to OMB by the Department of Homeland Security.

D. Determination to Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary because the SAFETY Act was signed into law on November 25, 2002 (Pub. L. 107–296). The primary implementing regulations were promulgated by the Department of Homeland Security on June 8, 2006, effective July 10, 2006 (71 FR 33147). Unless DHS's final rule is integrated into the Federal acquisition system and the SAFETY Act's benefits are made available to contractors, the Government will not be able to procure the necessary technologies to protect the nation from acts of terrorism. These amendments to the Federal Acquisition Regulation are therefore necessary to integrate the benefits of the SAFETY Act into the Federal acquisition system and promote effective acquisition of anti-terrorism technologies and services.

However, pursuant to Public Law 98–577 and FAR 1.501, the Councils will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Parts 1, 7, 18, 28, 32, 33, 43, 50, and 52

Government procurement.

Dated: October 31, 2007.

Al Matera,

Director, Office of Acquisition Policy.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 1, 7, 18, 28, 32, 33, 43, 50, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 1, 7, 18, 28, 32, 33, 43, 50, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

1.602 [Amended]

■ 2. Amend section 1.602–3 by removing from paragraph (d) ''part 50'' and adding ''Subpart 50.1'' in its place.

PART 7—ACQUISITION PLANNING

■ 3. Amend section 7.105 by revising paragraph (b)(19) to read as follows:

7.105 Contents of written acquisition plans.

* * * * *

(b) * * *

(19) *Other considerations.* Discuss, as applicable:

(i) Standardization concepts;

(ii) The industrial readiness program;

(iii) The Defense Production Act;

(iv) The Occupational Safety and Health Act;

(v) Support Anti-terrorism by Fostering Effective Technologies Act of 2002 (SAFETY Act) (see Subpart 50.2);

(vi) Foreign sales implications; and

(vii) Any other matters germane to the plan not covered elsewhere.

* * * * *

PART 18—EMERGENCY ACQUISITIONS

18.121 [Amended]

■ 4. Amend section 18.121 by removing ''Part 50'' and adding ''Subpart 50.1'' in its place.

18.126 [Amended]

■ 5. Amend section 18.126 by—

■ a. Removing from the introductory text ''Part 50'' and adding ''Subpart 50.1'' in its place;

■ b. Removing from paragraph (a) ''50.302–1'' and adding ''50.103–2(a)'' in its place;

■ c. Removing from paragraph (b) ''50.302–2'' and adding ''50.103–2(b)'' in its place; and

■ d. Removing from paragraph (c) ''50.302–3'' and adding ''50.103–2(c)'' in its place.

PART 28—BONDS AND INSURANCE

28.308 [Amended]

■ 6. Amend section 28.308 by removing from paragraph (e) ''50.403'' and adding ''50.104–3'' in its place.

PART 32—CONTRACT FINANCING

32.401 [Amended]

■ 7. Amend section 32.401 by removing from paragraph (c) ''part 50 of the Federal Acquisition Regulation (FAR)'' and adding ''Subpart 50.1'' in its place.

32.402 [Amended]

■ 8. Amend section 32.402 by—

■ a. Removing from paragraph (a) ''FAR 50.203(b)(4)'' and adding ''50.102–3(b)(4)'' in its place;

■ b. Removing from paragraph (e)(1) ''50.201(b)'' and adding ''50.102–1(b)'' in its place; and

■ c. Removing from paragraph (f) ''FAR 50.307'' and adding ''50.103–7'' in its place.

32.405 [Amended]

■ 9. Amend section 32.405 by removing from paragraph (a) ''50.101(a)'' and adding ''50.101–1(a)'' in its place.

PART 33—PROTESTS, DISPUTES, AND APPEALS

■ 10. Amend section 33.205 by removing from paragraphs (a) and (c) ''part 50'' and adding ''Subpart 50.1'', each time it appears (three times), in its place.

PART 43—CONTRACT MODIFICATIONS

43.000 [Amended]

■ 11. Amend section 43.000 by removing from paragraph (b) ''part 50'' and adding ''Subpart 50.1'' in its place.

■ 12. Revise Part 50 to read as follows:

PART 50—EXTRAORDINARY CONTRACTUAL ACTIONS AND THE SAFETY ACT

Sec.

50.000 Scope of part.

Subpart 50.1—Extraordinary Contractual Actions

50.100 Definitions.
50.101 General.
50.101–1 Authority.
50.101–2 Policy.
50.101–3 Records.
50.102 Delegation of and limitations on exercise of authority.
50.102–1 Delegation of authority.
50.102–2 Contract adjustment boards.
50.102–3 Limitations on exercise of authority.
50.103 Contract adjustments.
50.103–1 General.
50.103–2 Types of contract adjustment.
50.103–3 Contract adjustment.
50.103–4 Facts and evidence.
50.103–5 Processing cases.
50.103–6 Disposition.
50.103–7 Contract requirements.
50.104 Residual powers.
50.104–1 Standards for use.
50.104–2 General.
50.104–3 Special procedures for unusually hazardous or nuclear risks.
50.104–4 Contract clause.

Subpart 50.2—Support Anti-terrorism by Fostering Effective Technologies Act of 2002

50.200 Scope of subpart.
50.201 Definitions.
50.202 Authorities.
50.203 General.
50.204 Policy.
50.205 Procedures.
50.205–1 SAFETY Act considerations.
50.205–2 Pre-qualification designation notice.
50.205–3 Authorization of offers contingent upon SAFETY Act designation or certification before contract award.
50.205–4 Authorization of awards made presuming SAFETY Act designation or certification after contract award.
50.206 Solicitation provisions and contract clause.

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

50.000 Scope of part.

This part—

(a)(1) Prescribes policies and procedures for entering into, amending, or modifying contracts in order to facilitate the national defense under the extraordinary emergency authority granted by Public Law 85–804 (50 U.S.C. 1431—1434) and Executive Order 10789, dated November 14, 1958. It does not cover advance payments (see Subpart 32.4); and

(2) Implements indemnification authority granted by Pub. L. 85–804 and paragraph 1A of E.O. 10789 with respect to any matter that has been, or could be, designated by the Secretary of Homeland Security as a qualified anti-terrorism technology as defined in the Support Anti-terrorism by Fostering Effective Technologies Act of 2002 (SAFETY Act); and

(b) Implements SAFETY Act liability protections to promote development and use of anti-terrorism technologies.

Subpart 50.1—Extraordinary Contractual Actions

50.100 Definitions.

As used in this part—

Approving authority means an agency official or contract adjustment board authorized to approve actions under Pub. L. 85–804 and E.O. 10789.

Secretarial level means a level at or above the level of a deputy assistant agency head, or a contract adjustment board.

50.101 General.

50.101–1 Authority.

(a) Pub. L. 85–804 empowers the President to authorize agencies exercising functions in connection with the national defense to enter into, amend, and modify contracts, without regard to other provisions of law related to making, performing, amending, or modifying contracts, whenever the President considers that such action would facilitate the national defense.

(b) E.O. 10789 authorizes the heads of the following agencies to exercise the authority conferred by Pub. L. 85–804 and to delegate it to other officials within the agency: the Government Printing Office; the Department of Homeland Security; the Tennessee Valley Authority; the National Aeronautics and Space Administration; the General Services Administration; the Defense, Army, Navy, Air Force, Treasury, Interior, Agriculture, Commerce, and Transportation Departments; the Department of Energy for functions transferred to that Department from other authorized agencies; and any other agency that may be authorized by the President.

50.101–2 Policy.

(a) The authority conferred by Pub. L. 85–804 may not—

(1) Be used in a manner that encourages carelessness and laxity on the part of persons engaged in the defense effort; or

(2) Be relied upon when other adequate legal authority exists within the agency.

(b) Actions authorized under Pub. L. 85–804 shall be accomplished as expeditiously as practicable, consistent with the care, restraint, and exercise of sound judgment appropriate to the use of such extraordinary authority.

(c) Certain kinds of relief previously available only under Pub. L. 85–804; *e.g.*, rescission or reformation for mutual mistake, are now available under the

authority of the Contract Disputes Act of 1978. In accordance with paragraph (a)(2) of this subsection, Part 33 must be followed in preference to Subpart 50.1 for such relief. In case of doubt as to whether Part 33 applies, the contracting officer should seek legal advice.

50.101–3 Records.

Agencies shall maintain complete records of all actions taken under this Subpart 50.1. For each request for relief processed, these records shall include, as a minimum—

(a) The contractor's request;

(b) All relevant memorandums, correspondence, affidavits, and other pertinent documents;

(c) The Memorandum of Decision (see 50.103–6 and 50.104–2); and

(d) A copy of the contractual document implementing an approved request.

50.102 Delegation of and limitations on exercise of authority.

50.102–1 Delegation of authority.

An agency head may delegate in writing authority under Pub. L. 85–804 and E.O. 10789, subject to the following limitations:

(a) Authority delegated shall be to a level high enough to ensure uniformity of action.

(b) Authority to approve requests to obligate the Government in excess of $55,000 may not be delegated below the secretarial level.

(c) Regardless of dollar amount, authority to approve any amendment without consideration that increases the contract price or unit price may not be delegated below the secretarial level, except in extraordinary cases or classes of cases when the agency head finds that special circumstances clearly justify such delegation.

(d) Regardless of dollar amount, authority to indemnify against unusually hazardous or nuclear risks, including extension of such indemnification to subcontracts, shall be exercised only by the Secretary or Administrator of the agency concerned, the Public Printer, or the Chairman of the Board of Directors of the Tennessee Valley Authority (see 50.104–3).

50.102–2 Contract adjustment boards.

An agency head may establish a contract adjustment board with authority to approve, authorize, and direct appropriate action under this Subpart 50.1 and to make all appropriate determinations and findings. The decisions of the board shall not be subject to appeal; however, the board may reconsider and modify, correct, or reverse its previous decisions. The board shall determine its own procedures and have authority to take all action necessary or appropriate to conduct its functions.

50.102–3 Limitations on exercise of authority.

(a) Pub. L. 85–804 is not authority for—

(1) Using a cost-plus-a-percentage-of-cost system of contracting;

(2) Making any contract that violates existing law limiting profit or fees;

(3) Providing for other than full and open competition for award of contracts for supplies or services; or

(4) Waiving any bid bond, payment bond, performance bond, or other bond required by law.

(b) No contract, amendment, or modification shall be made under Pub. L. 85–804's authority—

(1) Unless the approving authority finds that the action will facilitate the national defense;

(2) Unless other legal authority within the agency concerned is deemed to be lacking or inadequate;

(3) Except within the limits of the amounts appropriated and the statutory contract authorization (however, indemnification agreements authorized by an agency head (50.104–3) are not limited to amounts appropriated or to contract authorization); and

(4) That will obligate the Government for any amount over $28.5 million, unless the Senate and House Committees on Armed Services are notified in writing of the proposed obligation and 60 days of continuous session of Congress have passed since the transmittal of such notification. However, this paragraph (b)(4) does not apply to indemnification agreements authorized under 50.104–3.

(c) No contract shall be amended or modified unless the contractor submits a request before all obligations (including final payment) under the contract have been discharged. No amendment or modification shall increase the contract price to an amount higher than the lowest rejected bid of any responsible bidder, if the contract was negotiated under 10 U.S.C. 2304(a)(15) or 41 U.S.C. 252(c)(14), or FAR 14.404–1(f).

(d) No informal commitment shall be formalized unless—

(1) The contractor submits a written request for payment within 6 months after furnishing, or arranging to furnish, supplies or services in reliance upon the commitment; and

(2) The approving authority finds that, at the time the commitment was made, it was impracticable to use normal contracting procedures.

(e) The exercise of authority by officials below the secretarial level is subject to the following additional limitations:

(1) The action shall not—

(i) Release a contractor from performance of an obligation over $55,000;

(ii) Result in an increase in cost to the Government over $55,000;

(iii) Deal with, or directly affect, any matter that has been submitted to the Government Accountability Office; or

(iv) Involve disposal of Government surplus property.

(2) Mistakes shall not be corrected by an action obligating the Government for over $1,000, unless the contracting officer receives notice of the mistake before final payment.

(3) The correction of a contract because of a mistake in its making shall not increase the original contract price to an amount higher than the next lowest responsive offer of a responsible offeror.

(f) No executive department or agency shall exercise the indemnification authority granted under paragraph 1A of E.O. 10789 with respect to any supply or service that has been, or could be, designated by the Secretary of Homeland Security as a qualified anti-terrorism technology unless—

(1) For the Department of Defense, the Secretary of Defense has determined that the exercise of authority under E.O. 10789 is necessary for the timely and effective conduct of the United States military or intelligence activities, after consideration of the authority provided under the SAFETY Act (Subtitle G of title VIII of the Homeland Security Act of 2002, 6 U.S.C. 441–444); or

(2) For other departments and agencies that have authority under E.O. 10789—

(i) The Secretary of Homeland Security has advised whether the use of the authority under the SAFETY Act would be appropriate; and

(ii) The Director of the Office of Management and Budget has approved the exercise of authority under the Executive order.

50.103 Contract adjustments.

This section prescribes standards and procedures for processing contractors' requests for contract adjustment under Pub. L. 85–804 and E.O. 10789.

50.103–1 General.

The fact that losses occur under a contract is not sufficient basis for exercising the authority conferred by Pub. L. 85–804. Whether appropriate action will facilitate the national defense is a judgment to be made on the

basis of all of the facts of the case. Although it is impossible to predict or enumerate all the types of cases in which action may be appropriate, examples are included in 50.103–2. Even if all of the factors in any of the examples are present, other considerations may warrant denying a contractor's request for contract adjustment. The examples are not intended to exclude other cases in which the approving authority determines that the circumstances warrant action.

50.103–2 Types of contract adjustment.

(a) *Amendments without consideration.* (1) When an actual or threatened loss under a defense contract, however caused, will impair the productive ability of a contractor whose continued performance on any defense contract or whose continued operation as a source of supply is found to be essential to the national defense, the contract may be amended without consideration, but only to the extent necessary to avoid such impairment to the contractor's productive ability.

(2) When a contractor suffers a loss (not merely a decrease in anticipated profits) under a defense contract because of Government action, the character of the action will generally determine whether any adjustment in the contract will be made, and its extent. When the Government directs its action primarily at the contractor and acts in its capacity as the other contracting party, the contract may be adjusted in the interest of fairness. Thus, when Government action, while not creating any liability on the Government's part, increases performance cost and results in a loss to the contractor, fairness may make some adjustment appropriate.

(b) *Correcting mistakes.* (1) A contract may be amended or modified to correct or mitigate the effect of a mistake. The following are examples of mistakes that may make such action appropriate:

(i) A mistake or ambiguity consisting of the failure to express, or express clearly, in a written contract, the agreement as both parties understood it.

(ii) A contractor's mistake so obvious that it was or should have been apparent to the contracting officer.

(iii) A mutual mistake as to a material fact.

(2) Amending contracts to correct mistakes with the least possible delay normally will facilitate the national defense by expediting the contracting program and assuring contractors that mistakes will be corrected expeditiously and fairly.

(c) *Formalizing informal commitments.* Under certain circumstances, informal commitments may be formalized to permit payment to persons who have taken action without a formal contract; for example, when a person, responding to an agency official's written or oral instructions and relying in good faith upon the official's apparent authority to issue them, has furnished or arranged to furnish supplies or services to the agency, or to a defense contractor or subcontractor, without formal contractual coverage. Formalizing commitments under such circumstances normally will facilitate the national defense by assuring such persons that they will be treated fairly and paid expeditiously.

50.103–3 Contract adjustment.

(a) *Contractor requests.* A contractor seeking a contract adjustment shall submit a request in duplicate to the contracting officer or an authorized representative. The request, normally a letter, shall state as a minimum—

(1) The precise adjustment requested;

(2) The essential facts, summarized chronologically in narrative form;

(3) The contractor's conclusions based on these facts, showing, in terms of the considerations set forth in 50.103–1 and 50.103–2, when the contractor considers itself entitled to the adjustment; and

(4) Whether or not—

(i) All obligations under the contracts involved have been discharged;

(ii) Final payment under the contracts involved has been made;

(iii) Any proceeds from the request will be subject to assignment or other transfer, and to whom; and

(iv) The contractor has sought the same, or a similar or related, adjustment from the Government Accountability Office or any other part of the Government, or anticipates doing so.

(b) *Contractor certification.* A contractor seeking a contract adjustment that exceeds the simplified acquisition threshold shall, at the time the request is submitted, submit a certification by a person authorized to certify the request on behalf of the contractor that—

(1) The request is made in good faith; and

(2) The supporting data are accurate and complete to the best of that person's knowledge and belief.

50.103–4 Facts and evidence.

(a) *General.* When it is appropriate, the contracting officer or other agency official shall request the contractor to support any request made under 50.103–3(a) with any of the following information:

(1) A brief description of the contracts involved, the dates of execution and amendments, the items being acquired, the price or prices, the delivery schedules, and any special contract provisions relevant to the request.

(2) A history of performance indicating when work under the contracts or commitments began, the progress made to date, an exact statement of the contractor's remaining obligations, and the contractor's expectations regarding completion.

(3) A statement of payments received, due, and yet to be received or to become due, including advance and progress payments; amounts withheld by the Government; and information as to any obligations of the Government yet to be performed under the contracts.

(4) A detailed analysis of the request's monetary elements, including precisely how the actual or estimated dollar amount was determined and the effect of approval or denial on the contractor's profits before Federal income taxes.

(5) A statement of the contractor's understanding of why the request's subject matter cannot now, and could not at the time it arose, be disposed of under the contract terms.

(6) The best supporting evidence available to the contractor, including contemporaneous memorandums, correspondence, and affidavits.

(7) Relevant financial statements, cost analyses, or other such data, preferably certified by a certified public accountant, as necessary to support the request's monetary elements.

(8) A list of persons connected with the contracts who have factual knowledge of the subject matter, including, when possible, their names, offices or titles, addresses, and telephone numbers.

(9) A statement and evidence of steps taken to reduce losses and claims to a minimum.

(10) Any other relevant statements or evidence that may be required.

(b) *Amendments without consideration—essentiality a factor.* When a request involves possible amendment without consideration, and essentiality to the national defense is a factor (50.103–2(a)(1)), the contractor may be asked to furnish, in addition to the facts and evidence listed in paragraph (a) of this subsection, any of the following information:

(1) A statement and evidence of the contractor's original breakdown of estimated costs, including contingency allowances, and profit.

(2) A statement and evidence of the contractor's present estimate of total costs under the contracts involved if it is enabled to complete them, broken down between costs accrued to date and

completion costs, and between costs paid and those owed.

(3) A statement and evidence of the contractor's estimate of the final price of the contracts, taking into account all known or contemplated escalation, changes, extras, and the like.

(4) A statement of any claims known or contemplated by the contractor against the Government involving the contracts, other than those stated in response to paragraph (b)(3) of this subsection.

(5) An estimate of the contractor's total profit or loss under the contracts if it is enabled to complete them at the estimated final contract price, broken down between profit or loss to date and completion profit or loss.

(6) An estimate of the contractor's total profit or loss from other Government business and all other sources, from the date of the first contract involved to the estimated completion date of the last contract involved.

(7) A statement of the amount of any tax refunds to date, and an estimate of those anticipated, for the period from the date of the first contract involved to the estimated completion date of the last contract involved.

(8) A detailed statement of efforts the contractor has made to obtain funds from commercial sources to enable contract completion.

(9) A statement of the minimum amount the contractor needs as an amendment without consideration to enable contract completion, and the detailed basis for that amount.

(10) A estimate of the time required to complete each contract if the request is granted.

(11) A statement of the factors causing the loss under the contracts involved.

(12) A statement of the course of events anticipated if the request is denied.

(13) Balance sheets, preferably certified by a certified public accountant, (i) for the contractor's fiscal year immediately preceding the date of the first contract, (ii) for each subsequent fiscal year, (iii) as of the request date, and (iv) projected as of the completion date of all the contracts involved (assuming the contractor is enabled to complete them at the estimated final prices), together with income statements for annual periods subsequent to the date of the first balance sheet. Balance sheets and income statements should be both consolidated and broken down by affiliates. They should show all transactions between the contractor and its affiliates, stockholders, and partners, including loans to the contractor guaranteed by any stockholder or partner.

(14) A list of all salaries, bonuses, and other compensation paid or furnished to the principal officers or partners, and of all dividends and other withdrawals, and of all payments to stockholders in any form since the date of the first contract involved.

(c) *Amendments without consideration—essentiality not a factor.* When a request involves possible amendment without consideration because of Government action, and essentiality to the national defense is not a factor (50.103–2(a)(2)), the contractor may be asked to furnish, in addition to the facts and evidence listed in paragraph (a) of this subsection, any of the following information:

(1) A clear statement of the precise Government action that the contractor considers to have caused a loss under the contract, with evidence to support each essential fact.

(2) A statement and evidence of the contractor's original breakdown of estimated costs, including contingency allowances, and profit.

(3) The estimated total loss under the contract, with detailed supporting analysis.

(4) The estimated loss resulting specifically from the Government action, with detailed supporting analysis.

(d) *Correcting mistakes.* When a request involves possible correction of a mistake (50.103–2(b)), the contractor may be asked to furnish, in addition to the facts and evidence listed in paragraph (a) of this subsection, any of the following information:

(1) A statement and evidence of the precise error made, ambiguity existing, or misunderstanding arising, showing what it consists of, how it occurred, and the intention of the parties.

(2) A statement explaining when the mistake was discovered, when the contracting officer was given notice of it, and whether this notice was given before completion of work under, or the effective termination date of, the contract.

(3) An estimate of profit or loss under the contract, with detailed supporting analysis.

(4) An estimate of the increase in cost to the Government resulting from the adjustment requested, with detailed supporting analysis.

(e) *Formalizing informal commitments.* When a request involves possible formalizing of an informal commitment (50.103–2(c)), the contractor may be asked to furnish, in addition to the facts and evidence listed in paragraph (a) of this subsection, any of the following information:

(1) Copies of any written instructions or assurances (or a sworn statement of any oral instructions or assurances) given the contractor, and identification of the Government official who gave them.

(2) A statement as to when the contractor furnished or arranged to furnish the supplies or services involved, and to whom.

(3) Evidence that the contractor relied upon the instructions or assurances, with a full description of the circumstances that led to this reliance.

(4) Evidence that, when performing the work, the contractor expected to be compensated directly for it by the Government and did not anticipate recovering the costs in some other way.

(5) A cost breakdown supporting the amount claimed as fair compensation for the work performed.

(6) A statement and evidence of the impracticability of providing, in an appropriate contractual instrument, for the work performed.

50.103–5 Processing cases.

(a) In response to a contractor request made in accordance with 50.103–3(a), the contracting officer or an authorized representative shall make a thorough investigation to establish the facts necessary to decide a given case. Facts and evidence, including signed statements of material facts within the knowledge of individuals when documentary evidence is lacking, and audits if considered necessary to establish financial or cost facts, shall be obtained from contractor and Government personnel.

(b) When a case involves matters of interest to more than one Government agency, the interested agencies should maintain liaison with each other to determine whether joint action should be taken.

(c) When additional funds are required from another agency, the contracting agency may not approve adjustment requests before receiving advice that the funds will be available. The request for this advice shall give the contractor's name, the contract number, the amount of proposed relief, a brief description of the contract, and the accounting classification or fund citation. If the other agency makes additional funds available, the agency considering the adjustment request shall be solely responsible for any action taken on the request.

(d) When essentiality to the national defense is an issue (50.103–2(a)(1)), agencies considering requests for amendment without consideration

involving another agency shall obtain advice on the issue from the other agency before making the final decision. When this advice is received, the agency considering the request for amendment without consideration shall be responsible for taking whatever action is appropriate.

50.103–6 Disposition.

When approving or denying a contractor's request made in accordance with 50.103–3(a), the approving authority shall sign and date a Memorandum of Decision containing—

(a) The contractor's name and address, the contract identification, and the nature of the request;

(b) A concise description of the supplies or services involved;

(c) The decision reached and the actual cost or estimated potential cost involved, if any;

(d) A statement of the circumstances justifying the decision;

(e) Identification of any of the foregoing information classified ''Confidential'' or higher (instead of being included in the memorandum, such information may be set forth in a separate classified document referenced in the memorandum); and

(f) If some adjustment is approved, a statement in substantially the following form: ''I find that the action authorized herein will facilitate the national defense.'' The case files supporting this statement will show the derivation and rationale for the dollar amount of the award. When the dollar amount exceeds the amounts supported by audit or other independent reviews, the approving authority will further document the rationale for deviating from the recommendation.

50.103–7 Contract requirements.

(a) Pub. L. 85–804 and E.O. 10789 require that every contract entered into, amended, or modified under this Subpart 50.1 shall contain—

(1) A citation of Pub. L. 85–804 and E.O. 10789;

(2) A brief statement of the circumstances justifying the action; and

(3) A recital of the finding that the action will facilitate the national defense.

(b) The authority in 50.101–1(a) shall not be used to omit from contracts, when otherwise required, the clauses at 52.203–5, Covenant Against Contingent Fees; 52.215–2, Audit and Records—Negotiation; 52.222–4, Contract Work Hours and Safety Standards Act—Overtime Compensation; 52.222–6, Davis-Bacon Act; 52.222–10, Compliance With Copeland Act Requirements; 52.222–20, Walsh-Healey Public Contracts Act; 52.222–26, Equal Opportunity; and 52.232–23, Assignment of Claims.

50.104 Residual powers.

This section prescribes standards and procedures for exercising residual powers under Pub. L. 85–804. The term ''residual powers'' includes all authority under Pub. L. 85–804 except—

(a) That covered by section 50.103; and

(b) The authority to make advance payments (see Subpart 32.4).

50.104–1 Standards for use.

Subject to the limitations in 50.102–3, residual powers may be used in accordance with the policies in 50.101–2 when necessary and appropriate, all circumstances considered. In authorizing the inclusion of the clause at 52.250–1, Indemnification Under Public Law 85–804, in a contract or subcontract, an agency head may require the indemnified contractor to provide and maintain financial protection of the type and amount determined appropriate. In deciding whether to approve use of the indemnification clause, and in determining the type and amount of financial protection the indemnified contractor is to provide and maintain, an agency head shall consider such factors as self-insurance, other proof of financial responsibility, workers' compensation insurance, and the availability, cost, and terms of private insurance. The approval and determination shall be final.

50.104–2 General.

(a) When approving or denying a proposal for the exercise of residual powers, the approving authority shall sign and date a Memorandum of Decision containing substantially the same information called for by 50.103–6.

(b) Every contract entered into, amended, or modified under residual powers shall comply with the requirements of 50.103–7.

50.104–3 Special procedures for unusually hazardous or nuclear risks.

(a) *Indemnification requests.* (1) Contractor requests for the indemnification clause to cover unusually hazardous or nuclear risks should be submitted to the contracting officer and shall include the following information:

(i) Identification of the contract for which the indemnification clause is requested.

(ii) Identification and definition of the unusually hazardous or nuclear risks for which indemnification is requested, with a statement indicating how the contractor would be exposed to them.

(iii) A statement, executed by a corporate official with binding contractual authority, of all insurance coverage applicable to the risks to be defined in the contract as unusually hazardous or nuclear, including—

(A) Names of insurance companies, policy numbers, and expiration dates;

(B) A description of the types of insurance provided (including the extent to which the contractor is self-insured or intends to self-insure), with emphasis on identifying the risks insured against and the coverage extended to persons or property, or both;

(C) Dollar limits per occurrence and annually, and any other limitation, for relevant segments of the total insurance coverage;

(D) Deductibles, if any, applicable to losses under the policies;

(E) Any exclusions from coverage under such policies for unusually hazardous or nuclear risks; and

(F) Applicable workers' compensation insurance coverage.

(iv) The controlling or limiting factors for determining the amount of financial protection the contractor is to provide and maintain, with information regarding the availability, cost, and terms of additional insurance or other forms of financial protection.

(v) Whether the contractor's insurance program has been approved or accepted by any Government agency; and whether the contractor has an indemnification agreement covering similar risks under any other Government program, and, if so, a brief description of any limitations.

(vi) If the contractor is a division or subsidiary of a parent corporation—

(A) A statement of any insurance coverage of the parent corporation that bears on the risks for which the contractor seeks indemnification; and

(B) A description of the precise legal relationship between parent and subsidiary or division.

(2) If the dollar value of the contractor's insurance coverage varies by 10 percent or more from that stated in an indemnification request submitted in accordance with paragraph (a)(1) of this subsection, or if other significant changes in insurance coverage occur after submission and before approval, the contractor shall immediately submit to the contracting officer a brief description of the changes.

(b) *Action on indemnification requests.* (1) The contracting officer, with assistance from legal counsel and cognizant program office personnel, shall review the indemnification request

and ascertain whether it contains all required information. If the contracting officer, after considering the facts and evidence, denies the request, the contracting officer shall notify the contractor promptly of the denial and of the reasons for it. If recommending approval, the contracting officer shall forward the request (as modified, if necessary, by negotiation) through channels to the appropriate official specified in 50.102–1(d). The contracting officer's submission shall include all information submitted by the contractor and—

(i) All pertinent information regarding the proposed contract or program, including the period of performance, locations, and facilities involved;

(ii) A definition of the unusually hazardous or nuclear risks involved in the proposed contract or program, with a statement that the parties have agreed to it;

(iii) A statement by responsible authority that the indemnification action would facilitate the national defense;

(iv) A statement that the contract will involve unusually hazardous or nuclear risks that could impose liability upon the contractor in excess of financial protection reasonably available;

(v) A statement that the contractor is complying with applicable Government safety requirements;

(vi) A statement of whether the indemnification should be extended to subcontractors; and

(vii) A description of any significant changes in the contractor's insurance coverage (see 50.104–3(a)(2)) occurring since submission of the indemnification request.

(2) Approval of a request to include the indemnification clause in a contract shall be by a Memorandum of Decision executed by the appropriate official specified in 50.102–1(d).

(3) When use of the indemnification clause is approved under paragraph (b)(2) of this subsection, the definition of unusually hazardous or nuclear risks (see paragraph (b)(1)(ii) of this subsection) shall be incorporated into the contract, along with the clause.

(4) When approval is—

(i) Authorized in the Memorandum of Decision; and

(ii) Justified by the circumstances, the contracting officer may approve the contractor's written request to provide for indemnification of subcontractors, using the same procedures as those required for contractors.

50.104–4 Contract clause.

The contracting officer shall insert the clause at 52.250–1, Indemnification Under Public Law 85–804, in contracts whenever the approving official determines that the contractor shall be indemnified against unusually hazardous or nuclear risks (also see 50.104–3(b)(3)). In cost-reimbursement contracts, the contracting officer shall use the clause with its Alternate I.

Subpart 50.2—Support Anti-terrorism by Fostering Effective Technologies Act of 2002

50.200 Scope of subpart.

This subpart implements the Support Anti-terrorism by Fostering Effective Technologies Act of 2002 (SAFETY Act) liability protections to promote development and use of anti-terrorism technologies.

50.201 Definitions.

Act of terrorism means any act determined to have met the following requirements or such other requirements as defined and specified by the Secretary of Homeland Security:

(1) Is unlawful.

(2) Causes harm, including financial harm, to a person, property, or entity, in the United States, or in the case of a domestic United States air carrier or a United States-flag vessel (or a vessel based principally in the United States on which United States income tax is paid and whose insurance coverage is subject to regulation in the United States), in or outside the United States.

(3) Uses or attempts to use instrumentalities, weapons or other methods designed or intended to cause mass destruction, injury or other loss to citizens or institutions of the United States.

Pre-qualification designation notice means a notice in a procurement solicitation or other publication by the Government stating that the technology to be procured either affirmatively or presumptively satisfies the technical criteria necessary to be deemed a qualified anti-terrorism technology. A pre-qualification designation notice authorizes successful offeror(s) to submit streamlined SAFETY Act applications for SAFETY Act designation and receive expedited processing of those applications.

Qualified Anti-Terrorism Technology (QATT) means any technology designed, developed, modified, procured, or sold for the purpose of preventing, detecting, identifying, or deterring acts of terrorism or limiting the harm such acts might otherwise cause, for which a SAFETY Act designation has been issued. For purposes of defining a QATT, technology means any product, equipment, service (including support services), device, or technology (including information technology) or any combination of the foregoing. Design services, consulting services, engineering services, software development services, software integration services, threat assessments, vulnerability studies, and other analyses relevant to homeland security may be deemed a technology.

SAFETY Act certification means a determination by Department of Homeland Security (DHS) pursuant to 6 U.S.C. 442, as further delineated in 6 CFR 25.8 and 25.9, that a QATT for which a SAFETY Act designation has been issued is an approved product for homeland security, *i.e.*, it will perform as intended, conforms to the seller's specifications, and is safe for use as intended. ''Block certification'' refers to a technology class that DHS has determined to be an approved class of approved products for homeland security.

SAFETY Act designation means a determination by DHS pursuant to 6 U.S.C. 443, as further delineated in 6 CFR 25.4, that a particular Anti-Terrorism Technology constitutes a QATT under the SAFETY Act. ''Block designation'' refers to a technology class that DHS has determined to be a QATT.

50.202 Authorities.

The following authorities apply:

(a) Support Anti-terrorism by Fostering Effective Technologies Act of 2002 (SAFETY Act), 6 U.S.C. 441–444.

(b) Executive Order 13286 of February 28, 2003, Amendment of Executive Orders, and Other Actions, in Connection With the Transfer of Certain Functions to the Secretary of Homeland Security.

(c) Executive Order 10789 of November 14, 1958, Contracting Authority of Government Agencies in Connection with National Defense Functions.

(d) 6 CFR Part 25.

50.203 General.

(a) As part of the Homeland Security Act of 2002, Pub. L. 107–296, Congress enacted the SAFETY Act to—

(1) Encourage the development and use of anti-terrorism technologies that will enhance the protection of the nation; and

(2) Provide risk management and litigation management protections for sellers of QATTs and others in the supply and distribution chain.

(b) The SAFETY Act's liability protections are complementary to the Terrorism Risk Insurance Act of 2002.

(c) Questions concerning the SAFETY Act may be directed to DHS Office of

SAFETY Act Implementation (OSAI). Additional information about the SAFETY Act may be found at *http://www.SAFETYAct.gov*.

50.204 Policy.

(a) Agencies should—

(1) Determine whether the technology to be procured is appropriate for SAFETY Act protections;

(2) Encourage offerors to seek SAFETY Act protections for their offered technologies, even in advance of the issuance of a solicitation; and

(3) Not mandate SAFETY Act protections for acquisitions because applying for SAFETY Act protections for a particular technology is the choice of the offeror.

(b) Agencies shall not solicit offers contingent upon SAFETY Act designation or certification before contract award unless authorized in accordance with 50.205–3.

(c) Agencies shall not solicit offers or award contracts presuming DHS will issue a SAFETY Act designation or certification after contract award unless authorized in accordance with 50.205–4.

(d) The DHS determination to extend SAFETY Act protections for a particular technology is not a determination that the technology meets, or fails to meet, the requirements of a solicitation.

50.205 Procedures.

50.205–1 SAFETY Act Considerations.

(a) *SAFETY Act applicability.* Requiring activities shall review requirements to identify potential technologies that prevent, detect, identify, or deter acts of terrorism or limit the harm such acts might cause, and may be appropriate for SAFETY Act protections. In questionable cases, the agency shall consult with DHS. For acquisitions involving such technologies, the requiring activity should address through preliminary discussions with DHS whether a block designation or block certification exists for the technology being acquired.

(1) If one does exist, the requiring activity shall inform the contracting officer to notify offerors.

(2) If one does not exist, see 50.205–2, Pre-qualification designation notice.

(b) *Early consideration of the SAFETY Act.* Acquisition officials shall consider SAFETY Act issues as early in the acquisition cycle as possible. Normally, this would be at the point where the required capabilities or performance characteristics are addressed. This is important because the processing times for issuing determinations on all types of SAFETY Act applications vary depending on many factors, including the influx of applications to DHS and the technical complexity of individual applications.

(c) *Industry outreach.* When applicable, acquisition officials should include SAFETY Act considerations in all industry outreach efforts including, but not limited to, requests for information, draft requests for proposal, and industry conferences.

(d) *Reciprocal waiver of claims.* For purposes of 6 CFR 25.5(e), the Government is not a customer from which a contractor must request a reciprocal waiver of claims.

50.205–2 Pre-qualification designation notice.

(a) *Requiring activity responsibilities.* (1) If the requiring activity determines that the technology to be acquired may qualify for SAFETY Act protection, the requiring activity is responsible for requesting a pre-qualification designation notice from DHS. DHS will then determine whether the technology identified in the request either affirmatively or presumptively satisfies the technical criteria for SAFETY Act designation. An affirmative determination means the technology described in the pre-qualification designation notice satisfies the technical criteria for SAFETY Act designation as a QATT. A presumptive determination means that the technology is a good candidate for SAFETY Act designation as a QATT. In either case, the notice will authorize offerors to—

(i) Submit a streamlined application for SAFETY Act designation; and

(ii) Receive expedited review of their application for SAFETY Act designation.

(2) The requiring activity shall make requests using the procurement pre-qualification request form available at *http://www.SAFETYAct.gov*. The website includes instructions for completing and submitting the form.

(3) The requiring activity shall provide a copy of the request, as well as a copy of the resulting pre-qualification designation notice or DHS denial, to the contracting officer.

(b) *Contracting officer responsibilities.* Upon receipt of the documentation specified in paragraph (a)(3) of this subsection, the contracting officer shall—

(1) Include in any pre-solicitation notice (Subpart 5.2) that a pre-qualification designation notice has been—

(i) Requested and is under review by DHS;

(ii) Denied by DHS; or

(iii) Issued and a copy will be included with the solicitation; and

(2) Incorporate the pre-qualification designation notice into the solicitation.

50.205–3 Authorization of offers contingent upon SAFETY Act designation or certification before contract award.

(a) Contracting officers may authorize such contingent offers, only if—

(1) DHS has issued—

(i) For offers contingent upon SAFETY Act designation, a pre-qualification designation notice or a block designation; or

(ii) For offers contingent upon SAFETY Act certification, a block certification;

(2) To the contracting officer's knowledge, the Government has not provided advance notice so that potential offerors could have obtained SAFETY Act designations/ certifications for their offered technologies before release of any solicitation; and

(3) Market research shows that there will be insufficient competition without SAFETY Act protections or the subject technology would be sold to the Government only with SAFETY Act protections.

(b) Contracting officers shall not authorize offers contingent upon obtaining a SAFETY Act certification (as opposed to a SAFETY Act designation), unless a block certification applies to the solicitation.

50.205–4 Authorization of awards made presuming SAFETY Act designation or certification after contract award.

(a) When necessary to award a contract prior to DHS issuing SAFETY Act protections, contracting officers may award contracts presuming that DHS will issue a SAFETY Act designation/ certification to the contractor after contract award only if—

(1) The criteria of 50.205–3(a) are met;

(2) The chief of the contracting office (or other official designated in agency procedures) approves the action; and

(3) The contracting officer advises DHS of the timelines for potential award and consults DHS as to when DHS could reasonably complete evaluations of offerors' applications for SAFETY Act designations or certifications.

(b) Contracting officers shall not authorize offers presuming that SAFETY Act certification will be obtained (as opposed to a SAFETY Act designation), unless a block certification applies to the solicitation.

50.206 Solicitation provisions and contract clause.

(a) Insert the provision at 52.250–2, SAFETY Act Coverage Not Applicable, in solicitations if—

(1) The agency consulted with DHS on a questionable case of SAFETY Act

applicability to an acquisition in accordance with 50.205–1(a), and after the consultation, the agency has determined that SAFETY Act protection is not applicable for the acquisition; or

(2) DHS has denied approval of a pre-qualification designation notice.

(b)(1) Insert the provision at 52.250–3, SAFETY Act Block Designation/Certification, in a solicitation when DHS has issued a block designation/certification for the solicited technologies.

(2) Use the provision at 52.250–3 with its Alternate I when contingent offers are authorized in accordance with 50.205–3.

(3) Use the provision at 52.250–3 with its Alternate II when offers presuming SAFETY Act designation or certification are authorized in accordance with 50.205–4. If this alternate is used, the contracting officer may alter the number of days within which offerors must submit their SAFETY Act designation or certification application.

(c)(1) Insert the provision at 52.250–4, SAFETY Act Pre-qualification Designation Notice, in a solicitation for which DHS has issued a pre-qualification designation notice.

(2) Use the provision at 52.250–4 with its Alternate I when contingent offers are authorized in accordance with 50.205–3.

(3) Use the provision at 52.250–4 with its Alternate II when offers presuming SAFETY Act designation or certification are authorized in accordance with 50.205–4. If this alternate is used, the contracting officer may alter the number of days within which offerors must submit their SAFETY Act designation or certification application.

(d) Insert the clause at 52.250–5, SAFETY Act—Equitable Adjustment—

(1) In the solicitation, if the provision at 52.250–3 or 52.250–4 is used with its Alternate II; and

(2) In any resultant contract, if DHS has not issued SAFETY Act designation or certification to the successful offeror before contract award.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 13. Amend section 52.250–1 by revising the introductory paragraph to read as follows:

52.250–1 Indemnification Under Public Law 85–804.

As prescribed in 50.104–4, insert the following clause:

* * * * *

■ 14. Add sections 52.250–2 through 52.250–5 to read as follows:

52.250–2 SAFETY Act Coverage Not Applicable.

As prescribed in 50.206(a), insert the following provision:

SAFETY ACT COVERAGE NOT APPLICABLE (Nov 2007)

The Government has determined that the product(s) or service(s) being acquired by this action is not an anti-terrorism technology as that term is defined by the Support Anti-terrorism by Fostering Effective Technologies Act of 2002 (SAFETY Act), 6 U.S.C. 441–444. Proposals in which either acceptance or pricing is made contingent upon SAFETY Act designation as a qualified anti-terrorism technology or SAFETY Act certification as an approved product for homeland security of the proposed product or service will not be considered for award. See FAR Subpart 50.2.

(End of provision)

52.250–3 SAFETY Act Block Designation/Certification.

As prescribed in 50.206(b)(1), insert the following provision:

SAFETY ACT BLOCK DESIGNATION/CERTIFICATION (Nov 2007)

(a) *Definitions.* As used in this provision—

Act of terrorism means any act determined to have met the following requirements or such other requirements as defined and specified by the Secretary of Homeland Security:

(1) Is unlawful.

(2) Causes harm, including financial harm, to a person, property, or entity, in the United States, or in the case of a domestic United States air carrier or a United States-flag vessel (or a vessel based principally in the United States on which United States income tax is paid and whose insurance coverage is subject to regulation in the United States), in or outside the United States.

(3) Uses or attempts to use instrumentalities, weapons or other methods designed or intended to cause mass destruction, injury or other loss to citizens or institutions of the United States.

Qualified Anti-Terrorism Technology (QATT) means any technology designed, developed, modified, procured, or sold for the purpose of preventing, detecting, identifying, or deterring acts of terrorism or limiting the harm such acts might otherwise cause, for which a SAFETY Act designation has been issued. For purposes of defining a QATT, technology means any product, equipment, service (including support services), device, or technology (including information technology) or any combination of the foregoing. Design services, consulting services, engineering services, software development services, software integration services, threat assessments, vulnerability studies, and other analyses relevant to homeland security may be deemed a technology.

SAFETY Act certification means a determination by Department of Homeland Security (DHS) pursuant to 6 U.S.C. 442, as further delineated in 6 CFR 25.9, that a QATT for which a SAFETY Act designation has been issued is an approved product for homeland security, *i.e.*, it will perform as intended, conforms to the seller's specifications, and is safe for use as intended. ''Block certification'' refers to a technology class that DHS has determined to be an approved class of approved products for homeland security.

SAFETY Act designation means a determination by DHS pursuant to 6 U.S.C. 443, as further delineated in 6 CFR 25.4, that a particular Anti-Terrorism Technology constitutes a QATT under the SAFETY Act. ''Block designation'' refers to a technology class that DHS has determined to be a QATT.

(b) The Support Anti-terrorism by Fostering Effective Technologies Act of 2002 (SAFETY Act), 6 U.S.C. 441–444, creates certain liability limitations for claims arising out of, relating to, or resulting from an act of terrorism where QATTs have been deployed. It also confers other important benefits. SAFETY Act designation and SAFETY Act certification are designed to support effective technologies aimed at preventing, detecting, identifying, or deterring acts of terrorism, or limiting the harm that such acts might otherwise cause, and which also meet other prescribed criteria. For some classes of technologies, DHS may issue a block designation/certification in order to lessen the burdens for filing for SAFETY Act designation or SAFETY Act certifications by not requiring applicants to provide certain information otherwise required and in order to offer expedited review of any application submitted pursuant to a block designation/certification. Block designations/certifications will be issued only for technologies that rely on established performance standards or defined technical characteristics.

(c)(1) DHS has issued a block designation or block certification for the technology to be acquired under this solicitation.

(2) This block designation or block certification is attached to this solicitation and contains essential information, including—

(i) A detailed description of and specification for the technology covered by the block designation or block certification;

(ii) A listing of those portions of the SAFETY Act application kit that must be completed and submitted by applicants;

(iii) The date of its expiration; and

(iv) Any other terms and conditions.

(3) Offerors should read this block designation or block certification carefully to make sure they comply with its terms if they plan to take advantage of SAFETY Act coverage for their technology(ies).

(d) A determination by DHS to issue a SAFETY Act designation or SAFETY Act certification based on this block designation/certification is not a determination that the technology meets, or fails to meet, the requirements of this solicitation. All determinations by DHS are based on factors set forth in the SAFETY Act, and are made independent of, and without regard to, the specific terms, conditions, specifications, statements of work, or evaluation factors set forth in the solicitation.

(e) Neither SAFETY Act designation nor certification is in any way a requirement of this action. Whether to seek the benefits of the SAFETY Act for a proposed product or service is entirely up to the offeror. Additional information about the SAFETY Act and this block designation/certification may be found at the SAFETY Act website at *http://www.SAFETYAct.gov* or requests may be mailed to: Directorate of Science and Technology, SAFETY Act/room 4320, Department of Homeland Security, Washington, DC 20528.

(f) Proposals in which pricing or any other terms or conditions are offered contingent upon SAFETY Act designation or SAFETY Act certification of the proposed product(s) or service(s) will not be considered for award.

(End of provision)

Alternate I (Nov 2007). As prescribed in 50.206(b)(2), substitute the following paragraph (f):

(f)(1) Offerors are authorized to submit proposals made contingent upon SAFETY Act designation (or SAFETY Act certification, if a block certification exists) before award. When an offer is made contingent upon SAFETY Act designation or certification, the offeror also may submit an alternate offer without the contingency.

(2) The Government may award a contract based on a contingent offer only if the offeror demonstrates that DHS has issued a SAFETY Act designation (or SAFETY Act certification, if a block certification exists) for the offeror's proposed technology prior to contract award.

(3) The Government reserves the right to award the contract prior to DHS resolution of the offeror's application for SAFETY Act designation (or SAFETY Act certification, if a block certification exists).

Alternate II (Nov 2007). As prescribed in 50.206(b)(3), substitute the following paragraph (f):

(f)(1) Offerors are authorized to submit offers presuming that SAFETY Act designation (or SAFETY Act certification, if a block certification exists) will be obtained before or after award.

(2) An offeror is eligible for award only if the offeror—

(i) Files a SAFETY Act designation (or SAFETY Act certification) application, limited to the scope of the applicable block designation (or block certification), within 15 days after submission of the proposal;

(ii) Pursues its SAFETY Act designation (or SAFETY Act certification) application in good faith; and

(iii) Agrees to obtain the amount of insurance DHS requires for issuing any SAFETY Act designation (or SAFETY Act certification).

(3) If DHS has not issued a SAFETY Act designation (or SAFETY Act certification) to the successful offeror before contract award, the contracting officer will include the clause at 52.250–5 in the resulting contract.

52.250–4 SAFETY Act Pre-qualification Designation Notice.

As prescribed in 50.206(c)(1), insert the following provision:

SAFETY ACT PRE-QUALIFICATION DESIGNATION NOTICE (Nov 2007)

(a) *Definitions.* As used in this provision—

Act of terrorism means any act determined to have met the following requirements or such other requirements as defined and specified by the Secretary of Homeland Security:

(1) Is unlawful.

(2) Causes harm, including financial harm, to a person, property, or entity, in the United States, or in the case of a domestic United States air carrier or a United States-flag vessel (or a vessel based principally in the United States on which United States income tax is paid and whose insurance coverage is subject to regulation in the United States), in or outside the United States.

(3) Uses or attempts to use instrumentalities, weapons or other methods designed or intended to cause mass destruction, injury or other loss to citizens or institutions of the United States.

Pre-qualification designation notice means a notice in a procurement solicitation or other publication by the Government stating that the technology to be procured either affirmatively or presumptively satisfies the technical criteria necessary to be deemed a qualified anti-terrorism technology. A pre-qualification designation notice authorizes successful offeror(s) to submit streamlined SAFETY Act applications for SAFETY Act designation and receive expedited processing of those applications.

Qualified Anti-Terrorism Technology (QATT) means any technology designed, developed, modified, procured, or sold for the purpose of preventing, detecting, identifying, or deterring acts of terrorism or limiting the harm such acts might otherwise cause, for which a SAFETY Act designation has been issued. For purposes of defining a QATT, technology means any product, equipment, service (including support services), device, or technology (including information technology) or any combination of the foregoing. Design services, consulting services, engineering services, software development services, software integration services, threat assessments, vulnerability studies, and other analyses relevant to homeland security may be deemed a technology.

SAFETY Act certification means a determination by Department of Homeland Security (DHS) pursuant to 6 U.S.C. 442, as further delineated in 6 CFR 25.9, that a QATT for which a SAFETY Act designation has been issued is an approved product for homeland security, i.e., it will perform as intended, conforms to the seller's specifications, and is safe for use as intended. ''Block certification'' refers to a technology class that DHS has determined to be an approved class of approved products for homeland security.

SAFETY Act designation means a determination by DHS pursuant to 6 U.S.C. 443, as further delineated in 6 CFR 25.4, that a particular Anti-Terrorism Technology constitutes a QATT under the SAFETY Act. ''Block designation'' refers to a technology class that DHS has determined to be a QATT.

(b) The Support Anti-terrorism by Fostering Effective Technologies Act of 2002 (SAFETY Act), 6 U.S.C. 441–444, creates certain liability limitations for claims arising out of, relating to, or resulting from an act of terrorism where QATTs have been deployed. It also confers other important benefits. SAFETY Act designation and SAFETY Act certification are designed to support effective technologies aimed at preventing, detecting, identifying, or deterring acts of terrorism, or limiting the harm that such acts might otherwise cause, and which also meet other prescribed criteria.

(c)(1) DHS has issued a SAFETY Act pre-qualification designation notice for the technology to be acquired under this solicitation.

(2) This notice is attached to this solicitation and contains essential information, including—

(i) A detailed description of and specification for the technology covered by the notice;

(ii) A statement that the technology described and specified in the notice satisfies the technical criteria to be deemed a QATT and the offeror's proposed technology either may presumptively or will qualify for the issuance of a designation provided the offeror complies with terms and conditions in the notice and its application is approved;

(iii) The period of time within which DHS will take action upon submission of a SAFETY Act application submitted pursuant to the notice;

(iv) A listing of those portions of the application that must be completed and submitted by selected awardees and the time periods for such submissions;

(v) The date of expiration of the notice; and

(vi) Any other terms and conditions concerning the notice.

(3) Offerors should read this notice carefully to make sure they comply with the terms of the notice if they plan on taking advantage of SAFETY Act coverage for their technologies.

(d) A determination by DHS to designate, or not designate, a particular technology as a QATT is not a determination that the technology meets, or fails to meet, the requirements of this solicitation. All determinations by DHS are based on factors set forth in the SAFETY Act, and are made independent of, and without regard to, the specific terms, conditions, specifications, statements of work, or evaluation factors set forth in the solicitation.

(e) Neither SAFETY Act designation nor certification is in any way a requirement of this action. Whether to seek the benefits of the SAFETY Act for a proposed product or service is entirely up to the offeror. Additional information about the SAFETY Act may be found at the SAFETY Act website at *http://www.SAFETYAct.gov*.

(f) Proposals in which pricing or any other terms or conditions are offered contingent upon SAFETY Act designation or certification of the proposed product(s) or service(s) will not be considered for award.

(End of provision)

Alternate I (Nov 2007). As prescribed in 50.206(c)(2), substitute the following paragraph (f):

(f)(1) Offerors are authorized to submit proposals made contingent upon SAFETY Act designation before award. When an offer is made contingent upon SAFETY Act designation, the offeror also may submit an alternate offer without the contingency.

(2) The Government may award a contract based on a contingent offer only if the offeror demonstrates that DHS has issued a SAFETY Act designation for the offeror's proposed technology prior to contract award.

(3) The Government reserves the right to award the contract prior to DHS resolution of the offeror's application for SAFETY Act designation.

Alternate II (Nov 2007). As prescribed in 50.206(c)(3), substitute the following paragraph (f):

(f)(1) Offerors are authorized to submit proposals presuming SAFETY Act designation before or after award.

(2) An offeror is eligible for award only if the offeror—

(i) Files a SAFETY Act designation application, limited to the scope of the applicable prequalification designation notice, within 15 days after submission of the proposal;

(ii) Pursues its SAFETY Act designation application in good faith; and

(iii) Agrees to obtain the amount of insurance DHS requires for issuing any SAFETY Act designation.

(3) If DHS has not issued a SAFETY Act designation to the successful offeror before contract award, the contracting officer will include the clause at 52.250–5 in the resulting contract.

52.250–5 SAFETY Act—Equitable Adjustment.

As prescribed in 50.206(d), insert the following clause:

SAFETY ACT—EQUITABLE ADJUSTMENT (Nov 2007)

(a) *Definitions.* As used in this clause—

Act of terrorism means any act determined to have met the following requirements or such other requirements as defined and specified by the Secretary of Homeland Security:

(1) Is unlawful.

(2) Causes harm, including financial harm, to a person, property, or entity, in the United States, or in the case of a domestic United States air carrier or a United States-flag vessel (or a vessel based principally in the United States on which United States income tax is paid and whose insurance coverage is subject to regulation in the United States), in or outside the United States.

(3) Uses or attempts to use instrumentalities, weapons or other methods designed or intended to cause mass destruction, injury or other loss to citizens or institutions of the United States.

Qualified Anti-Terrorism Technology (QATT) means any technology designed, developed, modified, procured, or sold for the purpose of preventing, detecting, identifying, or deterring acts of terrorism or limiting the harm such acts might otherwise cause, for which a SAFETY Act designation has been issued. For purposes of defining a QATT, technology means any product, equipment, service (including support services), device, or technology (including information technology) or any combination of the foregoing. Design services, consulting services, engineering services, software development services, software integration services, threat assessments, vulnerability studies, and other analyses relevant to homeland security may be deemed a technology.

SAFETY Act certification means a determination by Department of Homeland Security (DHS) pursuant to 6 U.S.C. 442, as further delineated in 6 CFR 25.9, that a QATT for which a SAFETY Act designation has been issued is an approved product for homeland security, *i.e.*, it will perform as intended, conforms to the seller's specifications, and is safe for use as intended. ''Block certification'' refers to a technology class that DHS has determined to be an approved class of approved products for homeland security.

SAFETY Act designation means a determination by DHS pursuant to 6 U.S.C. 443, as further delineated in 6 CFR 25.4, that a particular Anti-Terrorism Technology constitutes a QATT under the SAFETY Act. ''Block designation'' refers to a technology class that DHS has determined to be a QATT.

(b) Prices for the items covered by the pre-qualification designation notice, block designation, or block certification in the contract were established presuming DHS will issue a SAFETY Act designation (or SAFETY Act certification) for those items.

(c) In order to qualify for an equitable adjustment in accordance with paragraph (d) of this clause the Contractor shall in good faith pursue obtaining—

(1) SAFETY Act designation (or SAFETY Act certification); and

(2) The amount of insurance DHS requires for issuing any SAFETY Act designation (or SAFETY Act certification).

(d)(1) If DHS denies the Contractor's SAFETY Act designation (or certification) application, the Contractor may submit a request for an equitable adjustment within 30 days of DHS's notification of denial.

(2) The Contracting Officer shall either—

(i) Make an equitable adjustment to the contract price based on evidence of the resulting increase or decrease in the Contractor's costs and/or an equitable adjustment to other terms and

conditions based on lack of SAFETY Act designation (or certification); or

(ii) At the sole option of the Government, terminate this contract for the convenience of the Government in place of an equitable adjustment.

(3) A failure of the parties to agree on the equitable adjustment will be considered to be a dispute in accordance with the ''Disputes'' clause of this contract.

(4) Unless first terminated, the Contractor shall continue contract performance during establishment of any equitable adjustment.

(End of clause)

[FR Doc. 07–5477 Filed 11–6–07; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 4, 7, 11, 12, 13, 23, 42, 45, and 52

[FAC 2005–21; FAR Case 2004–032; Item II; Docket 2006–020; Sequence 13]

RIN 9000–AK65

Federal Acquisition Regulation; FAR Case 2004–032, Biobased Products Preference Program

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to implement 7 U.S.C. 8102, as enacted by section 9002 of the Farm Security and Rural Investment Act of 2002 (FSRIA) (Pub. L. 107–171), and amended by sections 205 and 943 of the Energy Policy Act of 2005 (Pub. L. 109–58). Entitled ''Federal Procurement of Biobased Products,'' 7 U.S.C. 8102 requires that a procurement preference be afforded biobased products within items designated by the Secretary of Agriculture.

DATES: *Effective Date*: December 7, 2007.

FOR FURTHER INFORMATION CONTACT: Mr. William Clark, Procurement Analyst, at (202) 219–1813 for clarification of content. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755. Please cite FAC 2005–21, FAR case 2004–032.

SUPPLEMENTARY INFORMATION:

A. Background

The United States Department of Agriculture (USDA) published regulations at 7 CFR 2902: 70 FR 1792, January 11, 2005; 71 FR 13686, March 16, 2006; 71 FR 42572, July 27, 2006; and 71 FR 67031, November 20, 2006.

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 71 FR 77360, December 26, 2006. The comment period closed on February 26, 2007. Six respondents submitted comments on the proposed rule. The comments are available at *http://www.regulations.gov*. A discussion of the comments and the changes made to the rule are provided below.

Public Comments

Provide coverage for products that use biobased products.

Comment: One respondent recommends that the FAR should include a preference for products that use biobased products. The example proffered was diesel engine generator sets that perform with biobased fuels.

Response: Extending coverage as suggested would exceed the congressional mandate, codified at 7 U.S.C. 8102, to procure designated biobased items. The comment is therefore beyond the scope of this case. It applies to the scope of the biobased product program, which was established by Congress.

Interface between the proposed contract clause and the order of precedence clause.

Comment: One respondent expresses concern with the interface between the contract clause and the order of precedence clause (FAR 52.215–8). The subject proposed rule includes a requirement to use a contract clause, specifically FAR 52.223–XX (now FAR 52.223–2), to make maximum use of biobased products in contracts for services, rather than the normal needs analysis and specification process embodied in Part 11, Describing Agency Needs. The subject clause is proposed to go into all service contracts (as well as construction), unless the contract will not involve the use of USDA-designated items. The respondent believes this unusual approach to describing contractual requirements is inappropriate in contracts for services because it creates a potential ambiguity. The respondent is concerned that in the order of precedence clause, contract clauses take precedence over specifications. As stated by the respondent, ''It is not clear that the exemption in the clause regarding 'meeting contract performance requirements' in paragraph (a)(2) applies to named products such as those on qualified product lists (QPLs), because of the order of precedence clause, 52.215–8, that already goes into all negotiated contracts. '' The respondent is concerned that, according to this rule of interpretation, the clause requirement to use a designated biobased hydraulic fluid or lubricant, for example, might be required over a QPL or other contractually specified product. This is a matter of concern to the respondent when acquiring services in support of complex systems, engineering services, and other contracts for services when multi-tiered subcontracting is involved.

The respondent suggests two alternatives—

- Include the requirement for biobased products in FAR Part 11 rather than in a contract clause; or
- Exempt products on QPLs.

Response: Review of the proposed contract clause and FAR 52.215–8 reveals that the two clauses can be harmonized in a manner that furthers the Congressional objective when read together. In accordance with the proposed contract clause and the provisions of 7 U.S.C. 8102, any entity contracting with any Federal agency is required to use designated biobased items (absent one of the statutory exemptions) in performance of the contract. As mandated in 7 U.S.C. 8102(d), Federal agencies have one year after designation of a product to modify specifications which they have the responsibility for drafting or reviewing, in order to ensure that such specifications require the use of biobased products unless an exemption applies. The proposed alternatives are addressed as follows:

- *Put the requirement in Part 11.* Regardless of where the requirement is incorporated into the FAR, the requirement must be incorporated into the contract to bind a contractor. The statute mandates: ''Except as provided in subsection (c), each procuring agency shall comply with the requirements set forth in this section and any regulations issued under this section…'' (7 U.S.C. 8102(a)). ''Procuring agency'' is defined in 7 U.S.C. 8101(4) as—

—Any Federal agency that is using Federal funds for procurement; or

—Any person contracting with any Federal agency with respect to work performed under the contract.

To implement 7 U.S.C. 8102, a contract clause is required. Absent a contract clause, the contractor is not bound to follow the mandates of 7

U.S.C. 8102. For a performance-based contract, there may be no specifications.

• *Exemption for Products on QPLs.* The exemptions are listed in the proposed and final rules at FAR 23.404(b), 23.405(b), and in the clause at 52.223–2(a). There is an exemption that covers situations in which the product fails to meet performance requirements. If there is a qualification requirement applicable to an acquisition, it will be unknown whether a product meets performance requirements until it has been evaluated for addition to the QPL. Either the product will meet the requirements and be added to the QPL, or the product will not meet the requirements, and need not be purchased. In any case, the QPL will control until the product is tested. Federal agencies should, however, expedite the qualification process. Congress has directed Federal agencies to revise specifications which they are responsible for drafting or reviewing within one year after the date of publication of the guidelines on designated products. Therefore, such exclusion for all products on QPLs would be inconsistent with 7 U.S.C. 8102(d).

Include a categorical exemption for spacecraft or combat systems in the clause.

Comment: One respondent expressed concern that ''…fabricators and operators working under large mission support services contracts, especially at the component subcontract level, might not be aware that spacecraft are exempt from some biobased requirements unless that specific exception is added to paragraph (a) of the clause…''

Response: The USDA designation of some items (*e.g.*, mobile equipment hydraulic fluids, diesel fuel additives, and penetrating lubricants, see 7 CFR 2902.10 *et seq.*) provides exemption from the preferred procurement requirement for the application of the designated item to one or both of the following:

(i) Spacecraft system and launch support equipment.

(ii) Military equipment: Product or system designed or procured for combat or combat-related missions.

These exemptions were initiated in response to public comments on the USDA proposed rule designating the first 6 biobased items for Federal procurement (70 FR 38612, July 5, 2005 and 71 FR 13685, March 16, 2006). USDA believed that the situations described were of sufficient concern that it was appropriate to provide specific exemptions for certain designated items when used in military equipment in combat or combat-related missions and spacecraft and their launch support equipment where failures could have catastrophic consequences.

The Councils have included these exemptions with the other exemptions at FAR 23.404(b) and in the clause at FAR 52.223–2, because these exemptions may impact more than just one agency. The clause prescription has not been modified, because an exemption may apply to one USDA-designated item to be used in the performance of the contract, but not other USDA-designated items, or even the same item with a different application.

Inconsistent with performance-based service contracting policy.

Comment: One respondent comments that the proposed contract clause approach is unnecessary and inconsistent with performance-based service contracting policy.

Response: Requiring a preference for biobased products does not impinge upon a contractor's discretion of determining work processes. Rather, once a contractor delineates a process, the contract clause only requires that if the process selected by the contractor involves the use of USDA-designated products, the contractor shall use biobased products, absent an applicable exception. The contractor may select another process that does not involve the use of any USDA-designated products.

Limit the use of the clause to contracts for commercial services with an estimated value in excess of $100,000.

Comment: One respondent recommends that the purpose of the new clause can still be achieved if the prescription were not as inclusive. Having a narrower prescription would balance the needs of USDA with the requirements of the rest of the procurement community. The respondent recommends limiting the use of the clause to contracts for commercial type services with an estimated value above $100,000.

Response: Such action would be inconsistent with 7 U.S.C. 8102(a). That statutory provision requires compliance where the purchase price of the item exceeds $10,000 or ''where the quantity of such items or of functionally equivalent items purchased or acquired in the course of the preceding fiscal year was $10,000 or more.''

Delete coverage for micro-purchases.

Comment: One respondent suggests deletion of coverage for micro-purchases at FAR 13.201(f). Justification for this recommendation is to enhance the simplicity of awarding micro-purchases, reduce the burden on agencies for training individuals executing such purchases, and the decreased time for processing associated paperwork.

Response: The requirements of 7 U.S.C. 8102 are specifically applicable to any purchase once the statutory threshold has been met (*i.e.*, the quantity of such items purchased by the agency the preceding year was $10,000 or more).

Continue to meet contract performance requirements.

Comment: One respondent suggests a change to proposed FAR clause 52.223–XX (now 52.223–2). The respondent suggests that (a)(2) of the proposed clause be changed from ''meeting contract performance requirements; or'' to ''and continue to meet contract performance requirements; or.''

Response: Absent a change in specification, a product that meets contract specifications at time of award will continue to meet such specifications subsequent to contract award. Therefore, no change to the proposed clause is required.

Include the certification in ORCA.

Comment: Include the certification in Online Representations and Certifications Application (ORCA).

Response: The Councils agree with this comment and have added the FAR clause 52.223–1 to the list of clauses at FAR 4.1202.

Objection to requirement for minimum biobased contents for lubricants.

Comment: One respondent objects ''to the USDA's proposal requiring minimum biobased contents in order for lubricants to qualify for Federal agency procurement preference.'' A variety of reasons are provided, including cost and performance.

Response: With respect to the comments involving cost or performance, Federal agencies are not required to procure such products if the product cannot be procured at a reasonable price or it does not meet requirements. The remaining comments relating to USDA's designation of products are beyond the scope of this case and need to be directed to the USDA.

Project officers will need to be trained.

Comment: One respondent comments that contracting officer technical representatives (project officers) will need to be trained.

Response: Program training will need to be conducted on an individual Federal agency basis, since preference programs are Federal agency specific. Therefore, training is most appropriately

addressed in conjunction with each Federal agency's procurement program.

Life-cycle cost information will be prohibitive for small businesses.

Comment: One respondent states that Life-cycle cost information will be prohibitive for many small businesses and should not be routinely requested from vendors since price, availability and functionality are generally the most important factors in most acquisition.

Response: The rule does not require routine collection of this data from vendors. It is permissive (''may request''), and is necessary to implement 7 CFR 2902.8, which requires that manufacturers and vendors must provide information on life cycle costs and environmental and health benefit tests, when requested by Federal agencies.

Need for Budget Object Code.

Comment: The respondent also comments that it will be difficult for agencies to capture data regarding affected procurements and a Budget Object Code is needed.

*Response:*This comment is outside the scope of this case.

Other Revisions to the Proposed Rule.

• **Definitions**. The proposed rule cited the statutory definition of ''Biobased product'' (7 U.S.C. 8101(2)), however, the definition conflicts with the intent of the rule that biobased products from certain designated countries must be treated by procuring agencies as eligible for the procurement preference under FSRIA. The revised definition deletes the statutory reference and encompasses biobased products composed of renewable agricultural materials or forestry materials from ''designated countries,'' as defined in FAR 25.003. Therefore, provided that those products otherwise meet all requirements for participation in the preference program, they will be entitled to receive the procurement preference.

• **Certification**. The Councils concluded that the certification in the proposed rule was unnecessarily burdensome, requiring submission of a separate signed certification. This certification was erroneously patterned after FAR clause 52.223–9, Estimate of Recovered Material Content for EPA-Designated Products, Alternate I, which is a requirement for a certification at the end of the contract performance. The more appropriate model is the pre-award Recovered Material Certification at FAR 52.223–4, in which the offeror provides certification by signing the offer. In this way, the estimated paperwork burden associated with the proposed rule is eliminated. In addition, the wording ''other than biobased products that are not purchased by the offeror as a direct result of this contract'' has been included in the certification to implement 7 CFR 2902.3(c), as amended by the USDA interim final rule of 71 FR 42572, July 27, 2006, which clarified the USDA intent to exclude from the preferred procurement program biobased products that are merely incidental to Federal funding. This clarification was necessary after the definition of ''procuring agency'' was expanded to include contractors.

• **Duplication of exemptions**. The proposed rule duplicated the statement of exemptions at FAR 23.404(b) and 23.405(b). The Councils provide a cross-reference at FAR 23.405(b) to 23.404(b), rather than a restatement of the exemptions.

• **Title of 52.223–9**. The Councils corrected the title of FAR 52.223–9 in the clause prescription at FAR 23.406(d) in the final rule.

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 Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because it implements in the FAR the USDA rule at 7 CFR Part 2902. Furthermore, USDA has certified that its designation of biobased items will not have a significant economic impact on a substantial number of small entities (71 FR 13685 at 13704, March 16, 2006). In support of this certification, USDA stated in the **Federal Register** that it anticipates that this program will affect entities, both large and small, that manufacture or sell biobased products. For example, the designation of items for preferred procurement will provide additional opportunities for businesses to manufacture and sell biobased products to Federal agencies and their contractors. Similar opportunities will be provided for entities that supply biobased materials to manufacturers. Conversely, the biobased procurement program may decrease opportunities for businesses that manufacture or sell non-biobased products or provide components for the manufacturing of such products. However, this rule will not affect existing purchase orders and it will not preclude procuring agencies from continuing to purchase non-biobased items under certain conditions relating to the availability, performance, or cost of biobased items. This rule will also not preclude businesses from modifying their product lines to meet new specifications or solicitation requirements for these products containing biobased materials. Because biobased products represent a small emerging market, only a small percentage of all manufacturers, large or small, are expected to develop and market biobased products. Thus, the number of small businesses affected is not expected to be substantial. The only comment received with regard to impact of the proposed rule on small business is addressed in the response to public comments.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.* The estimated burden of 18,000 hours per year associated with the proposed rule provision at FAR 52.223–1, has been eliminated in the final rule.

List of Subjects in 48 CFR Parts 2, 4, 7, 11, 12, 13, 23, 42, 45, and 52

Government procurement.

Dated: October 31, 2007.

Al Matera,

Director, Office of Acquisition Policy.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 2, 4, 7, 11, 12, 13, 23, 42, 45, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 2, 4, 7, 11, 12, 13, 23, 42, 45, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 2—DEFINITIONS OF WORDS AND TERMS

■ 2. Amend section 2.101 in paragraph (b)(2) by adding, in alphabetical order, the definition ''Biobased product'' to read as follows:

2.101 Definitions.

* * * * *

(b) * * *

(2) * * *

Biobased product means a product determined by the U.S. Department of Agriculture to be a commercial or industrial product (other than food or feed) that is composed, in whole or in significant part, of biological products, including renewable domestic agricultural materials (including plant,

animal, and marine materials) or forestry materials.

* * * * *

PART 4—ADMINISTRATIVE MATTERS

■ 3. Amend section 4.1202 by redesignating paragraphs (r) through (z) as (s) through (aa) respectively, and adding a new paragraph (r) to read as follows:

4.1202 Solicitation provision and contract clause.

* * * * *

(r) 52.223–1, Biobased Product Certification.

* * * * *

PART 7—ACQUISITION PLANNING

■ 4. Amend section 7.103 by revising paragraph (n)(2) to read as follows:

7.103 Agency-head responsibilities.

* * * * *

(n) * * *

(2) Comply with the policy in 11.002(d) regarding procurement of biobased products, products containing recovered materials, and environmentally preferable and energy-efficient products and services.

* * * * *

PART 11—DESCRIBING AGENCY NEEDS

■ 5. Amend section 11.002 by revising paragraph (d) to read as follows:

11.002 Policy.

* * * * *

(d)(1) When agencies acquire products and services, various statutes and executive orders (identified in Part 23) require consideration of—

(i) Energy-efficient products and services (Subpart 23.2);

(ii) Products and services that utilize renewable energy technologies (Subpart 23.2);

(iii) Products containing energy-efficient standby power devices (Subpart 23.2);

(iv) Products containing recovered materials (Subpart 23.4);

(v) Biobased products (Subpart 23.4); and

(vi) Environmentally preferable products and services (Subpart 23.7).

(2) Executive agencies shall consider maximum practicable use of products and services listed in paragraph (d)(1) of this section when—

(i) Developing, reviewing, or revising Federal and military specifications, product descriptions (including commercial item descriptions) and standards;

(ii) Describing Government requirements for products and services; and

(iii) Developing source-selection factors.

* * * * *

11.101 [Amended]

■ 6. Amend section 11.101 by removing paragraph (b) and redesignating paragraph (c) as (b).

■ 7. Amend section 11.302 by revising paragraph (c) to read as follows:

11.302 Policy.

* * * * *

(c)(1) When the contracting officer needs additional information to determine whether supplies meet minimum recovered material or biobased standards stated in the solicitation, the contracting officer may require offerors to submit additional information on the recycled or biobased content or related standards. The request for the information must be included in the solicitation. When acquiring commercial items, limit the information to the maximum extent practicable to that available under normal commercial practices.

(2) For biobased products, the contracting officer may require vendors to provide information on life cycle costs and environmental and health benefits in accordance with 7 CFR 2902.8.

PART 12—ACQUISITION OF COMMERCIAL ITEMS

■ 8. Amend section 12.301 by revising paragraph (e)(3) to read as follows:

12.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

* * * * *

(e) * * *

(3) The contracting officer may use the provisions and clauses contained in Part 23 regarding the use of recovered material and biobased products when appropriate for the item being acquired.

* * * * *

PART 13—SIMPLIFIED ACQUISITION PROCEDURES

■ 9. Amend section 13.201 by revising paragraph (f) to read as follows:

13.201 General.

* * * * *

(f) The procurement requirements in Subparts 23.2, 23.4, and 23.7 apply to purchases at or below the micro-purchase threshold.

* * * * *

PART 23—ENVIRONMENT, ENERGY AND WATER EFFICIENCY, RENEWABLE ENERGY TECHNOLOGIES, OCCUPATIONAL SAFETY, AND DRUG-FREE WORKPLACE

■ 10. Amend section 23.000 by revising paragraph (d) to read as follows:

23.000 Scope.

* * * * *

(d) Acquiring energy-efficient and water-efficient products and services, environmentally preferable products, products that use recovered materials, and biobased products; and

* * * * *

■ 11. Revise Subpart 23.4 to read as follows:

Subpart 23.4—Use of Recovered Materials and Biobased Products

Sec.

23.400 Scope of subpart.
23.401 Definitions.
23.402 Authorities.
23.403 Policy.
23.404 Agency affirmative procurement programs.
23.405 Procedures.
23.406 Solicitation provisions and contract clauses.

23.400 Scope of subpart.

(a) The procedures in this subpart apply to all agency acquisitions of an Environmental Protection Agency (EPA) or United States Department of Agriculture (USDA)-designated item, if—

(1) The price of the designated item exceeds $10,000; or

(2) The aggregate amount paid for designated items, or for functionally equivalent designated items, in the preceding fiscal year was $10,000 or more.

(b) While micro-purchases are included in determining the aggregate amount paid under paragraph (a)(2) of this section, it is not recommended that an agency track micro-purchases when—

(1) The agency anticipates the aggregate amount paid will exceed $10,000; or

(2) The agency intends to establish or continue an affirmative procurement program in the following fiscal year.

23.401 Definitions.

As used in this subpart—

(a) *EPA-designated item* means a product that is or can be made with recovered material—

(1) That is listed by EPA in a procurement guideline (40 CFR part 247); and

(2) For which EPA has provided purchasing recommendations in a

related Recovered Materials Advisory Notice (RMAN).

(b) *USDA-designated item* means a generic grouping of products that are or can be made with biobased materials—

(1) That is listed by USDA in a procurement guideline (7 CFR part 2902, subpart B); and

(2) For which USDA has provided purchasing recommendations.

23.402 Authorities.

(a) The Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6962.

(b) The Farm Security and Rural Investment Act of 2002 (FSRIA), 7 U.S.C. 8102.

(c) Executive Order 13101 of September 14, 1998, Greening the Government Through Waste Prevention, Recycling, and Federal Acquisition.

(d) The Energy Policy Act of 2005, Public Law 109–58.

23.403 Policy.

Government policy on the use of products containing recovered materials and biobased products considers cost, availability of competition, and performance. Agencies shall assure the use of products containing recovered materials and biobased products to the maximum extent practicable without jeopardizing the intended use of the product while maintaining a satisfactory level of competition at a reasonable price. Such products shall meet the reasonable performance standards of the agency and be acquired competitively, in a cost-effective manner. Except as provided at FAR 23.404(b), virgin material shall not be required by the solicitation (see 11.302).

23.404 Agency affirmative procurement programs.

(a) An agency must establish an affirmative procurement program for EPA and USDA-designated items if the agency's purchases of designated items exceed the threshold set forth in 23.400.

(1) Agencies have a period of 1 year to revise their procurement program(s) after the designation of any new item by EPA or USDA.

(2) Technical or requirements personnel and procurement personnel are responsible for the preparation, implementation, and monitoring of affirmative procurement programs.

(3) Agency affirmative procurement programs must include—

(i) A recovered materials and biobased products preference program;

(ii) An agency promotion program;

(iii) For EPA-designated items only, a program for requiring reasonable estimates, certification, and verification of recovered material used in the performance of contracts. Both the recovered material content and biobased programs require preaward certification that the products meet EPA or USDA recommendations. A second certification is required at contract completion for recovered material content; and

(iv) Annual review and monitoring of the effectiveness of the program.

(b) *Exemptions.* (1) Agency affirmative procurement programs must require that 100 percent of purchases of EPA or USDA-designated items contain recovered material or biobased content, respectively, unless the item cannot be acquired—

(i) Competitively within a reasonable time frame;

(ii) Meeting reasonable performance standards; or

(iii) At a reasonable price.

(2) EPA and USDA may provide categorical exemptions for items that they designate, when procured for a specific purpose. For example, some USDA-designated items such as mobile equipment hydraulic fluids, diesel fuel additives, and penetrating lubricants (see 7 CFR 2902.10 *et seq.*) are excluded from the preferred procurement requirement for the application of the USDA-designated item to one or both of the following:

(i) Spacecraft system and launch support equipment.

(ii) Military equipment, *i.e.*, a product or system designed or procured for combat or combat-related missions.

(c) Agency affirmative procurement programs must provide guidance for purchases of EPA-designated items at or below the micro-purchase threshold.

(d) Agencies may use their own specifications or commercial product descriptions when procuring products containing recovered materials or biobased products. When using either, the contract should specify—

(1) For products containing recovered materials, that the product is composed of the—

(i) Highest percent of recovered materials practicable; or

(ii) Minimum content standards in accordance with EPA's Recovered Materials Advisory Notices; and

(2) For biobased products, that the product is composed of—

(i) The highest percentage of biobased material practicable; or

(ii) USDA's recommended minimum contents standards.

(e) Agencies shall treat as eligible for the preference for biobased products, products from ''designated countries,'' as defined in 25.003, provided that those products—

(1) Meet the criteria for the definition of biobased product, except that the products need not meet the requirement that renewable agricultural materials (including plant, animal, and marine materials) or forestry materials in such product must be domestic; and

(2) Otherwise meet all requirements for participation in the preference program.

23.405 Procedures.

(a) *Designated items and procurement guidelines.*

(1) *Recovered Materials.* Contracting officers should refer to EPA's list of EPA-designated items (available via the Internet at *http://www.epa.gov/cpg/*) and to their agencies' affirmative procurement program when purchasing products that contain recovered material, or services that could include the use of products that contain recovered material.

(2) *Biobased products.* Contracting officers should refer to USDA's list of USDA-designated items (available through the Internet at *http://www.usda.gov/biopreferred*) and to their agencies affirmative procurement program when purchasing supplies that contain biobased material or when purchasing services that could include supplies that contain biobased material.

(b) *Procurement exemptions.*

(1) Once an item has been designated by either EPA or USDA, agencies shall purchase conforming products unless an exemption applies (see 23.404(b)).

(2) When an exemption is used for an EPA-designated item or the procurement of a product containing recovered material does not meet or exceed the EPA recovered material content guidelines, the contracting officer shall place a written justification in the contract file.

(c) *Program priorities.* When both the USDA-designated item and the EPA-designated item will be used for the same purposes, and both meet the agency's needs, the agency shall purchase the EPA-designated item.

23.406 Solicitation provisions and contract clauses.

(a) Insert the provision at 52.223–1, Biobased Product Certification, in solicitations that—

(1) Require the delivery or specify the use of USDA-designated items; or

(2) Include the clause at 52.223–2.

(b) Insert the clause at 52.223–2, Affirmative Procurement of Biobased Products Under Service and Construction Contracts, in service or construction solicitations and contracts unless the contract will not involve the use of USDA-designated items at *http://*

www.usda.gov/biopreferred or 7 CFR Part 2902.

(c) Insert the provision at 52.223–4, Recovered Material Certification, in solicitations that are for, or specify the use of, EPA-designated items.

(d) Insert the clause at 52.223–9, Estimate of Percentage of Recovered Material Content for EPA-Designated Products, in solicitations and contracts exceeding $100,000 that are for, or specify the use of, EPA-designated products containing recovered materials. If technical personnel advise that estimates can be verified, use the clause with its Alternate I.

23.701 [Removed]

■ 12. Remove and reserve section 23.701.

■ 13. Amend section 23.702 by adding paragraph (g) to read as follows:

23.702 Authorities.

* * * * *

(g) Farm Security and Rural Investment Act of 2002 (FSRIA) (7 U.S.C. 8102).

■ 14. Amend section 23.703 by revising paragraph (b)(7); and adding paragraph (b)(8) to read as follows:

23.703 Policy.

* * * * *

(b) * * *

(7) Promote the use of biobased products.

(8) Purchase only plastic ring carriers that are degradable (7 USC 8102(c)(1), 40 CFR part 238).

PART 42—CONTRACT ADMINISTRATION AND AUDIT SERVICES

■ 15. Amend section 42.302 by revising paragraph (a)(68)(ii) to read as follows:

42.302 Contract administration functions.

(a) * * *

(68) * * *

(ii) Monitoring contractor compliance with specifications or other contractual requirements requiring the delivery or use of environmentally preferable products, energy-efficient products, products containing recovered materials, and biobased products. This must occur as part of the quality assurance procedures set forth in Part 46; and

* * * * *

PART 45—GOVERNMENT PROPERTY

45.103 [Amended]

■ 16. Amend section 45.103 by removing from paragraph (a)(1) ''11.101(c)'' and adding ''11.101(b)'' in its place.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 17. Add sections 52.223–1 and 52.223–2 to read as follows:

52.223–1 Biobased Product Certification.

As prescribed in 23.406(a), insert the following provision:

BIOBASED PRODUCT CERTIFICATION [December 7, 2007]

As required by the Farm Security and Rural Investment Act of 2002 and the Energy Policy Act of 2005 (7 U.S.C. 8102(c)(3)), the offeror certifies, by signing this offer, that biobased products (within categories of products listed by the United States Department of Agriculture in 7 CFR part 2902, subpart B) to be used or delivered in the performance of the contract, other than biobased products that are not purchased by the offeror as a direct result of this contract, will comply with the applicable specifications or other contractual requirements.

(End of provision)

52.223–2 Affirmative Procurement of Biobased Products Under Service and Construction Contracts.

As prescribed in 23.406(b), insert the following clause:

AFFIRMATIVE PROCUREMENT OF BIOBASED PRODUCTS UNDER SERVICE AND CONSTRUCTION CONTRACTS [December 7, 2007]

(a) In the performance of this contract, the contractor shall make maximum use of biobased products that are United States Department of Agriculture (USDA)-designated items unless—

(1) The product cannot be acquired—

(i) Competitively within a time frame providing for compliance with the contract performance schedule;

(ii) Meeting contract performance requirements; or

(iii) At a reasonable price.

(2) The product is to be used in an application covered by a USDA categorical exemption (see 7 CFR 2902.10 *et seq.*). For example, some USDA-designated items such as mobile equipment hydraulic fluids, diesel fuel additives, and penetrating lubricants are excluded from the preferred procurement requirement for the application of the USDA-designated item to one or both of the following:

(i) Spacecraft system and launch support equipment.

(ii) Military equipment, *i.e.*, a product or system designed or procured for combat or combat-related missions.

(b) Information about this requirement and these products is available at *http://www.usda.gov/biopreferred*.

(End of clause)

52.223–4 [Amended]

■ 18. Amend section 52.223–4 by removing from the prescription ''23.406(a)'' and adding ''23.406(c)'' in its place.

52.223–9 [Amended]

■ 19. Amend section 52.223–9 by removing from the prescription and Alternate I ''23.406(b)'' and adding ''23.406(d)'' respectively, in its place.

[FR Doc. 07–5478 Filed 11–6–07; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 3, 12, 15, 18, 19, 27, 33, and 52

[FAC 2005–21; FAR Case 1999–402; Item III; Docket 2007–0001; Sequence 7]

RIN 9000–AJ64

Federal Acquisition Regulation; FAR Case 1999–402, FAR Part 27 Rewrite in Plain Language

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to clarify, streamline, and update text and clauses on Patents, Data, and Copyrights (FAR Part 27).

DATES: *Effective Date*: December 7, 2007.

FOR FURTHER INFORMATION CONTACT: Mr. Ernest Woodson, Procurement Analyst, at (202) 501–3775 for clarification of content. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755. Please cite FAC 2005–21, FAR case 1999–402.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule is a ''plain language'' rewrite of FAR Part 27 and its associated clauses in Part 52. Part 27 implements a number of statutes and executive orders pertaining to patents, data, and copyrights. This effort focused on clarifying, streamlining, and updating the text, with the ultimate goal of making the policies and procedures

more understandable to the reader. For example, the materials have been edited to conform to the FAR Drafting Guide (available at *http://www.arnet.gov/far/draftingguide.htm*). This rewrite was not intended to include substantive changes to Part 27 policies or procedures, except where necessary to comply with current statutory or regulatory requirements, or to resolve internal inconsistencies within FAR Part 27 and its associated clauses.

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 68 FR 31790, May 28, 2003 with public comments due by July 28, 2003. The background information published with the proposed rule provided an overview of the rewrite effort, and highlighted examples of both plain language edits and additional substantive changes deemed within the scope of the revision. Accordingly, the remainder of the discussion below focuses on analysis of the public responses to the proposed rule, and the subsequent revisions to the proposed rule in response to those comments. Several of the public comments indicated general support for the plain language rewrite effort, or for specific revisions in the proposed rule, but these comments will not be discussed individually. The remainder of the comments was organized into three categories:

Category 1: Revisions Based on Plain Language Rules.

The first category included comments directed to the application of plain language rules, and thus fell clearly within the scope of the rewrite effort. These suggested edits or changes were evaluated based on the application of plain language rules (*e.g.*, the FAR Drafting Guide), as follows:

The definitions of ''computer database'' and ''technical data'' were moved from 27.401 to 2.101 because these terms appear in multiple FAR Parts. The definition of ''computer database'' was further revised to replace the term ''data'' with the term ''recorded information'' to avoid any confusion regarding the specialized use of the term ''data'' as it is defined at 27.401.

The definition of ''computer software'' at 2.101 was conformed to the definition of that term as included in 27.401 of the proposed rule (and the definition at 27.401 was removed) to ensure consistent use of the term throughout the FAR.

A definition of ''computer software documentation'' has been added at FAR 2.101.

The heading for Subpart 27.2 was revised to refer to copyrights as well as patents.

In 27.201–1(a), the phrase ''on behalf of the Government'' was clarified to specify that this determination depends on whether the Government has provided its ''authorization or consent.''

In 27.201–2(c)(2)(i), the undefined term ''noncommercial item'' was clarified as ''items that are not commercial items.''

In 27.302(i), the revisions clarify the guidance for contracting officers' review and approval of a contractor's request to transfer that contractor's license rights.

In 27.304–1(h), redundant language that repeated (with only minor paraphrasing) the text from the associated clause was replaced with a cross-reference to the appropriate clause paragraph.

In 52.227–1(b), 52.227–2(c), and 52.227–10(e), clause flow down language was conformed to FAR drafting conventions.

In 52.227–13(c)(1)(ii) and 52.227–13(h), the language was conformed to the plain language describing the same requirements at 52.227–11(h), and 52.227–11(g), respectively.

In 52.227–11(k) and 52.227–13(i), the guidance regarding flow down of the clauses to subcontractors was relocated to be the final paragraph in each clause, conformed to FAR drafting conventions, and clarified regarding the modification of clauses to identify the parties when flowed down to lower tiers.

In 52.227–14(d)(1), the language was clarified to reference prohibitions by any Federal law or regulation, with export control and national security being examples rather than an all-inclusive listing.

In 52.227–19, the requirement to place a notice on delivered software was highlighted by relocation from the end of paragraph (b)(3) to its own new paragraph (c).

One respondent argued against the use of the defined term ''made'' instead of the phrase ''conceived or first actually reduced to practice'' within the definition of ''subject invention'' at 27.301 and associated clauses. This suggestion is not adopted. The combined revisions to the definitions ''made'' and ''subject invention'' are more consistent with the plain language guidelines.

One respondent recommended that the phrase ''to the Government'' should be added to the end of the FAR 27.102(e) to clarify where the data is to be delivered. This suggestion is adopted.

The final rule also incorporates a number of minor editorial, typographical, or grammatical corrections noted in the public comments.

Category 2: Additional Revisions Within the Scope of This Case.

The second category of comments raised issues or suggested changes that go beyond mere ''plain language'' conversions, but which the Councils determined were necessary for compliance with clear statutory or regulatory requirements, or otherwise mandated to resolve internal inconsistencies in the FAR Part 27 coverage. These suggestions are discussed below.

A number of comments stated that the proposed definition of ''commercial computer software'' at FAR 2.101 restricts the scope of software that is to be treated as a commercial item under FAR 12.212, and is therefore inconsistent with the requirements of the Federal Acquisition Streamlining Act (''FASA''), Pub. L. No. 103–355, 108 Stat. 3243 (1994). The comments recommended either the elimination or redrafting of the proposed definition. The final rule resolves this issue by redefining commercial computer software as the intersection of two defined categories of items: ''computer software'' and ''commercial item.''

Two respondents recommended that the term ''computer software documentation'' be defined in a manner generally consistent with the definition of that term in the Defense Federal Acquisition Regulation Supplement (DFARS) at 252.227–7014(a)(5). The term has been defined at 2.101 using the DFARS definition.

One respondent noted that the time periods associated with the restrictive markings challenge procedures in the clause at 52.227–14(e) are inconsistent with the time periods specified in 41 U.S.C. 253d. The commenter recommended changing the 30-day contractor response period to 60 days, and eliminating the 90-day limit. These corrections are implemented at 52.227–14(e)(1)(i) and (ii), respectively.

The phrase ''without unduly encumbering future research and discovery'' has been added to 27.302(a)(3) and 27.304–1(c)(2) to reflect changes to 35 U.S.C. 200 made in 2000.

Two respondents stated that the revision of the definition of ''computer software'' to exclude ''computer databases'' and the revision of the definition of ''technical data'' to include ''computer databases'' were substantive changes and beyond the scope of this rulemaking. They recommended that databases be treated as computer software. These recommendations are not adopted. The definition of ''computer database'' is consistent with the policy and intent of 27.404–2(c)(3) (formerly 27.404(d)(3)), and 52.227–

14(g)(2) (formerly (g)(1)). Similarly, this approach is consistent with the treatment of computer databases under the Defense Federal Acquisition Regulation Supplement (DFARS) (see DFARS 252.227–7014(a)(2)). The individual elements of recorded information that are stored or formatted for delivery as a database must be distinguished from the computer software that may be required to view or manipulate the content of the database using a computer.

One respondent suggested that the term ''commercial computer software'' had been substituted for ''restricted computer software'' in FAR 27.405–3 and 52.227–19, and that these revised sections change acquisition policy by discouraging use of commercial terms and conditions for the acquisition of computer software, which is inconsistent with FAR 12.212. There has been no change in policy from that expressed in FAR 12.212. Under the preexisting Part 27 scheme, the clause at 52.227–19 was prescribed for use with ''existing computer software,'' which was defined at former 27.405(b)(2) as software that was normally vended commercially. Thus, the term ''restricted computer software'' in that clause was applied only to ''existing computer software'' which was intended to mean commercial computer software. Furthermore, the revised 27.405–3 expressly states that commercial computer software shall be acquired under licenses customarily provided to the public to the extent the license is consistent with Federal law and otherwise satisfies the Government's needs, and refers to 12.212 for further guidance in acquiring commercial computer software. Similarly, 12.212(b) has been revised to reference 27.405–3 for guidance when negotiating licenses for commercial computer software (*e.g.*, when the standard commercial license is inconsistent with federal law or does not meet the Government's needs). The use of the clause 52.227–19 is discussed further in the Category 3 comments below.

One respondent noted that the reference to the ''date of determination defined at 7 U.S.C. 2401(d'') within the definition of ''subject invention'' at 27.301 and the associated clauses is improper because the cited section of the Plant Variety Protection Act (PVPA) has been deleted, and recommended that the citation be deleted. This suggestion is partially adopted. Although the statutory citation is outdated, the concept of a ''date of determination'' is still relevant and required under the statutory scheme (see 35 U.S.C. 201) to define the inventive event that connects the invention of a plant variety to a particular Federal contract. Accordingly, the substance of the previously codified definition of ''date of determination'' has been incorporated into the definition of the term ''made,'' at 27.301 and the associated clauses, as it applies to plant varieties. Additionally, further changes were made to the clause language to remove ambiguities regarding the contractor's ability to pursue PVPA protection as an alternative to patent protection (*e.g.*, where the nomenclature that is used to reference patent requirements could have been mistakenly interpreted to exclude the equivalent under PVPA).

One commenter argued that the flowdown provisions at 52.227–13(i) are potentially inconsistent with the Bayh-Dole Act (BDA) when that clause is used in a subcontract with a small business or nonprofit organization that is otherwise entitled to the standard BDA terms and conditions. These flowdown provisions are revised to conform to the BDA requirements.

After the publication of the proposed rule, and the expiration of the public comment period, the BDA implementing regulations at 37 CFR Part 401 were revised (69 FR 17299) to provide an alternate version of the patent rights clause for contractors supporting works under cooperative research and development agreements. Thus, a change is necessary to implement this modification in the regulatory implementation of the BDA. The alternate language from 37 CFR 401.14(c) as prescribed by 37 CFR 401.3(c) is incorporated as a new Alternate V to the basic clause at FAR 52.227–11, with appropriate prescriptive language at 27.303(b)(7).

Additional revisions were made to the coverage for Small Business Innovation Research (SBIR), to accommodate changes in the relevant SBIR statute (Pub. L. 106–554) and the Small Business Administration's SBIR Program Policy Directive (67 FR 60071). It was clarified that SBIR data rights also apply to phase three awards, and that the minimum four-year protection period can be extended in appropriate circumstances. See 27.409(h), and 52.227–20(d).

Category 3: Recommendations for Substantive Changes Beyond the Scope of This Case.

The third category included comments suggesting edits that were substantive in nature, but which the Councils determined were not required to implement statutory or regulatory requirements. Accordingly, regardless of the merits of any individual recommendation, none of these comments were eligible for inclusion in the final rule because they exceeded the scope of the rulemaking effort. However, the Councils recognize that several of these comments raising substantive issues may be appropriate for further rulemaking efforts in the future. The following is an overview of the comments in this category:

Two respondents suggested that 27.404 and its clauses be modified to state more clearly that the Government's unlimited rights license in technical data that is funded exclusively at Government expense is applicable only when delivery of that data is required as an element of performance and is necessary to ensure the competitive acquisition of supplies or services in substantial quantities in the future, citing 41 U.S.C. 418a(b)(1). One responder suggested further that the Part 27 materials should implement the concept of ''government purpose rights for mixed funding,'' citing 41 U.S.C. 418a(b)(2). Neither comment recommends specific language. The Councils note that Part 27 addresses delivery requirements independently of the license rights in those deliverables, and that there is no mention of a ''mixed funding'' criteria in the cited statute. In any case, the Part 27 implementation of the cited statutory requirements is well established, and any significant change in the overall scheme for specifying delivery requirements or license rights is beyond the scope of this plain language rewrite.

Several respondents suggested that the clause at 52.227–19 be eliminated in favor of using the vendor's standard commercial computer software license, arguing that this is the policy stated at FAR 12.212. Elimination of the clause is unnecessary; the policies and procedures at 12.212 and 27.405–3 are entirely consistent and have been revised to cross-reference one another. As stated at 27.405–3, the clause at 52.227–19 is provided as one optional solution when the standard commercial computer software license is inadequate under the criteria specified at 12.212 (*e.g.*, when the standard commercial license is inconsistent with federal law or otherwise does not satisfy agency needs).

One respondent recommended that the final rule further limit an agency's ability to restrict the publication or release of data first produced in the performance of the contract.

One respondent recommended revising the policies and procedures regarding the delivery of data without restrictive markings at 52.227–14(f).

One respondent recommended using the term ''may'' rather than ''should'' at 27.102(c). These terms are not equivalent, and thus the change is more than a plain language edit.

Two respondents recommended eliminating the requirement to obtain the contracting officer's permission before asserting copyright in data first produced in the performance of the contract.

One respondent suggested further broadening the government's acceptance of standard commercial terms and conditions.

Two respondents recommended modification of the government's license rights in restricted computer software to more closely resemble commercial licenses.

One respondent recommended the elimination of portions of the Rights in Data—General clause at FAR 52.227–14.

One respondent recommended harmonizing the patent, data, and copyright sections of the FAR and DFARS.

One respondent recommended adding coverage to specifically address the use or delivery of ''open source'' software.

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 Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because most changes in the rule are plain language changes and the other changes have minimal economic impact.

* The changes to the policies, procedures, and contract clauses pertaining to patents that were necessary to reflect current patent law and the current practices at the U.S. Patent and Trademark Office, do not impose any significant economic burden on small businesses.

* The changes to implement the ''Small Business Innovation Research Program Policy Directive'' of the Small Business Administration allow the small business contractor to extend the period during which it is allowed to treat data and software as proprietary. Small business entities are entirely free to choose whether to utilize this new and enhanced capability. The procedures for extension of the protection period are set forth in the Small Business Innovation Research Program Policy Directive, not this FAR rule, which just references the policy directive.

There were no public comments from small entities in response to the statement in the **Federal Register** notice for the proposed rule that the Councils did not expect the proposed rule to have a significant economic impact on a substantial number of small entities.

C. Paperwork Reduction Act

The Paperwork Reduction Act applies because, as discussed in the preamble to the proposed rule, the clause 52.227–12 is being removed from the FAR and will be incorporated into the Defense Federal Acquisition Regulation Supplement (DFARS). The current paperwork burden associated with Part 27 of the FAR has already been cleared under OMB Control Numbers 9000–0090 and 9000–0095. OMB clearance 9000–0095 covers the burdens associated with FAR patent rights clauses 52.227–11, 52.227–12, and 52.227–13. We estimate that removal of the clause at 52.227–12 will reduce the approved FAR burden by 21,528 hours (from 45,630 hours to 24,102 hours), but there will be a corresponding increase under another case in the estimated burden hours under OMB clearance 0704–0369. There will be no change to OMB clearance 9000–0090, which covers FAR data rights clauses (52.227–14 through 52.227–23), and is currently approved at 2,970 hours. As a result, these changes to the FAR do not impose additional information collection requirements to the previously approved paperwork burden.

List of Subjects in 48 CFR Parts 2, 3, 12, 15, 18, 19, 27, 33, and 52

Government procurement.

Dated: October 31, 2007.

Al Matera,

Director, Contract Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 2, 3, 12, 15, 18, 19, 27, 33, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 2, 3, 12, 15, 18, 19, 27, 33, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 2—DEFINITIONS OF WORDS AND TERMS

■ 2. Amend section 2.101 in paragraph (b)(2) by—

■ a. Adding the definitions ''Commercial computer software'' and ''Computer database'';

■ b. Revising the definition ''Computer software'';

■ c. Adding the definitions ''Computer software documentation'', ''Small business concern'', and ''Technical data'', and

■ d. Amending the definition ''United States'', by redesignating paragraph (6) as paragraph (7), and adding a new paragraph (6).

■ The added and revised text reads as follows:

2.101 Definitions.

* * * * *

(b) * * *

(2) * * *

Commercial computer software means any computer software that is a commercial item.

* * * * *

Computer database or *database* means a collection of recorded information in a form capable of, and for the purpose of, being stored in, processed, and operated on by a computer. The term does not include computer software.

Computer software—(1) Means (i) Computer programs that comprise a series of instructions, rules, routines, or statements, regardless of the media in which recorded, that allow or cause a computer to perform a specific operation or series of operations; and

(ii) Recorded information comprising source code listings, design details, algorithms, processes, flow charts, formulas, and related material that would enable the computer program to be produced, created, or compiled.

(2) Does not include computer databases or computer software documentation.

Computer software documentation means owner's manuals, user's manuals, installation instructions, operating instructions, and other similar items, regardless of storage medium, that explain the capabilities of the computer software or provide instructions for using the software.

* * * * *

Small business concern means a concern, including its affiliates, that is independently owned and operated, not dominant in the field of operation in which it is bidding on Government contracts, and qualified as a small business under the criteria and size standards in 13 CFR part 121 (see 19.102). Such a concern is ''not dominant in its field of operation'' when it does not exercise a controlling or major influence on a national basis in a kind of business activity in which a number of business concerns are primarily engaged. In determining

whether dominance exists, consideration must be given to all appropriate factors, including volume of business, number of employees, financial resources, competitive status or position, ownership or control of materials, processes, patents, license agreements, facilities, sales territory, and nature of business activity. (See 15 U.S.C. 632.)

* * * * *

Technical data means recorded information (regardless of the form or method of the recording) of a scientific or technical nature (including computer databases and computer software documentation). This term does not include computer software or financial, administrative, cost or pricing, or management data or other information incidental to contract administration. The term includes recorded information of a scientific or technical nature that is included in computer databases (See 41 U.S.C. 403(8)).

* * * * *

United States * * *

(6) For use in Part 27, see the definition at 27.001.

* * * * *

PART 3—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

3.104–4 [Amended]

■ 3. Amend section 3.104–4 in paragraph (d)(3) by removing ''27.404(h)'' and adding ''27.404–5'' in its place.

PART 12—ACQUISITION OF COMMERCIAL ITEMS

■ 4. Amend section 12.212 by adding a sentence to the end of paragraph (b) to read as follows:

12.212 Computer software.

* * * * *

(b) * * * For additional guidance regarding the use and negotiation of license agreements for commercial computer software, see 27.405–3.

PART 15—CONTRACTING BY NEGOTIATION

15.408 [Amended]

■ 5. Amend section 15.408 in Table 15–2, ''II. Cost Elements'' which follows paragraph (m)(4), by removing from paragraph ''E(10)'' ''FAR 27.204'' and adding ''FAR 27.202'' in its place.

PART 18—EMERGENCY ACQUISITIONS

18.119 [Amended]

■ 6. Amend section 18.119 by removing ''See 27.208'' and adding ''See 27.204–1'' in its place.

PART 19—SMALL BUSINESS PROGRAMS

19.001 [Amended]

■ 7. Amend section 19.001 by removing the definition ''Small business concern''.

■ 8. Revise Part 27 to read as follows:

PART 27—PATENTS, DATA, AND COPYRIGHTS

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27.407 Rights to technical data in successful proposals.
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Subpart 27.5—Foreign License and Technical Assistance Agreements

27.501 General.

27.000 Scope of part.

This part prescribes the policies, procedures, solicitation provisions, and contract clauses pertaining to patents, data, and copyrights.

27.001 Definition.

United States, as used in this part, means the 50 States and the District of Columbia, U.S. territories and possessions, Puerto Rico, and the Northern Mariana Islands.

Subpart 27.1—General

27.101 Applicability.

This part applies to all agencies. However, agencies are authorized to adopt alternative policies, procedures, solicitation provisions, and contract clauses to the extent necessary to meet the specific requirements of laws, executive orders, treaties, or international agreements. Any agency adopting alternative policies, procedures, solicitation provisions, and contract clauses should include them in the agency's published regulations.

27.102 General guidance.

(a) The Government encourages the maximum practical commercial use of

inventions made under Government contracts.

(b) Generally, the Government will not refuse to award a contract on the grounds that the prospective contractor may infringe a patent. The Government may authorize and consent to the use of inventions in the performance of certain contracts, even though the inventions may be covered by U.S. patents.

(c) Generally, contractors providing commercial items should indemnify the Government against liability for the infringement of U.S. patents.

(d) The Government recognizes rights in data developed at private expense, and limits its demands for delivery of that data. When such data is delivered, the Government will acquire only those rights essential to its needs.

(e) Generally, the Government requires that contractors obtain permission from copyright owners before including copyrighted works, owned by others, in data to be delivered to the Government.

Subpart 27.2—Patents and Copyrights

27.200 Scope of subpart.

This subpart prescribes policies and procedures with respect to—

(a) Patent and copyright infringement liability;

(b) Royalties;

(c) Security requirements for patent applications containing classified subject matter; and

(d) Patented technology under trade agreements.

27.201 Patent and copyright infringement liability.

27.201–1 General.

(a) Pursuant to 28 U.S.C. 1498, the exclusive remedy for patent or copyright infringement by or on behalf of the Government is a suit for monetary damages against the Government in the Court of Federal Claims. There is no injunctive relief available, and there is no direct cause of action against a contractor that is infringing a patent or copyright with the authorization or consent of the Government (*e.g.*, while performing a contract).

(b) The Government may expressly authorize and consent to a contractor's use or manufacture of inventions covered by U.S. patents by inserting the clause at 52.227–1, Authorization and Consent.

(c) Because of the exclusive remedies granted in 28 U.S.C. 1498, the Government requires notice and assistance from its contractors regarding any claims for patent or copyright infringement by inserting the clause at 52.227–2, Notice and Assistance, Regarding Patent and Copyright Infringement.

(d) The Government may require a contractor to reimburse it for liability for patent infringement arising out of a contract for commercial items by inserting the clause at FAR 52.227–3, Patent Indemnity.

27.201–2 Contract clauses.

(a)(1) Insert the clause at 52.227–1, Authorization and Consent, in solicitations and contracts except that use of the clause is—

(i) Optional when using simplified acquisition procedures; and

(ii) Prohibited when both complete performance and delivery are outside the United States.

(2) Use the clause with its Alternate I in all R&D solicitations and contracts for which the primary purpose is R&D work, except that this alternate shall not be used in construction and architect-engineer contracts unless the contract calls exclusively for R&D work.

(3) Use the clause with its Alternate II in solicitations and contracts for communication services with a common carrier and the services are unregulated and not priced by a tariff schedule set by a regulatory body.

(b) Insert the clause at 52.227–2, Notice and Assistance Regarding Patent and Copyright Infringement, in all solicitations and contracts that include the clause at 52.227–1, Authorization and Consent.

(c)(1) Insert the clause at 52.227–3, Patent Indemnity, in solicitations and contracts that may result in the delivery of commercial items, unless—

(i) Part 12 procedures are used;

(ii) The simplified acquisition procedures of Part 13 are used;

(iii) Both complete performance and delivery are outside the United States; or

(iv) The contracting officer determines after consultation with legal counsel that omission of the clause would be consistent with commercial practice.

(2) Use the clause with either its Alternate I (identification of excluded items) or II (identification of included items) if—

(i) The contract also requires delivery of items that are not commercial items; or

(ii) The contracting officer determines after consultation with legal counsel that limitation of applicability of the clause would be consistent with commercial practice.

(3) Use the clause with its Alternate III if the solicitation or contract is for communication services and facilities where performance is by a common carrier, and the services are unregulated and are not priced by a tariff schedule set by a regulatory body.

(d)(1) Insert the clause at 52.227–4, Patent Indemnity—Construction Contracts, in solicitations and contracts for construction or that are fixed-price for dismantling, demolition, or removal of improvements. Do not insert the clause in contracts solely for architect-engineer services.

(2) If the contracting officer determines that the construction will necessarily involve the use of structures, products, materials, equipment, processes, or methods that are nonstandard, noncommercial, or special, the contracting officer may expressly exclude them from the patent indemnification by using the clause with its Alternate I. Note that this exclusion is for items, as distinguished from identified patents (see paragraph (e) of this subsection).

(e) It may be in the Government's interest to exempt specific U.S. patents from the patent indemnity clause. Exclusion from indemnity of identified patents, as distinguished from items, is the prerogative of the agency head. Upon written approval of the agency head, the contracting officer may insert the clause at 52.227–5, Waiver of Indemnity, in solicitations and contracts in addition to the appropriate patent indemnity clause.

(f) If a patent indemnity clause is not prescribed, the contracting officer may include one in the solicitation and contract if it is in the Government's interest to do so.

(g) The contracting officer shall not include in any solicitation or contract any clause whereby the Government agrees to indemnify a contractor for patent infringement.

27.202 Royalties.

27.202–1 Reporting of royalties.

(a) To determine whether royalties anticipated or actually paid under Government contracts are excessive, improper, or inconsistent with Government patent rights the solicitation provision at 52.227–6 requires prospective contractors to furnish royalty information. The contracting officer shall take appropriate action to reduce or eliminate excessive or improper royalties.

(b) If the response to a solicitation includes a charge for royalties, the contracting officer shall, before award of the contract, forward the information to the office having cognizance of patent matters for the contracting activity. The cognizant office shall promptly advise the contracting officer of appropriate action.

(c) The contracting officer, when considering the approval of a subcontract, shall require royalty information if it is required under the prime contract. The contracting officer shall forward the information to the office having cognizance of patent matters. However, the contracting officer need not delay consent while awaiting advice from the cognizant office.

(d) The contracting officer shall forward any royalty reports to the office having cognizance of patent matters for the contracting activity.

27.202–2 Notice of Government as a licensee.

(a) When the Government is obligated to pay a royalty on a patent because of an existing license agreement and the contracting officer believes that the licensed patent will be applicable to a prospective contract, the Government should furnish the prospective offerors with—

(1) Notice of the license;

(2) The number of the patent; and

(3) The royalty rate cited in the license.

(b) When the Government is obligated to pay such a royalty, the solicitation should also require offerors to furnish information indicating whether or not each offeror is the patent owner or a licensee under the patent. This information is necessary so that the Government may either—

(1) Evaluate an offeror's price by adding an amount equal to the royalty; or

(2) Negotiate a price reduction with an offeror when the offeror is licensed under the same patent at a lower royalty rate.

27.202–3 Adjustment of royalties.

(a) If at any time the contracting officer believes that any royalties paid, or to be paid, under a contract or subcontract are inconsistent with Government rights, excessive, or otherwise improper, the contracting officer shall promptly report the facts to the office having cognizance of patent matters for the contracting activity concerned.

(b) In coordination with the cognizant office, the contracting officer shall promptly act to protect the Government against payment of royalties—

(1) With respect to which the Government has a royalty-free license;

(2) At a rate in excess of the rate at which the Government is licensed; or

(3) When the royalties in whole or in part otherwise constitute an improper charge.

(c) In appropriate cases, the contracting officer in coordination with the cognizant office shall demand a refund pursuant to any refund of royalties clause in the contract (see 27.202–4) or negotiate for a reduction of royalties.

(d) For guidance in evaluating information furnished pursuant to 27.202–1, see 31.205–37. See also 31.109 regarding advance understandings on particular cost items, including royalties.

27.202–4 Refund of royalties.

The clause at 52.227–9, Refund of Royalties, establishes procedures to pay the contractor royalties under the contract and recover royalties not paid by the contractor when the royalties were included in the contractor's fixed price.

27.202–5 Solicitation provisions and contract clause.

(a)(1) Insert a solicitation provision substantially the same as the provision at 52.227–6, Royalty Information, in—

(i) Any solicitation that may result in a negotiated contract for which royalty information is desired and for which cost or pricing data are obtained under 15.403; or

(ii) Sealed bid solicitations only if the need for such information is approved at a level above the contracting officer as being necessary for proper protection of the Government's interests.

(2) If the solicitation is for communication services and facilities by a common carrier, use the provision with its Alternate I.

(b) If the Government is obligated to pay a royalty on a patent involved in the prospective contract, insert in the solicitation a provision substantially the same as the provision at 52.227–7, Patents—Notice of Government Licensee. If the clause at 52.227–6 is not included in the solicitation, the contracting officer may require offerors to provide information sufficient to provide this notice to the other offerors.

(c) Insert the clause at 52.227–9, Refund of Royalties, in negotiated fixed-price solicitations and contracts when royalties may be paid under the contract. If a fixed-price incentive contract is contemplated, change ''price'' to ''target cost and target profit'' wherever it appears in the clause. The clause may be used in cost-reimbursement contracts where agency approval of royalties is necessary to protect the Government's interests.

27.203 Security requirements for patent applications containing classified subject matter.

27.203–1 General.

(a) Unauthorized disclosure of classified subject matter, whether in patent applications or resulting from the issuance of a patent, may be a violation of 18 U.S.C. 792, *et seq.* (Chapter 37—Espionage and Censorship), and related statutes, and may be contrary to the interests of national security.

(b) Upon receipt of a patent application under paragraph (a) or (b) of the clause at 52.227–10, Filing of Patent Applications—Classified Subject Matter, the contracting officer shall ascertain the proper security classification of the patent application. If the application contains classified subject matter, the contracting officer shall inform the contractor how to transmit the application to the United States Patent Office in accordance with procedures provided by legal counsel. If the material is classified ''Secret'' or higher, the contracting officer shall make every effort to notify the contractor within 30 days of the Government's determination, pursuant to paragraph (a) of the clause.

(c) Upon receipt of information furnished by the contractor under paragraph (d) of the clause at 52.227–10, the contracting officer shall promptly submit that information to legal counsel in order that the steps necessary to ensure the security of the application will be taken.

(d) The contracting officer shall act promptly on requests for approval of foreign filing under paragraph (c) of the clause at 52.227–10 in order to avoid the loss of valuable patent rights of the Government or the contractor.

27.203–2 Contract clause.

Insert the clause at 52.227–10, Filing of Patent Applications—Classified Subject Matter, in all classified solicitations and contracts and in all solicitations and contracts where the nature of the work reasonably might result in a patent application containing classified subject matter.

27.204 Patented technology under trade agreements.

27.204–1 Use of patented technology under the North American Free Trade Agreement.

(a) The requirements of this section apply to the use of technology covered by a valid patent when the patent holder is from a country that is a party to the North American Free Trade Agreement (NAFTA).

(b) Article 1709(10) of NAFTA generally requires a user of technology covered by a valid patent to make a reasonable effort to obtain authorization prior to use of the patented technology. However, NAFTA provides that this requirement for authorization may be waived in situations of national emergency or other circumstances of extreme urgency, or for public noncommercial use.

(c) Section 6 of Executive Order 12889, ''Implementation of the North American Free Trade Act,'' of December 27, 1993, waives the requirement to obtain advance authorization for an invention used or manufactured by or for the Federal Government. However, the patent owner shall be notified in advance whenever the agency or its contractor knows or has reasonable grounds to know, without making a patent search, that an invention described in and covered by a valid U.S. patent is or will be used or manufactured without a license. In cases of national emergency or other circumstances of extreme urgency, this notification need not be made in advance, but shall be made as soon as reasonably practicable.

(d) The contracting officer, in consultation with the office having cognizance of patent matters, shall ensure compliance with the notice requirements of NAFTA Article 1709(10) and Executive Order 12889. A contract award should not be suspended pending notification to the patent owner.

(e) Section 6(c) of Executive Order 12889 provides that the notice to the patent owner does not constitute an admission of infringement of a valid privately-owned patent.

(f) When addressing issues regarding compensation for the use of patented technology, Government personnel should be advised that NAFTA uses the term ''adequate remuneration.'' Executive Order 12889 equates ''remuneration'' to ''reasonable and entire compensation'' as used in 28 U.S.C. 1498, the statute that gives jurisdiction to the U.S. Court of Federal Claims to hear patent and copyright cases involving infringement by the Government.

(g) When questions arise regarding the notice requirements or other matters relating to this section, the contracting officer should consult with legal counsel.

27.204–2 Use of patented technology under the General Agreement on Tariffs and Trade (GATT).

Article 31 of Annex 1C, Agreement on Trade-Related Aspects of Intellectual Property Rights, to GATT (Uruguay Round) addresses situations where the law of a member country allows for use of a patent without authorization, including use by the Government.

Subpart 27.3—Patent Rights under Government Contracts

27.300 Scope of subpart.

This subpart prescribes policies, procedures, solicitation provisions, and contract clauses pertaining to inventions made in the performance of work under a Government contract or subcontract for experimental, developmental, or research work. Agency policies, procedures, solicitation provisions, and contract clauses may be specified in agency supplemental regulations as permitted by law, including 37 CFR 401.1.

27.301 Definitions.

As used in this subpart—

Invention means any invention or discovery that is or may be patentable or otherwise protectable under title 35 of the U.S. Code, or any variety of plant that is or may be protectable under the Plant Variety Protection Act (7 U.S.C. 2321, *et seq.*)

Made means—

(1) When used in relation to any invention other than a plant variety, means the conception or first actual reduction to practice of the invention; or

(2) When used in relation to a plant variety, means that the contractor has at least tentatively determined that the variety has been reproduced with recognized characteristics.

Nonprofit organization means a university or other institution of higher education or an organization of the type described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)) and exempt from taxation under section 501(a) of the Internal Revenue Code (26 U.S.C. 501(a)), or any nonprofit scientific or educational organization qualified under a State nonprofit organization statute.

Practical application means to manufacture, in the case of a composition or product; to practice, in the case of a process or method; or to operate, in the case of a machine or system; and, in each case, under such conditions as to establish that the invention is being utilized and that its benefits are, to the extent permitted by law or Government regulations, available to the public on reasonable terms.

Subject invention means any invention of the contractor made in the performance of work under a Government contract.

27.302 Policy.

(a) *Introduction.* In accordance with chapter 18 of title 35, U.S.C. (as implemented by 37 CFR part 401), Presidential Memorandum on Government Patent Policy to the Heads of Executive Departments and Agencies dated February 18, 1983, and Executive Order 12591, Facilitating Access to Science and Technology dated April 10, 1987, it is the policy and objective of the Government to—

(1) Use the patent system to promote the use of inventions arising from federally supported research or development;

(2) Encourage maximum participation of industry in federally supported research and development efforts;

(3) Ensure that these inventions are used in a manner to promote free competition and enterprise without unduly encumbering future research and discovery;

(4) Promote the commercialization and public availability of the inventions made in the United States by United States industry and labor;

(5) Ensure that the Government obtains sufficient rights in federally supported inventions to meet the needs of the Government and protect the public against nonuse or unreasonable use of inventions; and

(6) Minimize the costs of administering patent policies.

(b) *Contractor right to elect title.* (1) Generally, pursuant to 35 U.S.C. 202 and the Presidential Memorandum and Executive order cited in paragraph (a) of this section, each contractor may, after required disclosure to the Government, elect to retain title to any subject invention.

(2) A contract may require the contractor to assign to the Government title to any subject invention—

(i) When the contractor is not located in the United States or does not have a place of business located in the United States or is subject to the control of a foreign government (see 27.303(e)(1)(i));

(ii) In exceptional circumstances, when an agency determines that restriction or elimination of the right to retain title in any subject invention will better promote the policy and objectives of chapter 18 of title 35, U.S.C. and the Presidential Memorandum;

(iii) When a Government authority, that is authorized by statute or executive order to conduct foreign intelligence or counterintelligence activities, determines that the restriction or elimination of the right to retain title to any subject invention is necessary to protect the security of such activities;

(iv) When the contract includes the operation of a Government-owned,

contractor-operated facility of the Department of Energy (DOE) primarily dedicated to the Department's naval nuclear propulsion or weapons related programs and all funding agreement limitations under 35 U.S.C. 202(a)(iv) for agreements with small business concerns and nonprofit organizations are limited to inventions occurring under the above two programs; or

(v) Pursuant to statute or in accordance with agency regulations.

(3) When the Government has the right to acquire title to a subject invention, the contractor may, nevertheless, request greater rights to a subject invention (see 27.304–1(c)).

(4) Consistent with 37 CFR part 401, when a contract with a small business concern or nonprofit organization requires assignment of title to the Government based on the exceptional circumstances enumerated in paragraph (b)(2)(ii) or (iii) of this section for reasons of national security, the contract shall still provide the contractor with the right to elect ownership to any subject invention that—

(i) Is not classified by the agency; or

(ii) Is not limited from dissemination by the DOE within 6 months from the date it is reported to the agency.

(5) Contracts in support of DOE's naval nuclear propulsion program are exempted from this paragraph (b).

(6) When a contract involves a series of separate task orders, an agency may structure the contract to apply the exceptions at paragraph (b)(2)(ii) or (iii) of this section to individual task orders.

(c) *Government license*. The Government shall have at least a nonexclusive, nontransferable, irrevocable, paid-up license to practice, or have practiced for or on behalf of the United States, any subject invention throughout the world. The Government may require additional rights in order to comply with treaties or other international agreements. In such case, these rights shall be made a part of the contract (see 27.303).

(d) *Government right to receive title*. (1) In addition to the right to obtain title to subject inventions pursuant to paragraph (b)(2)(i) through (v) of this section, the Government has the right to receive title to an invention—

(i) If the contractor has not disclosed the invention within the time specified in the clause; or

(ii) In any country where the contractor—

(A) Does not elect to retain rights or fails to elect to retain rights to the invention within the time specified in the clause;

(B) Has not filed a patent or plant variety protection application within the time specified in the clause;

(C) Decides not to continue prosecution of a patent or plant variety protection application, pay maintenance fees, or defend in a reexamination or opposition proceeding on the patent; or

(D) No longer desires to retain title.

(2) For the purposes of this paragraph, filing in a European Patent Office Region or under the Patent Cooperation Treaty constitutes election in the countries selected in the application(s).

(e) *Utilization reports*. The Government has the right to require periodic reporting on how any subject invention is being used by the contractor or its licensees or assignees. In accordance with 35 U.S.C. 202(c)(5) and 37 CFR part 401, agencies shall not disclose such utilization reports to persons outside the Government without permission of the contractor. Contractors should mark as confidential/proprietary any utilization report to help prevent inadvertent release outside the Government.

(f) *March-in rights*. (1) Pursuant to 35 U.S.C. 203, agencies have certain march-in rights that require the contractor, an assignee, or exclusive licensee of a subject invention to grant a nonexclusive, partially exclusive, or exclusive license in any field of use to responsible applicants, upon terms that are reasonable under the circumstances. If the contractor, assignee or exclusive licensee of a subject invention refuses to grant such a license, the agency can grant the license itself. March-in rights may be exercised only if the agency determines that this action is necessary—

(i) Because the contractor or assignee has not taken, or is not expected to take within a reasonable time, effective steps to achieve practical application of the subject invention in the field(s) of use;

(ii) To alleviate health or safety needs that are not reasonably satisfied by the contractor, assignee, or their licensees;

(iii) To meet requirements for public use specified by Federal regulations and these requirements are not reasonably satisfied by the contractor, assignee, or licensees; or

(iv) Because the agreement required by paragraph (g) of this section has neither been obtained nor waived, or because a licensee of the exclusive right to use or sell any subject invention in the United States is in breach of its agreement obtained pursuant to paragraph (g) of this section.

(2) The agency shall not exercise its march-in rights unless the contractor has been provided a reasonable time to present facts and show cause why the proposed agency action should not be taken. The agency shall provide the contractor an opportunity to dispute or appeal the proposed action, in accordance with 27.304–1(g).

(g) *Preference for United States industry*. In accordance with 35 U.S.C. 204, no contractor that receives title to any subject invention and no assignee of the contractor shall grant to any person the exclusive right to use or sell any subject invention in the United States unless that person agrees that any products embodying the subject invention or produced through the use of the subject invention will be manufactured substantially in the United States. However, in individual cases, the requirement for this agreement may be waived by the agency upon a showing by the contractor or assignee that reasonable but unsuccessful efforts have been made to grant licenses on similar terms to potential licensees that would be likely to manufacture substantially in the United States or that under the circumstances domestic manufacture is not commercially feasible.

(h) *Special conditions for nonprofit organizations' preference for small business concerns*. (1) Nonprofit organization contractors are expected to use reasonable efforts to attract small business licensees (see paragraph (i)(4) of the clause at 52.227–11, Patent Rights—Ownership by the Contractor). What constitutes reasonable efforts to attract small business licensees will vary with the circumstances and the nature, duration, and expense of efforts needed to bring the invention to the market.

(2) Small business concerns that believe a nonprofit organization is not meeting its obligations under the clause may report the matter to the Secretary of Commerce. To the extent deemed appropriate, the Secretary of Commerce will undertake informal investigation of the matter, and may discuss or negotiate with the nonprofit organization ways to improve its efforts to meet its obligations under the clause. However, in no event will the Secretary of Commerce intervene in ongoing negotiations or contractor decisions concerning the licensing of a specific subject invention. These investigations, discussions, and negotiations involving the Secretary of Commerce will be in coordination with other interested agencies, including the Small Business Administration. In the case of a contract for the operation of a Government-owned, contractor-operated research or production facility, the Secretary of Commerce will coordinate with the agency responsible for the facility prior

to any discussions or negotiations with the contractor.

(i) *Minimum rights to contractor.* (1) When the Government acquires title to a subject invention, the contractor is normally granted a revocable, nonexclusive, paid-up license to that subject invention throughout the world. The contractor's license extends to any of its domestic subsidiaries and affiliates within the corporate structure of which the contractor is a part and includes the right to grant sublicenses to the extent the contractor was legally obligated to do so at the time of contract award. The contracting officer shall approve or disapprove, in writing, any contractor request to transfer its licenses. No approval is necessary when the transfer is to the successor of that part of the contractor's business to which the subject invention pertains.

(2) In response to a third party's proper application for an exclusive license, the contractor's domestic license may be revoked or modified to the extent necessary to achieve expeditious practical application of the subject invention. The application shall be submitted in accordance with the applicable provisions in 37 CFR part 404 and agency licensing regulations. The contractor's license will not be revoked in that field of use or the geographical areas in which the contractor has achieved practical application and continues to make the benefits of the subject invention reasonably accessible to the public. The license in any foreign country may be revoked or modified to the extent the contractor, its licensees, or its domestic subsidiaries or affiliates have failed to achieve practical application in that country. (See the procedures at 27.304–1(f).)

(j) *Confidentiality of inventions.* Publishing information concerning an invention before a patent application is filed on a subject invention may create a bar to a valid patent. To avoid this bar, agencies may withhold information from the public that discloses any invention in which the Government owns or may own a right, title, or interest (including a nonexclusive license) (see 35 U.S.C. 205 and 37 CFR part 401). Agencies may only withhold information concerning inventions for a reasonable time in order for a patent application to be filed. Once filed in any patent office, agencies are not required to release copies of any document that is a part of a patent application for those subject inventions. (See also 27.305–4.)

27.303 Contract clauses.

(a)(1) Insert a patent rights clause in all solicitations and contracts for experimental, developmental, or research work as prescribed in this section.

(2) This section also applies to solicitations or contracts for construction work or architect-engineer services that include—

(i) Experimental, developmental, or research work;

(ii) Test and evaluation studies; or

(iii) The design of a Government facility that may involve novel structures, machines, products, materials, processes, or equipment (including construction equipment).

(3) The contracting officer shall not include a patent rights clause in solicitations or contracts for construction work or architect-engineer services that call for or can be expected to involve only ''standard types of construction.'' ''Standard types of construction'' are those involving previously developed equipment, methods, and processes and in which the distinctive features include only—

(i) Variations in size, shape, or capacity of conventional structures; or

(ii) Purely artistic or aesthetic (as distinguished from functionally significant) architectural configurations and designs of both structural and nonstructural members or groupings, whether or not they qualify for design patent protection.

(b)(1) Unless an alternative patent rights clause is used in accordance with paragraph (c), (d), or (e) of this section, insert the clause at 52.227–11, Patent Rights—Ownership by the Contractor.

(2) To the extent the information is not required elsewhere in the contract, and unless otherwise specified by agency supplemental regulations, the contracting officer may modify 52.227–11(e) or otherwise supplement the clause to require the contractor to do one or more of the following:

(i) Provide periodic (but not more frequently than annually) listings of all subject inventions required to be disclosed during the period covered by the report.

(ii) Provide a report prior to the closeout of the contract listing all subject inventions or stating that there were none.

(iii) Provide the filing date, serial number, title, patent number and issue date for any patent application filed on any subject invention in any country or, upon request, copies of any patent application so identified.

(iv) Furnish the Government an irrevocable power to inspect and make copies of the patent application file when a Government employee is a co-inventor.

(3) Use the clause with its Alternate I if the Government must grant a foreign government a sublicense in subject inventions pursuant to a specified treaty or executive agreement. The contracting officer may modify Alternate I, if the agency head determines, at contract award, that it would be in the national interest to sublicense foreign governments or international organizations pursuant to any existing or future treaty or agreement. When necessary to effectuate a treaty or agreement, Alternate I may be appropriately modified.

(4) Use the clause with its Alternate II in contracts that may be affected by existing or future treaties or agreements.

(5) Use the clause with its Alternate III in contracts with nonprofit organizations for the operation of a Government-owned facility.

(6) If the contract is for the operation of a Government-owned facility, the contracting officer may use the clause with its Alternate IV.

(7) If the contract is for the performance of services at a Government owned and operated laboratory or at a Government owned and contractor operated laboratory directed by the Government to fulfill the Government's obligations under a Cooperative Research and Development Agreement (CRADA) authorized by 15 U.S.C. 3710a, the contracting officer may use the clause with its Alternate V. Since this provision is considered an exercise of an agency's ''exceptional circumstances'' authority, the contracting officer must comply with 37 CFR 401.3(e) and 401.4.

(c) Insert a patent rights clause in accordance with the procedures at 27.304–2 if the solicitation or contract is being placed on behalf of another Government agency.

(d) Insert a patent rights clause in accordance with agency procedures if the solicitation or contract is for DoD, DOE, or NASA, and the contractor is other than a small business concern or nonprofit organization.

(e)(1) Except as provided in paragraph (e)(2) of this section, and after compliance with the applicable procedures in 27.304–1(b), the contracting officer may insert the clause at 52.227–13, Patent Rights—Ownership by the Government, or a clause prescribed by agency supplemental regulations, if—

(i) The contractor is not located in the United States or does not have a place of business located in the United States or is subject to the control of a foreign government;

(ii) There are exceptional circumstances and the agency head

determines that restriction or elimination of the right to retain title to any subject invention will better promote the policy and objectives of chapter 18 of title 35 of the United States Code;

(iii) A Government authority that is authorized by statute or executive order to conduct foreign intelligence or counterintelligence activities, determines that restriction or elimination of the right to retain any subject invention is necessary to protect the security of such activities; or

(iv) The contract includes the operation of a Government-owned, contractor-operated facility of DOE primarily dedicated to that Department's naval nuclear propulsion or weapons related programs.

(2) If an agency exercises the exceptions at paragraph (e)(1)(ii) or (iii) of this section in a contract with a small business concern or a nonprofit organization, the contracting officer shall use the clause at 52.227–11 with only those modifications necessary to address the exceptional circumstances and shall include in the modified clause greater rights determinations procedures equivalent to those at 52.227–13(b)(2).

(3) When using the clause at 52.227–13, Patent Rights—Ownership by the Government, the contracting officer may supplement the clause to require the contractor to—

(i) Furnish a copy of each subcontract containing a patent rights clause (but if a copy of a subcontract is furnished under another clause, a duplicate shall not be requested under the patent rights clause);

(ii) Submit interim and final invention reports listing subject inventions and notifying the contracting officer of all subcontracts awarded for experimental, developmental, or research work;

(iii) Provide the filing date, serial number, title, patent number, and issue date for any patent application filed on any subject invention in any country or, upon specific request, copies of any patent application so identified; and

(iv) Submit periodic reports on the utilization of a subject invention.

(4) Use the clause at 52.227–13 with its Alternate I if—

(i) The Government must grant a foreign government a sublicense in subject inventions pursuant to a treaty or executive agreement; or

(ii) The agency head determines, at contract award, that it would be in the national interest to sublicense foreign governments or international organizations pursuant to any existing or future treaty or agreement. If other rights are necessary to effectuate any treaty or agreement, Alternate I may be appropriately modified.

(5) Use the clause at 52.227–13 with its Alternate II in the contract when necessary to effectuate an existing or future treaty or agreement.

27.304 Procedures.

27.304–1 General.

(a) *Status as small business concern or nonprofit organization.* If an agency has reason to question the size or nonprofit status of the prospective contractor, the agency may require the prospective contractor to furnish evidence of its nonprofit status or may file a size protest in accordance with FAR 19.302.

(b) *Exceptions.* (1) Before using any of the exceptions under 27.303(e)(1) in a contract with a small business concern or a nonprofit organization and before using the exception of 27.303(e)(1)(ii) for any contractor, the agency shall follow the applicable procedures at 37 CFR 401.

(2) A small business concern or nonprofit organization is entitled to an administrative review of the use of the exceptions at 27.303(e)(1)(i) through (e)(1)(iv) in accordance with agency procedures and 37 CFR part 401.

(c) *Greater rights determinations.* Whenever the contract contains the clause at 52.227–13, Patent Rights—Ownership by the Government, or a patent rights clause modified pursuant to 27.303(e)(2), the contractor (or an employee-inventor of the contractor after consultation with the contractor) may request greater rights to an identified invention within the period specified in the clause. The contracting officer may grant requests for greater rights if the contracting officer determines that the interests of the United States and the general public will be better served. In making these determinations, the contracting officer shall consider at least the following objectives (see 37 CFR 401.3(b) and 401.15):

(1) Promoting the utilization of inventions arising from federally supported research and development.

(2) Ensuring that inventions are used in a manner to promote full and open competition and free enterprise without unduly encumbering future research and discovery.

(3) Promoting public availability of inventions made in the United States by United States industry and labor.

(4) Ensuring that the Government obtains sufficient rights in federally supported inventions to meet the needs of the Government and protect the public against nonuse or unreasonable use of inventions.

(d) *Retention of rights by inventor.* If the contractor elects not to retain title to a subject invention, the agency may consider and, after consultation with the contractor, grant requests for retention of rights by the inventor. Retention of rights by the inventor will be subject to the conditions in paragraphs (d) (except paragraph (d)(1)(i)), (e)(4), (f), (g), and (h) of the clause at 52.227–11, Patent Rights—Ownership by the Contractor.

(e) *Government assignment to contractor of rights in Government employees' inventions.* When a Government employee is a co-inventor of an invention made under a contract with a small business concern or nonprofit organization, the agency employing the co-inventor may license or assign whatever rights it may acquire in the subject invention from its employee to the contractor, subject at least to the conditions of 35 U.S.C. 202–204.

(f) *Revocation or modification of contractor's minimum rights.* Before revoking or modifying the contractor's license in accordance with 27.302(i)(2), the contracting officer shall furnish the contractor a written notice of intention to revoke or modify the license. The agency shall allow the contractor at least 30 days (or another time as may be authorized for good cause by the contracting officer) after the notice to show cause why the license should not be revoked or modified. The contractor has the right to appeal, in accordance with applicable regulations in 37 CFR part 404 and agency licensing regulations, any decisions concerning the revocation or modification.

(g) *Exercise of march-in rights.* When exercising march-in rights, agencies shall follow the procedures set forth in 37 CFR 401.6.

(h) *Licenses and assignments under contracts with nonprofit organizations.* If the contractor is a nonprofit organization, paragraph (i) of the clause at 52.227–11 provides that certain contractor actions require agency approval.

27.304–2 Contracts placed by or for other Government agencies.

The following procedures apply unless an interagency agreement provides otherwise:

(a) When a Government agency requests another Government agency to award a contract on its behalf, the request should explain any special circumstances surrounding the contract and specify the patent rights clause to be used. The clause should be selected and modified, if necessary, in accordance with the policies and procedures of this subpart. If, however,

the request states that a clause of the requesting agency is required (*e.g.*, because of statutory requirements, a deviation, or exceptional circumstances), the awarding agency shall use that clause rather than those of this subpart.

(1) If the request states that an agency clause is required and the work to be performed under the contract is not severable and is funded wholly or in part by the requesting agency, then include the requesting agency clause and no other patent rights clause in the contract.

(2) If the request states that an agency clause is required, and the work to be performed under the contract is severable, then the contracting officer shall assure that the requesting agency clause applies only to that severable portion of the work and that the work for the awarding agency is subject to the appropriate patent rights clause.

(3) If the request states that a requesting agency clause is not required in any resulting contract, the awarding agency shall use the appropriate patent rights clause, if any.

(b) Any action requiring an agency determination, report, or deviation involved in the use of the requesting agency's clause is the responsibility of the requesting agency unless the agencies agree otherwise. However, the awarding agency may not alter the requesting agency's clause without prior approval of the requesting agency.

(c) The requesting agency may require, and provide instructions regarding, the forwarding or handling of any invention disclosures or other reporting requirements of the specified clauses. Normally, the requesting agency is responsible for the administration of any subject inventions. This responsibility shall be established in advance of awarding any contracts.

27.304–3 Subcontracts.

(a) The policies and procedures in this subpart apply to all subcontracts at any tier.

(b) Whenever a prime contractor or a subcontractor considers including a particular clause in a subcontract to be inappropriate or a subcontractor refuses to accept the clause, the contracting officer, in consultation with counsel, shall resolve the matter.

(c) It is Government policy that contractors shall not use their ability to award subcontracts as economic leverage to acquire rights for themselves in inventions resulting from subcontracts.

27.304–4 Appeals.

(a) The designated agency official shall provide the contractor with a written statement of the basis, including any relevant facts, for taking any of the following actions:

(1) A refusal to grant an extension to the invention disclosure period under paragraph (c)(4) of the clause at 52.227–11;

(2) A demand for a conveyance of title to the Government under 27.302(d)(1)(i) and (ii);

(3) A refusal to grant a waiver under 27.302(g), Preference for United States industry; or

(4) A refusal to approve an assignment under 27.304–1(h).

(b) Each agency may establish and publish procedures under which any of these actions may be appealed. These appeal procedures should include administrative due process procedures and standards for fact-finding. The resolution of any appeal shall consider both the factual and legal basis for the action and its consistency with the policy and objectives of 35 U.S.C. 200–206 and 210.

(c) To the extent that any of the actions described in paragraph (a) of this section are subject to appeal under the Contract Disputes Act, the procedures under that Act will satisfy the requirements of paragraph (b).

27.305 Administration of patent rights clauses.

27.305–1 Goals.

(a) Contracts having a patent rights clause should be so administered that—

(1) Inventions are identified, disclosed, and reported as required by the contract, and elections are made;

(2) The rights of the Government in subject inventions are established;

(3) When patent protection is appropriate, patent applications are timely filed and prosecuted by contractors or by the Government;

(4) The rights of the Government in filed patent applications are documented by formal instruments such as licenses or assignments; and

(5) Expeditious commercial utilization of subject inventions is achieved.

(b) If a subject invention is made under a contract funded by more than one agency, at the request of the contractor or on their own initiative, the agencies shall designate one agency as responsible for administration of the rights of the Government in the invention.

27.305–2 Administration by the Government.

(a) Agencies should establish and maintain appropriate follow-up procedures to protect the Government's interest and to check that subject inventions are identified and disclosed, and when appropriate, patent applications are filed, and that the Government's rights therein are established and protected. Follow-up activities for contracts that include a clause referenced in 27.304–2 should be coordinated with the appropriate agency.

(b)(1) The contracting officer administering the contract (or other representative specifically designated in the contract for this purpose) is responsible for receiving invention disclosures, reports, confirmatory instruments, notices, requests, and other documents and information submitted by the contractor pursuant to a patent rights clause.

(i) For other than confirmatory instruments, if the contractor fails to furnish documents or information as called for by the clause within the time required, the contracting officer shall promptly request the contractor to supply the required documents or information. If the failure persists, the contracting officer shall take appropriate action to secure compliance.

(ii) If the contractor does not furnish confirmatory instruments within 6 months after filing each patent application, or within 6 months after submitting the invention disclosure if the application has been previously filed, the contracting officer shall request the contractor to supply the required documents.

(2) The contracting officer shall promptly furnish all invention disclosures, reports, confirmatory instruments, notices, requests, and other documents and information relating to patent rights clauses to legal counsel.

(c) Contracting activities should establish appropriate procedures to detect and correct failures by the contractor to comply with its obligations under the patent rights clauses, such as failures to disclose and report subject inventions, both during and after contract performance. Government effort to review and correct contractor compliance with its patent rights obligations should be directed primarily toward contracts that are more likely to result in subject inventions significant in number or quality. These contracts include contracts of a research, developmental, or experimental nature; contracts of a large dollar amount; and any other contracts when there is reason to believe the contractor may not be

complying with its contractual obligations. Other contracts may be reviewed using a spot-check method, as feasible. Appropriate follow-up procedures and activities may include the investigation or review of selected contracts or contractors by those qualified in patent and technical matters to detect failures to comply with contract obligations.

(d) Follow-up activities should include, where appropriate, use of Government patent personnel—

(1) To interview agency technical personnel to identify novel developments made in contracts;

(2) To review technical reports submitted by contractors with cognizant agency technical personnel;

(3) To check the Official Gazette of the United States Patent and Trademark Office and other sources for patents issued to the contractor in fields related to its Government contracts; and

(4) To have cognizant Government personnel interview contractor personnel regarding work under the contract involved, observe the work on site, and inspect laboratory notebooks and other records of the contractor related to work under the contract.

(e) If a contractor or subcontractor does not have a clear understanding of its obligations under the clause, or its procedures for complying with the clause are deficient, the contracting officer should explain to the contractor its obligations. The withholding of payments provision (if any) of the patent rights clause may be invoked if the contractor fails to meet the obligations required by the patents rights clause. Significant or repeated failures by a contractor to comply with the patent rights obligation in its contracts shall be documented and made a part of the general file (see 4.801(c)(3)).

27.305–3 Securing invention rights acquired by the Government.

(a) Agencies are responsible for implementing procedures necessary to protect the Government's interest in subject inventions. When the Government acquires the entire right, title, and interest in an invention by contract, the chain of title from the inventor to the Government shall be clearly established. This is normally accomplished by an assignment either from each inventor to the contractor and from the contractor to the Government, or from the inventor to the Government with the consent of the contractor. When the Government's rights are limited to a license, there should be a confirmatory instrument to that effect.

(b) Agencies may, by supplemental instructions, develop suitable assignments, licenses, and other papers evidencing any rights of the Government in patents or patents applications. These instruments should be recorded in the U.S. Patent and Trademark Office (see Executive Order 9424, Establishing in the United States Patent Office a Register of Government Interests in Patents and Applications for Patents, (February 18, 1944).

27.305–4 Protection of invention disclosures.

(a) The Government will, to the extent authorized by 35 U.S.C. 205, withhold from disclosure to the public any invention disclosures reported under the patent rights clauses of 52.227–11 or 52.227–13 for a reasonable time in order for patent applications to be filed. The Government will follow the policy in 27.302(j) regarding protection of confidentiality.

(b) The Government should also use reasonable efforts to withhold from disclosure to the public for a reasonable time other information disclosing a subject invention. This information includes any data delivered pursuant to contract requirements provided that the contractor notifies the agency as to the identity of the data and the subject invention to which it relates at the time of delivery of the data. This notification shall be provided to both the contracting officer and to any patent representative to which the invention is reported, if other than the contracting officer.

(c) For more information on protection of invention disclosures, also see 37 CFR 401.13.

27.306 Licensing background patent rights to third parties.

(a) A contract with a small business concern or nonprofit organization shall not contain a provision allowing the Government to require the licensing to third parties of inventions owned by the contractor that are not subject inventions unless the agency head has approved and signed a written justification in accordance with paragraph (b) of this section. The agency head may not delegate this authority and may exercise the authority only if it is determined that the—

(1) Use of the invention by others is necessary for the practice of a subject invention or for the use of a work object of the contract; and

(2) Action is necessary to achieve the practical application of the subject invention or work object.

(b) Any determination will be on the record after an opportunity for a hearing, and the agency shall notify the contractor of the determination by certified or registered mail. The notification shall include a statement that the contractor must bring any action for judicial review of the determination within 60 days after the notification.

Subpart 27.4—Rights in Data and Copyrights

27.400 Scope of subpart.

This subpart sets forth policies and procedures regarding rights in data and copyrights, and acquisition of data. The policy statement in 27.402 applies to all executive agencies. The remainder of the subpart applies to all executive agencies except the Department of Defense.

27.401 Definitions.

As used in this subpart—

Data means recorded information, regardless of form or the media on which it may be recorded. The term includes technical data and computer software. The term does not include information incidental to contract administration, such as financial, administrative, cost or pricing, or management information.

Form, fit, and function data means data relating to items, components, or processes that are sufficient to enable physical and functional interchangeability, and data identifying source, size, configuration, mating and attachment characteristics, functional characteristics, and performance requirements. For computer software it means data identifying source, functional characteristics, and performance requirements, but specifically excludes the source code, algorithms, processes, formulas, and flow charts of the software.

Limited rights means the rights of the Government in limited rights data as set forth in a Limited Rights Notice.

Limited rights data means data, other than computer software, that embody trade secrets or are commercial or financial and confidential or privileged, to the extent that such data pertain to items, components, or processes developed at private expense, including minor modifications. (Agencies may, however, adopt the following alternate definition: Limited rights data means data (other than computer software) developed at private expense that embody trade secrets or are commercial or financial and confidential or privileged (see 27.404–2(b)).

Restricted computer software means computer software developed at private expense and that is a trade secret, is commercial or financial and

confidential or privileged, or is copyrighted computer software, including minor modifications of the computer software.

Restricted rights means the rights of the Government in restricted computer software as set forth in a Restricted Rights Notice.

Unlimited rights means the rights of the Government to use, disclose, reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, in any manner and for any purpose, and to have or permit others to do so.

27.402 Policy.

(a) To carry out their missions and programs, agencies acquire or obtain access to many kinds of data produced during or used in the performance of their contracts. Agencies require data to—

(1) Obtain competition among suppliers;

(2) Fulfill certain responsibilities for disseminating and publishing the results of their activities;

(3) Ensure appropriate utilization of the results of research, development, and demonstration activities including the dissemination of technical information to foster subsequent technological developments;

(4) Meet other programmatic and statutory requirements; and

(5) Meet specialized acquisition needs and ensure logistics support.

(b) Contractors may have proprietary interests in data. In order to prevent the compromise of these interests, agencies shall protect proprietary data from unauthorized use and disclosure. The protection of such data is also necessary to encourage qualified contractors to participate in and apply innovative concepts to Government programs. In light of these considerations, agencies shall balance the Government's needs and the contractor's legitimate proprietary interests.

27.403 Data rights—General.

All contracts that require data to be produced, furnished, acquired, or used in meeting contract performance requirements, must contain terms that delineate the respective rights and obligations of the Government and the contractor regarding the use, reproduction, and disclosure of that data. Data rights clauses do not specify the type, quantity or quality of data that is to be delivered, but only the respective rights of the Government and the contractor regarding the use, disclosure, or reproduction of the data. Accordingly, the contract shall specify the data to be delivered.

27.404 Basic rights in data clause.

This section describes the operation of the clause at 52.227–14, Rights in Data—General, and also the use of the provision at 52.227–15, Representation of Limited Rights Data and Restricted Computer Software.

27.404–1 Unlimited rights data.

The Government acquires unlimited rights in the following data except for copyrighted works as provided in 27.404–3:

(a) Data first produced in the performance of a contract (except to the extent the data constitute minor modifications to data that are limited rights data or restricted computer software).

(b) Form, fit, and function data delivered under contract.

(c) Data (except as may be included with restricted computer software) that constitute manuals or instructional and training material for installation, operation, or routine maintenance and repair of items, components, or processes delivered or furnished for use under a contract.

(d) All other data delivered under the contract other than limited rights data or restricted computer software (see 27.404–2).

27.404–2 Limited rights data and restricted computer software.

(a) *General.* The basic clause at 52.227–14, Rights in Data—General, enables the contractor to protect qualifying limited rights data and restricted computer software by withholding the data from the Government and instead delivering form, fit, and function data.

(b) *Alternate definition of limited rights data.* For contracts that do not require the development, use, or delivery of items, components, or processes that are intended to be acquired by or for the Government, an agency may adopt the alternate definition of limited rights data set forth in Alternate I to the clause at 52.227–14. The alternate definition does not require that the data pertain to items, components, or processes developed at private expense; but rather that the data were developed at private expense and embody a trade secret or are commercial or financial and confidential or privileged.

(c) *Protection of limited rights data specified for delivery.* (1) The clause at 52.227–14 with its Alternate II enables the Government to require delivery of limited rights data rather than allow the contractor to withhold the data. To obtain delivery, the contract may identify and specify data to be delivered, or the contracting officer may require, by written request during contract performance, the delivery of data that has been withheld or identified to be withheld under paragraph (g)(1) of the clause. In addition, the contract may specifically identify data that are not to be delivered under Alternate II or which, if delivered, will be delivered with limited rights. The limited rights obtained by the Government are set forth in the Limited Rights Notice contained in paragraph (g)(3) of Alternate II. Agencies shall not, without permission of the contractor, use limited rights data for purposes of manufacture or disclose the data outside the Government except as set forth in the Notice. Any disclosure by the Government shall be subject to prohibition against further use and disclosure by the recipient. The following are examples of specific purposes that may be adopted by an agency in its supplement and added to the Limited Rights Notice of paragraph (g)(3) of Alternate II of the clause:

(i) Use (except for manufacture) by support service contractors.

(ii) Evaluation by nongovernment evaluators.

(iii) Use (except for manufacture) by other contractors participating in the Government's program of which the specific contract is a part.

(iv) Emergency repair or overhaul work.

(v) Release to a foreign government, or its instrumentalities, if required to serve the interests of the U.S. Government, for information or evaluation, or for emergency repair or overhaul work by the foreign government.

(2) The provision at 52.227–15, Representation of Limited Rights Data and Restricted Computer Software, helps the contracting officer to determine whether the clause at 52.227–14 should be used with its Alternate II. This provision requests that an offeror state whether limited rights data are likely to be delivered. Where limited rights data are expected to be delivered, use Alternate II. Where negotiations are based on an unsolicited proposal, the need for Alternate II of the clause at 52.227–14 should be addressed during negotiations or discussions, and if Alternate II was not included initially it may be added by modification, if needed, during contract performance.

(3) If data that would otherwise qualify as limited rights data is delivered as a computer database, the data shall be treated as limited rights data, rather than restricted computer software, for the purposes of paragraph (g) of the clause at 52.227–14.

(d) *Protection of restricted computer software specified for delivery.* (1) Alternate III of the clause at 52.227–14, enables the Government to require delivery of restricted computer software rather than allow the contractor to withhold such restricted computer software. To obtain delivery of restricted computer software the contracting officer shall—

(i) Identify and specify the deliverable computer software in the contract; or

(ii) Require by written request during contract performance, the delivery of computer software that has been withheld or identified to be withheld under paragraph (g)(1) of the clause.

(2) In considering whether to use Alternate III, contracting officers should note that, unlike other data, computer software is also an end item in itself. Thus, the contracting officer shall use Alternate III if delivery of restricted computer software is required to meet agency needs.

(3) Unless otherwise agreed (see paragraph (d)(4) of this subsection), the restricted rights obtained by the Government are set forth in the Restricted Rights Notice contained in paragraph (g)(4) (Alternate III). Such restricted computer software will not be used or reproduced by the Government, or disclosed outside the Government, except that the computer software may be—

(i) Used or copied for use with the computers for which it was acquired, including use at any Government installation to which the computers may be transferred;

(ii) Used or copied for use with a backup computer if any computer for which it was acquired is inoperative;

(iii) Reproduced for safekeeping (archives) or backup purposes;

(iv) Modified, adapted, or combined with other computer software, *provided* that the modified, adapted, or combined portions of the derivative software incorporating any of the delivered, restricted computer software shall be subject to the same restricted rights;

(v) Disclosed to and reproduced for use by support service contractors or their subcontractors, in accordance with paragraphs (3)(i) through (iv) of this section; and

(vi) Used or copied for use with a replacement computer.

(4) The restricted rights set forth in paragraph (d)(3) of this subsection are the minimum rights the Government normally obtains with restricted computer software and will automatically apply when such software is acquired under the Restricted Rights Notice of paragraph (g)(4) of Alternate III of the clause at 52.227–14. However, the contracting officer may specify different rights in the contract, consistent with the purposes and needs for which the software is to be acquired. For example, the contracting officer should consider any networking needs or any requirements for use of the computer software from remote terminals. Also, in addressing such needs, the scope of the restricted rights may be different for the documentation accompanying the computer software than for the programs and databases. Any additions to, or limitations on, the restricted rights set forth in the Restricted Rights Notice of paragraph (g)(4) of Alternate III of the clause at 52.227–14 shall be expressly stated in the contract or in a collateral agreement incorporated in and made part of the contract, and the notice modified accordingly.

(5) The provision at 52.227–15, Representation of Limited Rights Data and Restricted Computer Software, helps the contracting officer determine whether to use the clause at 52.227–14 with its Alternate III. This provision requests that an offeror state whether restricted computer software is likely to be delivered under the contract. In addition, the need for Alternate III should be addressed during negotiations or discussions with an offeror, particularly where negotiations are based on an unsolicited proposal. However, if Alternate III is not used initially, it may be added by modification, if needed, during contract performance.

27.404–3 Copyrighted works.

(a) *Data first produced in the performance of a contract.* (1) Generally, the contractor must obtain permission of the contracting officer prior to asserting rights in any copyrighted work containing data first produced in the performance of a contract. However, contractors are normally authorized, without prior approval of the contracting officer, to assert copyright in technical or scientific articles based on or containing such data that is published in academic, technical or professional journals, symposia proceedings and similar works.

(2) The contractor must make a written request for permission to assert its copyright in works containing data first produced under the contract. In its request, the contractor should identify the data involved or furnish copies of the data for which permission is requested, as well as a statement as to the intended publication or dissemination media or other purpose for which the permission is requested. Generally, a contracting officer should grant the contractor's request when copyright protection will enhance the appropriate dissemination or use of the data unless the—

(i) Data consist of a report that represents the official views of the agency or that the agency is required by statute to prepare;

(ii) Data are intended primarily for internal use by the Government;

(iii) Data are of the type that the agency itself distributes to the public under an agency program;

(iv) Government determines that limitation on distribution of the data is in the national interest; or

(v) Government determines that the data should be disseminated without restriction.

(3) Alternate IV of the clause at 52.227–14 provides a substitute paragraph (c)(1) granting permission for contractors to assert copyright in any data first produced in the performance of the contract without the need for any further requests. Except for contracts for management or operation of Government facilities and contracts and subcontracts in support of programs being conducted at those facilities or where international agreements require otherwise, Alternate IV shall be used in all contracts for basic or applied research to be performed solely by colleges and universities. Alternate IV shall not be used in contracts with colleges and universities if a purpose of the contract is for development of computer software for distribution to the public (including use in solicitations) by or on behalf of the Government. In addition, Alternate IV may be used in other contracts if an agency determines that it is not necessary for a contractor to request further permission to assert copyright in data first produced in performance of the contract. The contracting officer may exclude any data, or items or categories of data, from the provisions of Alternate IV by expressly so providing in the contract or by adding a paragraph (d)(4) to the clause, consistent with 27.404–4(b).

(4) Pursuant to paragraph (c)(1) of the clause at 52.227–14, the contractor grants the Government a paid-up nonexclusive, irrevocable, worldwide license to reproduce, prepare derivative works, distribute to the public, perform publicly and display publicly by or on behalf of the Government, for all data (other than computer software) first produced in the performance of a contract. For computer software, the scope of the Government's license includes all of the above rights except the right to distribute to the public. Agencies may also obtain a license of

different scope if the contracting officer determines, after consulting with legal counsel, such a license will substantially enhance the dissemination of any data first produced under the contract or if such a license is required to comply with international agreements. If an agency obtains a different license, the contractor shall clearly state the scope of that license in a conspicuous place on the medium on which the data is recorded. For example, if the data is delivered as a report, the terms of the license shall be stated on the cover, or first page, of the report.

(5) The clause requires the contractor to affix the applicable copyright notices of 17 U.S.C. 401 or 402, and acknowledgment of Government sponsorship, (including the contract number) to data when it asserts copyright in data. Failure to do so could result in such data being treated as unlimited rights data (see 27.404–5(b)).

(b) *Data not first produced in the performance of a contract.* (1) Contractors shall not deliver any data that is not first produced under the contract without either—

(i) Acquiring for or granting to the Government a copyright license for the data; or

(ii) Obtaining permission from the contracting officer to do otherwise.

(2) The copyright license the Government acquires for such data will normally be of the same scope as discussed in paragraph (a)(4) of this subsection, and is set forth in paragraph (c)(2) of the clause at 52.227–14. However, agencies may obtain a license of different scope if the agency determines, after consultation with its legal counsel, that such different license will not be inconsistent with the purpose of acquiring the data. If a license of a different scope is acquired, it must be so stated in the contract and clearly set forth in a conspicuous place on the data when delivered to the Government. If the contractor delivers computer software not first produced under the contract, the contractor shall grant the Government the license set forth in paragraph (g)(4) of Alternate III if included in the clause at 52.227–14, or a license agreed to in a collateral agreement made part of the contract.

27.404–4 Contractor's release, publication, and use of data.

(a) In contracts for basic or applied research with universities or colleges, agencies shall not place any restrictions on the conduct of or reporting on the results of unclassified basic or applied research, except as provided in applicable U.S. statutes. However, agencies may restrict the release or disclosure of computer software that is or is intended to be developed to the point of practical application (including for agency distribution under established programs). This is not considered a restriction on the reporting of the results of basic or applied research. Agencies may also preclude a contractor from asserting copyright in any computer software for purposes of established agency distribution programs, or where required to accomplish the purpose for which the software is acquired.

(b) Except for the results of basic or applied research under contracts with universities or colleges, agencies may, to the extent provided in their FAR supplements, place limitations or restrictions on the contractor's exercise of its rights in data first produced in the performance of the contract, including a requirement to assign copyright to the Government or another party. Any of these restrictions shall be expressly included in the contract.

27.404–5 Unauthorized, omitted, or incorrect markings.

(a) *Unauthorized marking of data.* (1) The Government has, in accordance with paragraph (e) of the clause at 52.227–14, the right to either return data containing unauthorized markings or to cancel or ignore the markings.

(2) Agencies shall not cancel or ignore markings without making written inquiry of the contractor and affording the contractor at least 60 days to provide a written justification substantiating the propriety of the markings.

(i) If the contractor fails to respond or fails to provide a written justification substantiating the propriety of the markings within the time afforded, the Government may cancel or ignore the markings.

(ii) If the contractor provides a written justification substantiating the propriety of the markings, the contracting officer shall consider the justification.

(A) If the contracting officer determines that the markings are authorized, the contractor will be so notified in writing.

(B) If the contracting officer determines, with concurrence of the head of the contracting activity, that the markings are not authorized, the contractor will be furnished a written determination which becomes the final agency decision regarding the appropriateness of the markings and the markings will be cancelled or ignored and the data will no longer be made subject to disclosure prohibitions, unless the contractor files suit within 90 days in a court of competent jurisdiction. The markings will not be cancelled or ignored until final resolution of the matter, either by the contracting officer's determination becoming the final agency decision or by final disposition of the matter by court decision if suit is filed.

(3) The foregoing procedures may be modified in accordance with agency regulations implementing the Freedom of Information Act (5 U.S.C. 552) if necessary to respond to a request. In addition, the contractor may bring a claim, in accordance with the Disputes clause of the contract, that may arise as the result of the Government's action to remove or ignore any markings on data, unless the action occurs as the result of a final disposition of the matter by a court of competent jurisdiction.

(b) *Omitted or incorrect notices.* (1) Data delivered under a contract containing the clause without a limited rights notice or restricted rights notice, and without a copyright notice, will be presumed to have been delivered with unlimited rights, and the Government assumes no liability for the disclosure, use, or reproduction of the data. However, to the extent the data has not been disclosed without restriction outside the Government, the contractor may, within 6 months (or a longer period approved by the contracting officer for good cause shown), request permission of the contracting officer to have the omitted limited rights or restricted rights notices, as applicable, placed on qualifying data at the contractor's expense. The contracting officer may permit adding appropriate notices if the contractor—

(i) Identifies the data for which a notice is to be added;

(ii) Demonstrates that the omission of the proposed notice was inadvertent;

(iii) Establishes that use of the proposed notice is authorized; and

(iv) Acknowledges that the Government has no liability with respect to any disclosure or use of any such data made prior to the addition of the notice or resulting from the omission of the notice.

(2) The contracting officer may also—

(i) Permit correction, at the contractor's expense, of incorrect notices if the contractor identifies the data on which correction of the notice is to be made, and demonstrates that the correct notice is authorized; or

(ii) Correct any incorrect notices.

27.404–6 Inspection of data at the contractor's facility.

Contracting officers may obtain the right to inspect data at the contractor's facility by use of the clause at 52.227–14 with its Alternate V, which adds

paragraph (j) to provide that right. Agencies may also adopt Alternate V for general use. The data subject to inspection may be data withheld or withholdable under paragraph (g)(1) of the clause. Inspection may be made by the contracting officer or designee (including nongovernmental personnel under the same conditions as the contracting officer) for the purpose of verifying a contractor's assertion regarding the limited rights or restricted rights status of the data, or for evaluating work performance under the contract. This right may be exercised up to 3 years after acceptance of all items to be delivered under the contract. The contract may specify data items that are not subject to inspection under paragraph (j) of the Alternate. If the contractor demonstrates to the contracting officer that there would be a possible conflict of interest if inspection were made by a particular representative, the contracting officer shall designate an alternate representative.

27.405 Other data rights provisions.

27.405–1 Special works.

(a) The clause at 52.227–17, Rights in Data—Special Works, is for use in contracts (or may be made applicable to portions thereof) that are primarily for the production or compilation of data (other than limited rights data or restricted computer software) for the Government's own use, or when there is a specific need to limit distribution and use of the data or to obtain indemnity for liabilities that may arise out of the content, performance, or disclosure of the data. Examples are contracts for—

(1) The production of audiovisual works, including motion pictures or television recordings with or without accompanying sound, or for the preparation of motion picture scripts, musical compositions, sound tracks, translation, adaptation, and the like;

(2) Histories of the respective agencies, departments, services, or units thereof;

(3) Surveys of Government establishments;

(4) Works pertaining to the instruction or guidance of Government officers and employees in the discharge of their official duties;

(5) The compilation of reports, books, studies, surveys, or similar documents that do not involve research, development, or experimental work;

(6) The collection of data containing personally identifiable information such that the disclosure thereof would violate the right of privacy or publicity of the individual to whom the information relates;

(7) Investigatory reports;

(8) The development, accumulation, or compilation of data (other than that resulting from research, development, or experimental work performed by the contractor), the early release of which could prejudice follow-on acquisition activities or agency regulatory or enforcement activities; or

(9) The development of computer software programs, where the program—

(i) May give a commercial advantage; or

(ii) Is agency mission sensitive, and release could prejudice agency mission, programs, or follow-on acquisitions.

(b) The contract may specify the purposes and conditions (including time limitations) under which the data may be used, released, or reproduced other than for contract performance. Contracts for the production of audiovisual works, sound recordings, etc., may include limitations in connection with talent releases, music licenses, and the like that are consistent with the purposes for which the works are acquired.

(c) Paragraph (c)(1)(ii) of the clause, which enables the Government to obtain assignment of copyright in any data first produced in the performance of the contract, may be deleted if the contracting officer determines that such assignment is not needed to further the objectives of the contract.

(d) Paragraph (e) of the clause, which requires the contractor to indemnify the Government against any liability incurred as the result of any violation of trade secrets, copyrights, right of privacy or publicity, or any libelous or other unlawful matter arising out of or contained in any production or compilation of data that are subject to the clause, may be deleted or limited in scope where the contracting officer determines that, because of the nature of the particular data involved, such liability will not arise.

(e) When the audiovisual or other special works are produced to accomplish a public purpose other than acquisition for the Government's own use (such as for production and distribution to the public of the works by other than a Federal agency) agencies are authorized to modify the clause for use in contracts, with rights in data provisions that meet agency mission needs yet protect free speech and freedom of expression, as well as the artistic license of the creator of the work.

27.405–2 Existing works.

The clause at 52.227–18, Rights in Data—Existing Works, is for use in contracts exclusively for the acquisition (without modification) of existing works such as, motion pictures, television recordings, and other audiovisual works; sound recordings; musical, dramatic, and literary works; pantomimes and choreographic works; pictorial, graphic, and sculptural works; and works of a similar nature. The contract may set forth limitations consistent with the purposes for which the works covered by the contract are being acquired. Examples of these limitations are means of exhibition or transmission, time, type of audience, and geographical location. However, if the contract requires that works of the type indicated in this paragraph are to be modified through editing, translation, or addition of subject matter, etc. (rather than purchased in existing form), then see 27.405–1.

27.405–3 Commercial computer software.

(a) When contracting other than from GSA's Multiple Award Schedule contracts for the acquisition of commercial computer software, no specific contract clause prescribed in this subpart need be used, but the contract shall specifically address the Government's rights to use, disclose, modify, distribute, and reproduce the software. Section 12.212 sets forth the guidance for the acquisition of commercial computer software and states that commercial computer software or commercial computer software documentation shall be acquired under licenses customarily provided to the public to the extent the license is consistent with Federal law and otherwise satisfies the Government's needs. The clause at 52.227–19, Commercial Computer Software License, may be used when there is any confusion as to whether the Government's needs are satisfied or whether a customary commercial license is consistent with Federal law. Additional or lesser rights may be negotiated using the guidance concerning restricted rights as set forth in 27.404–2(d), or the clause at 52.227–19. If greater rights than the minimum rights identified in the clause at 52.227–19 are needed, or lesser rights are to be acquired, they shall be negotiated and set forth in the contract. This includes any additions to, or limitations on, the rights set forth in paragraph (b) of the clause at 52.227–19 when used. Examples of greater rights may be those necessary for networking purposes or use of the software from remote terminals communicating with a host

computer where the software is located. If the computer software is to be acquired with unlimited rights, the contract shall also so state. In addition, the contract shall adequately describe the computer programs and/or databases, the media on which it is recorded, and all the necessary documentation.

(b) If the contract incorporates, makes reference to, or uses a vendor's standard commercial lease, license, or purchase agreement, the contracting officer shall ensure that the agreement is consistent with paragraph (a)(1) of this subsection. The contracting officer should exercise caution in accepting a vendor's terms and conditions, since they may be directed to commercial sales and may not be appropriate for Government contracts. Any inconsistencies in a vendor's standard commercial agreement shall be addressed in the contract and the contract terms shall take precedence over the vendor's standard commercial agreement. If the clause at 52.227–19 is used, inconsistencies in the vendor's standard commercial agreement regarding the Government's right to use, reproduce or disclose the computer software are reconciled by that clause.

(c) If a prime contractor under a contract containing the clause at 52.227–14, Rights in Data—General, with paragraph (g)(4) (Alternate III) in the clause, acquires restricted computer software from a subcontractor (at any tier) as a separate acquisition for delivery to or for use on behalf of the Government, the contracting officer may approve any additions to, or limitations on the restricted rights in the Restricted Rights Notice of paragraph (g)(4) in a collateral agreement incorporated in and made part of the contract.

27.405–4 Other existing data.

(a) Except for existing works pursuant to 27.405–2 or commercial computer software pursuant to 27.405–3, no clause contained in this subpart is required to be included in—

(1) Contracts solely for the acquisition of books, periodicals, and other printed items in the exact form in which these items are to be obtained unless reproduction rights are to be acquired; or

(2) Other contracts that require only existing data (other than limited rights data) to be delivered and the data are available without disclosure prohibitions, unless reproduction rights to the data are to be obtained.

(b) If the reproduction rights to the data are to be obtained in any contract of the type described in paragraph (b)(1)(i) or (ii) of this section, the rights shall be specifically set forth in the contract. No clause contained in this subpart is required to be included in contracts substantially for on-line data base services in the same form as they are normally available to the general public.

27.406 Acquisition of data.

27.406–1 General.

(a) It is the Government's practice to determine, to the extent feasible, its data requirements in time for inclusion in solicitations. The data requirements may be subject to revision during contract negotiations. Since the preparation, reformatting, maintenance and updating, cataloging, and storage of data represents an expense to both the Government and the contractor, efforts should be made to keep the contract data requirements to a minimum, consistent with the purposes of the contract.

(b) The contracting officer shall specify in the contract all known data requirements, including the time and place for delivery and any limitations and restrictions to be imposed on the contractor in the handling of the data. Further, and to the extent feasible, in major system acquisitions, the contracting officer shall set out data requirements as separate contract line items. In establishing the contract data requirements and in specifying data items to be delivered by a contractor, agencies may, consistent with paragraph (a) of this subsection, develop their own contract schedule provisions. Agency procedures may, among other things, provide for listing, specifying, identifying source, assuring delivery, and handling any data required to be delivered, first produced, or specifically used in the performance of the contract.

(c) Data delivery requirements should normally not require that a contractor provide the Government, as a condition of the procurement, unlimited rights in data that qualify as limited rights data or restricted computer software. Rather, form, fit, and function data may be furnished with unlimited rights instead of the qualifying data, or the qualifying data may be furnished with limited rights or restricted rights if needed (see 27.404–2(c) and (d)). If greater rights are needed, they should be clearly set forth in the solicitation and the contractor fairly compensated for the greater rights.

27.406–2 Additional data requirements.

(a) In some contracting situations, such as experimental, developmental, research, or demonstration contracts, it may not be feasible to ascertain all the data requirements at contract award. The clause at 52.227–16, Additional Data Requirements, may be used to enable the subsequent ordering by the contracting officer of additional data first produced or specifically used in the performance of these contracts as the actual requirements become known. The clause shall normally be used in solicitations and contracts involving experimental, developmental, research or demonstration work (other than basic or applied research to be performed under a contract solely by a university or college when the contract amount will be $500,000 or less) unless all the requirements for data are believed to be known at the time of contracting and specified in the contract. If the contract is for basic or applied research to be performed by a university or college, and the contracting officer believes the contract effort will in the future exceed $500,000, even though the initial award does not, the contracting officer may include the clause in the initial award.

(b) Data may be ordered under the clause at 52.227–16 at any time during contract performance or within a period of 3 years after acceptance of all items to be delivered under the contract. The contractor is to be compensated for converting the data into the prescribed form, for reproduction, and for delivery. In order to minimize storage costs for the retention of data, the contracting officer may relieve the contractor of the retention requirements for specified data items at any time during the retention period required by the clause. The contracting officer may permit the contractor to identify and specify in the contract data not to be ordered for delivery under the clause if the data is not necessary to meet the Government's requirements for data. Also, the contracting officer may alter the clause by deleting the term ''or specifically used'' in paragraph (a) of the clause if delivery of the data is not necessary to meet the Government's requirements for data. Any data ordered under this clause will be subject to the clause at 52.227–14, Rights in Data—General, (or other equivalent clause setting forth the respective rights of the Government and the contractor) in the contract. Data authorized to be withheld under such clause will not be required to be delivered under the clause at 52.227–16, except as provided in Alternate II or Alternate III, if included (see 27.404–2(c) and (d)).

(c) Absent an established program for dissemination of computer software, agencies should not order additional computer software under the clause at 52.227–16, for the sole purpose of disseminating or marketing the software to the public. In ordering software for internal purposes, the contracting

officer shall consider, consistent with the Government's needs, not ordering particular source codes, algorithms, processes, formulas, or flow charts of the software if the contractor shows that this aids its efforts to disseminate or market the software.

27.406–3 Major system acquisition.

(a) The clause at 52.227–21, Technical Data Declaration, Revision, and Withholding of Payment—Major Systems, implements 41 U.S.C. 418a(d). When using the clause at 52.227–21, the section of the contract specifying data delivery requirements (see 27.406–1(b)) shall expressly identify those line items of technical data to which the clause applies. Upon delivery of the technical data, the contracting officer shall review the technical data and the contractor's declaration relating to it to assure that the data are complete, accurate, and comply with contract requirements. If the data are not complete, accurate, or compliant, the contracting officer should request the contractor to correct the deficiencies, and may withhold payment. Final payment shall not be made under the contract until it has been determined that the delivery requirements of those line items of data to which the clause applies have been satisfactorily met.

(b) In a contract for, or in support of, a major system awarded by a civilian agency other than NASA or the U.S. Coast Guard, the following applies:

(1) The contracting officer shall require the delivery of any technical data relating to the major system or supplies for the major system, that are to be developed exclusively with Federal funds if the delivery of the technical data is needed to ensure the competitive acquisition of supplies or services that will be required in substantial quantities in the future. The clause at 52.227–22, Major System—Minimum Rights, is used in addition to the clause at 52.227–14, Rights in Data—General, and other required clauses, to ensure that the Government acquires at least those rights required by Pub. L. 98–577 in technical data developed exclusively with Federal funds.

(2) Technical data, relating to a major system or supplies for a major system, procured or to be procured by the Government and also relating to the design, development, or manufacture of products or processes offered or to be offered for sale to the public (except for such data as may be necessary for the Government to operate or maintain the product, or use the process if obtained by the Government as an element of performance under the contract), shall not be required to be provided to the Government from persons who have developed such products or processes as a condition for the procurement of such products or processes by the Government.

27.407 Rights to technical data in successful proposals.

The clause at 52.227–23, Rights to Proposal Data (Technical), allows the Government to acquire unlimited rights to technical data in successful proposals. Pursuant to the clause, the prospective contractor is afforded the opportunity to specifically identify pages containing technical data to be excluded from the grant of unlimited rights. This exclusion is not dispositive of the protective status of the data, but any excluded technical data, as well as any commercial and financial information contained in the proposal, will remain subject to the policies in Subpart 15.2 or 15.6 (or agency supplements) relating to proposal information (*e.g.*, will be used for evaluation purposes only). If there is a need to have access to any of the excluded technical data during contract performance, consideration should be given to acquiring the data with limited rights, if they so qualify, in accordance with 27.404–2(c).

27.408 Cosponsored research and development activities.

(a) In contracts involving cosponsored research and development that require the contractor to make substantial contributions of funds or resources (*e.g.*, by cost-sharing or by repayment of nonrecurring costs), and the contractor's and the Government's respective contributions to any item, component, process, or computer software, developed or produced under the contract are not readily segregable, the contracting officer may limit the acquisition of, or acquire less than unlimited rights to, any data developed and delivered under the contract. Agencies may regulate the use of this authority in their supplements. Lesser rights shall, at a minimum, assure use of the data for agreed-to Governmental purposes (including reprocurement rights as appropriate), and address any disclosure limitations or restrictions to be imposed on the data. Also, consideration may be given to requiring the contractor to directly license others if needed to carry out the objectives of the contract. Since the purpose of the cosponsored research and development, the legitimate proprietary interests of the contractor, the needs of the Government, and the respective contributions of both parties may vary, no specific clauses are prescribed, but a clause providing less than unlimited rights in the Government for data developed and delivered under the contract (such as license rights) may be tailored to the circumstances consistent with the foregoing and the policy set forth in 27.402. As a guide, a clause may be appropriate when the contractor contributes money or resources, or agrees to make repayment of nonrecurring costs, of a value of approximately 50 percent of the total cost of the contract (*i.e.*, Government, contractor, and/or third party paid costs), and the respective contributions are not readily segregable for any work element to be performed under the contract. A clause may be used for all or for only specifically identified tasks or work elements under the contract. In the latter instance, its use will be in addition to whatever other data rights clause is prescribed under this subpart, with the contract specifically identifying which clause is to apply to which tasks or work elements. Further, this type of clause may not be appropriate where the purpose of the contract is to produce data for dissemination to the public, or to develop or demonstrate technologies that will be available, in any event, to the public for its direct use.

(b) Where the contractor's contributions are readily segregable (by performance requirements and the funding for the contract) and so identified in the contract, any resulting data may be treated under this clause as limited rights data or restricted computer software in accordance with 27.404–2(c) or (d), as applicable; or if this treatment is inconsistent with the purpose of the contract, rights to the data may, if so negotiated and stated in the contract, be treated in a manner consistent with paragraph (a) of this section.

27.409 Solicitation provisions and contract clauses

(a) Generally, a contract should contain only one data rights clause. However, where more than one is needed, the contract should distinguish the portion of contract performance to which each pertains.

(b)(1) Insert the clause at 52.227–14, Rights in Data—General, in solicitations and contracts if it is contemplated that data will be produced, furnished, or acquired under the contract, unless the contract is—

(i) For the production of special works of the type set forth in 27.405–1, although in these cases insert the clause at 52.227–14, Rights in Data—General, and make it applicable to data other

than special works, as appropriate (see paragraph (e) of this section);

(ii) For the acquisition of existing data, commercial computer software, or other existing data, as described in 27.405–2 through 27.405–4 (see paragraphs (f) and (g) of this section);

(iii) A small business innovation research contract (see paragraph (h) of this section);

(iv) To be performed outside the United States (see paragraph (i)(1) of this section);

(v) For architect-engineer services or construction work (see paragraph (i)(2) of this section);

(vi) For the management, operation, design, or construction of a Government-owned facility to perform research, development, or production work (see paragraph (i)(3) of this section); or

(vii) A contract involving cosponsored research and development in which a clause providing for less than unlimited right has been authorized (see 27.408).

(2) If an agency determines, in accordance with 27.404–2(b), to adopt the alternate definition of ''Limited Rights Data'' in paragraph (a) of the clause, use the clause with its Alternate I.

(3) If a contracting officer determines, in accordance with 27.404–2(c) that it is necessary to obtain limited rights data, use the clause with its Alternate II. The contracting officer shall complete paragraph (g)(3) to include the purposes, if any, for which limited rights data are to be disclosed outside the Government.

(4) In accordance with 27.404–2(d), if a contracting officer determines it is necessary to obtain restricted computer software, use the clause with its Alternate III. Any greater or lesser rights regarding the use, reproduction, or disclosure of restricted computer software than those set forth in the Restricted Rights Notice of paragraph (g)(4) of the clause shall be specified in the contract and the notice modified accordingly.

(5) Use the clause with its Alternate IV in contracts for basic or applied research (other than those for the management or operation of Government facilities, and contracts and subcontracts in support of programs being conducted at those facilities or where international agreements require otherwise) to be performed solely by universities and colleges. The clause may be used with its Alternate IV in other contracts if in accordance with 27.404–3(a), an agency determines to grant permission for the contractor to assert claim to copyright subsisting in all data first produced without further request being made by the contractor. When Alternate IV is used, the contract may exclude items or categories of data from the permission granted, either by express provisions in the contract or by the addition of a paragraph (d)(4) to the clause (see 27.404–4).

(6) In accordance with 27.404–6, if the Government needs the right to inspect certain data at a contractor's facility, use the clause with its Alternate V.

(c) In accordance with 27.404–2(c)(2) and 27.404–2(d)(5), if the contracting officer desires to have an offeror state in response to a solicitation whether limited rights data or restricted computer software are likely to be used in meeting the data delivery requirements set forth in the solicitation, insert the provision at 52.227–15, Representation of Limited Rights Data and Restricted Computer Software, in any solicitation containing the clause at 52.227–14, Rights in Data—General. The contractor's response may provide an aid in determining whether the clause should be used with Alternate II and/or Alternate III.

(d) Insert the clause at 52.227–16, Additional Data Requirements, in solicitations and contracts involving experimental, developmental, research, or demonstration work (other than basic or applied research to be performed solely by a university or college where the contract amount will be $500,000 or less) unless all the requirements for data are believed to be known at the time of contracting and specified in the contract (see 27.406–2). This clause may also be used in other contracts when considered appropriate. For example, if the contract is for basic or applied research to be performed by a university or college, and the contracting officer believes the contract effort will in the future exceed $500,000, even though the initial award does not, the contracting officer may include the clause in the initial award.

(e) In accordance with 27.405–1, insert the clause at 52.227–17, Rights in Data—Special Works, in solicitations and contracts primarily for the production or compilation of data (other than limited rights data or restricted computer software) for the Government's internal use, or when there is a specific need to limit distribution and use of the data or to obtain indemnity for liabilities that may arise out of the content, performance, or disclosure of the data. Examples of such contracts are set forth in 27.405–1.

(1) Insert the clause if existing works are to be modified, as by editing, translation, addition of subject matter, etc.

(2) The contract may specify the purposes and conditions (including time limitations) under which the data may be used, released, or reproduced by the contractor for other than contract performance.

(3) Contracts for the production of audiovisual works, sound recordings, etc. may include limitations in connection with talent releases, music licenses, and the like that are consistent with the purposes for which the data is acquired.

(4) The clause may be modified in accordance with paragraphs (c) through (e) of 27.405–1.

(f) Insert the clause at 52.227–18, Rights in Data—Existing Works, in solicitations and contracts exclusively for the acquisition, without modification, of existing audiovisual and similar works of the type set forth in 27.405–2. The contract may set forth limitations consistent with the purposes for which the work is being acquired. While no specific clause of this subpart is required to be included in contracts solely for the acquisition, without disclosure prohibitions, of books, publications, and similar items in the exact form in which the items exist prior to the request for purchase (*i.e.*, the off-the-shelf purchase of such items), or in other contracts where only existing data available without disclosure prohibitions is to be furnished, if reproduction rights are to be acquired, the contract shall include terms addressing such rights. (See 27.405–4.)

(g) In accordance with 27.405–3, when contracting (other than from GSA's Multiple Award Schedule contracts) for the acquisition of commercial computer software, the contracting officer may insert the clause at 52.227–19, Commercial Computer Software License, in the solicitation and contract. In any event, the contracting officer shall assure that the contract contains terms to obtain sufficient rights for the Government to fulfill the need for which the software is being acquired and is otherwise consistent with 27.405–3).

(h) If the contract is a Small Business Innovation Research (SBIR) contract, insert the clause at 52.227–20, Rights in Data—SBIR Program in all Phase I, Phase II, and Phase III contracts awarded under the Small Business Innovation Research Program established pursuant to 15 U.S.C. 638. The SBIR protection period may be extended in accordance with the Small Business Administration's ''Small Business Innovation Research Program Policy Directive'' (September 24, 2002).

(i) Agencies may prescribe in their procedures, as appropriate, a clause

consistent with the policy of 27.402 in contracts—

(1) To be performed outside the United States;

(2) For architect-engineer services and construction work, *e.g.*, the clause at 52.227–17, Rights in Data—Special Works); or

(3) For management, operation, design, or construction of Government-owned research, development, or production facilities, and in contracts and subcontracts in support of programs being conducted at such facilities.

(j) In accordance with 27.406–3(a), insert the clause at 52.227–21, Technical Data Declaration, Revision, and Withholding of Payment—Major Systems, in contracts for major systems acquisitions or for support of major systems acquisitions. This requirement includes contracts for detailed design, development, or production of a major system and contracts for any individual part, component, subassembly, assembly, or subsystem integral to the major system, and other property that may be replaced during the service life of the system, including spare parts. When used, this clause requires that the technical data to which it applies be specified in the contract (see 27.406–3(a)).

(k) In accordance with 27.406–3(b), in the case of civilian agencies other than NASA and the U.S. Coast Guard, insert the clause at 52.227–22, Major System—Minimum Rights, in contracts for major systems or contracts in support of major systems.

(l) In accordance with 27.407, if a contracting officer desires to acquire unlimited rights in technical data contained in a successful proposal upon which a contract award is based, insert the clause at 52.227–23, Rights to Proposal Data (Technical). Rights to technical data in a proposal are not acquired by mere incorporation by reference of the proposal in the contract, and if a proposal is incorporated by reference, the contracting officer shall follow 27.404 to assure that the rights are appropriately addressed.

Subpart 27.5—Foreign License and Technical Assistance Agreements

27.501 General.

Agencies shall provide necessary policy and procedures regarding foreign technical assistance agreements and license agreements involving intellectual property, including avoiding unnecessary royalty charges.

PART 33—PROTESTS, DISPUTES, AND APPEALS

33.104 [Amended]

■ 9. Amend section 33.104 in paragraph (h)(5) introductory text by removing ''19.001'' and adding ''2.101'' in its place.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 10. Amend section 52.227–1 by revising the introductory paragraph, date of the clause, and paragraphs (a) and (b) of the clause; and revising the introductory paragraphs of Alternate I and II to read as follows:

52.227–1 Authorization and Consent.

As prescribed in 27.201–2(a)(1), insert the following clause:

AUTHORIZATION AND CONSENT (DEC 2007)

(a) The Government authorizes and consents to all use and manufacture, in performing this contract or any subcontract at any tier, of any invention described in and covered by a United States patent—

(1) Embodied in the structure or composition of any article the delivery of which is accepted by the Government under this contract; or

(2) Used in machinery, tools, or methods whose use necessarily results from compliance by the Contractor or a subcontractor with (i) specifications or written provisions forming a part of this contract or (ii) specific written instructions given by the Contracting Officer directing the manner of performance. The entire liability to the Government for infringement of a United States patent shall be determined solely by the provisions of the indemnity clause, if any, included in this contract or any subcontract hereunder (including any lower-tier subcontract), and the Government assumes liability for all other infringement to the extent of the authorization and consent hereinabove granted.

(b) The Contractor shall include the substance of this clause, including this paragraph (b), in all subcontracts that are expected to exceed the simplified acquisition threshold. However, omission of this clause from any subcontract, including those at or below the simplified acquisition threshold, does not affect this authorization and consent.

(End of Clause)

Alternate I (Apr 1984). As prescribed in 27.201–2(a)(2), substitute the following paragraph (a) for paragraph (a) of the basic clause:

* * * * *

Alternate II (Apr 1984). As prescribed in 27.201–2(a)(3), substitute the following paragraph (a) for paragraph (a) of the basic clause:

* * * * *

■ 11. Amend section 52.227–2 by revising the introductory paragraph, date of the clause, and paragraphs (b) and (c) to read as follows:

52.227–2 Notice and Assistance Regarding Patent and Copyright Infringement.

As prescribed in 27.201–2(b), insert the following clause:

NOTICE AND ASSISTANCE REGARDING PATENT AND COPYRIGHT INFRINGEMENT (DEC 2007)

* * * * *

(b) In the event of any claim or suit against the Government on account of any alleged patent or copyright infringement arising out of the performance of this contract or out of the use of any supplies furnished or work or services performed under this contract, the Contractor shall furnish to the Government, when requested by the Contracting Officer, all evidence and information in the Contractor's possession pertaining to such claim or suit. Such evidence and information shall be furnished at the expense of the Government except where the Contractor has agreed to indemnify the Government.

(c) The Contractor shall include the substance of this clause, including this paragraph (c), in all subcontracts that are expected to exceed the simplified acquisition threshold.

(End of clause)

■ 12. Amend section 52.227–3 by revising the introductory paragraph and the introductory paragraphs of Alternate I, II, and III to read as follows:

52.227–3 Patent Indemnity.

As prescribed in 27.201–2(c)(1), insert the following clause:

* * * * *

Alternate I (Apr 1984). As prescribed in 27.201–2(c)(2), add the following paragraph (c) to the basic clause:

* * * * *

Alternate II (Apr 1984). As prescribed in 27.201–2(c)(2), add the following paragraph (c) to the basic clause:

* * * * *

Alternate III (Jul 1995). As prescribed in 27.201–2(c)(3), add the following paragraph to the basic clause:

* * * * *

■ 13. Revise section 52.227–4 to read as follows:

52.227–4 Patent Indemnity—Construction Contracts.

As prescribed in 27.201–2(d)(1), insert the following clause:

PATENT INDEMNITY—CONSTRUCTION CONTRACTS (DEC 2007)

Except as otherwise provided, the Contractor shall indemnify the Government and its officers, agents, and employees against liability, including costs and expenses, for infringement of any United States patent (except a patent issued upon an application that is now or may hereafter be withheld from issue pursuant to a Secrecy Order under 35 U.S.C. 181) arising out of performing this contract or out of the use or disposal by or for the account of the Government of supplies furnished or work performed under this contract.

(End of clause)

Alternate I (DEC 2007). As prescribed in 27.201–2(d)(2), designate the first paragraph of the basic clause as paragraph (a) and add the following paragraph (b) to the basic clause:

(b) This patent indemnification shall not apply to the following items:

_____

[*Contracting Officer list the items to be excluded.*]

52.227–5 [Amended]

■ 14. Amend the introductory paragraph of section 52.227–5 by removing ''at 27.203–6'' and adding ''in 27.201–2(e)'' in its place.

■ 15. Amend section 52.227–6 by revising the introductory paragraph and the introductory paragraph of Alternate I to read as follows:

52.227–6 Royalty Information.

As prescribed in 27.202–5(a)(1), insert the following provision:

* * * * *

Alternate I (Apr 1984). As prescribed in 27.202–5(a)(2), substitute the following for the introductory portion of paragraph (a) of the basic provision:

* * * * *

52.227–7 [Amended]

■ 16. Amend the introductory paragraph of section 52.227–7 by removing ''27.204–3(c)'' and adding ''27.202–5(b)'' in its place.

■ 17. Amend section 52.227–9 by revising the introductory paragraph to read as follows:

52.227–9 Refund of Royalties.

As prescribed in 27.202–5(c), insert the following clause:

* * * * *

■ 18. Amend section 52.227–10 by revising the introductory paragraph, the date of the clause, and paragraph (e) to read as follows:

52.227–10 Filing of Patent Applications—Classified Subject Matter.

As prescribed at 27.203–2, insert the following clause:

FILING OF PATENT APPLICATIONS—CLASSIFIED SUBJECT MATTER (DEC 2007)

* * * * *

(e) The Contractor shall include the substance of this clause, including this paragraph (e), in all subcontracts that cover or are likely to cover classified subject matter.

(End of clause)

■ 19. Revise section 52.227–11 to read as follows:

52.227–11 Patent Rights—Ownership by the Contractor.

As prescribed in 27.303((b)(1), insert the following clause:

PATENT RIGHTS—OWNERSHIP BY THE CONTRACTOR (DEC 2007)

(a) As used in this clause—

Invention means any invention or discovery that is or may be patentable or otherwise protectable under title 35 of the U.S. Code, or any variety of plant that is or may be protectable under the Plant Variety Protection Act (7 U.S.C. 2321, *et seq.*)

Made means—

(1) When used in relation to any invention other than a plant variety, the conception or first actual reduction to practice of the invention; or

(2) When used in relation to a plant variety, that the Contractor has at least tentatively determined that the variety has been reproduced with recognized characteristics.

Nonprofit organization means a university or other institution of higher education or an organization of the type described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)) and exempt from taxation under section 501(a) of the Internal Revenue Code (26 U.S.C. 501(a)), or any nonprofit scientific or educational organization qualified under a State nonprofit organization statute.

Practical application means to manufacture, in the case of a composition of product; to practice, in the case of a process or method; or to operate, in the case of a machine or system; and, in each case, under such conditions as to establish that the invention is being utilized and that its benefits are, to the extent permitted by law or Government regulations, available to the public on reasonable terms.

Subject invention means any invention of the Contractor made in the performance of work under this contract.

(b) *Contractor's rights.* (1) *Ownership.* The Contractor may retain ownership of each subject invention throughout the world in accordance with the provisions of this clause.

(2) *License.* (i) The Contractor shall retain a nonexclusive royalty-free license throughout the world in each subject invention to which the Government obtains title, unless the Contractor fails to disclose the invention within the times specified in paragraph (c) of this clause. The Contractor's license extends to any domestic subsidiaries and affiliates within the corporate structure of which the Contractor is a part, and includes the right to grant sublicenses to the extent the Contractor was legally obligated to do so at contract award. The license is transferable only with the written approval of the agency, except when transferred to the successor of that part of the Contractor's business to which the invention pertains.

(ii) The Contractor's license may be revoked or modified by the agency to the extent necessary to achieve expeditious practical application of the subject invention in a particular country in accordance with the procedures in FAR 27.302(i)(2) and 27.304–1(f).

(c) *Contractor's obligations.* (1) The Contractor shall disclose in writing each subject invention to the Contracting Officer within 2 months after the inventor discloses it in writing to Contractor personnel responsible for patent matters. The disclosure shall identify the inventor(s) and this contract under which the subject invention was made. It shall be sufficiently complete in technical detail to convey a clear understanding of the subject invention. The disclosure shall also identify any publication, on sale (*i.e.*, sale or offer for sale), or public use of the subject invention, or whether a manuscript describing the subject invention has been submitted for publication and, if so, whether it has been accepted for publication. In addition, after disclosure to the agency, the Contractor shall promptly notify the Contracting Officer of the acceptance of any manuscript describing the subject invention for publication and any on sale or public use.

(2) The Contractor shall elect in writing whether or not to retain ownership of any subject invention by notifying the Contracting Officer within 2 years of disclosure to the agency. However, in any case where publication, on sale, or public use has initiated the 1-year statutory period during which valid patent protection can be obtained in the United States, the period for election of title may be shortened by the agency to a date that is no more than 60 days prior to the end of the statutory period.

(3) The Contractor shall file either a provisional or a nonprovisional patent application or a Plant Variety Protection Application on an elected subject invention within 1 year after election. However, in any case where a publication, on sale, or public use has initiated the 1-year statutory period during which valid patent protection can be obtained in the United States, the Contractor shall file the application prior to the end of that statutory period. If the Contractor files a provisional application, it shall file a nonprovisional application within 10 months of the filing of the provisional application. The Contractor shall file patent applications in additional countries or international patent offices within either 10 months of the first filed patent application (whether provisional or nonprovisional) or 6 months from the date permission is granted by the Commissioner of Patents to file foreign patent applications where such filing has been prohibited by a Secrecy Order.

(4) The Contractor may request extensions of time for disclosure, election, or filing under paragraphs (c)(1), (c)(2), and (c)(3) of this clause.

(d) *Government's rights*—(1) *Ownership.* The Contractor shall assign to the agency, on written request, title to any subject invention—

(i) If the Contractor fails to disclose or elect ownership to the subject invention within the times specified in paragraph (c) of this clause, or elects not to retain ownership; provided, that the agency may request title only within 60 days after learning of the Contractor's failure to disclose or elect within the specified times.

(ii) In those countries in which the Contractor fails to file patent applications within the times specified in paragraph (c) of this clause; provided, however, that if the Contractor has filed a patent application in a country after the times specified in paragraph (c) of this clause, but prior to its receipt of the written request of the agency, the Contractor shall continue to retain ownership in that country.

(iii) In any country in which the Contractor decides not to continue the prosecution of

any application for, to pay the maintenance fees on, or defend in reexamination or opposition proceeding on, a patent on a subject invention.

(2) *License.* If the Contractor retains ownership of any subject invention, the Government shall have a nonexclusive, nontransferable, irrevocable, paid-up license to practice, or have practiced for or on its behalf, the subject invention throughout the world.

(e) *Contractor action to protect the Government's interest.* (1) The Contractor shall execute or have executed and promptly deliver to the agency all instruments necessary to—

(i) Establish or confirm the rights the Government has throughout the world in those subject inventions in which the Contractor elects to retain ownership; and

(ii) Assign title to the agency when requested under paragraph (d) of this clause and to enable the Government to obtain patent protection and plant variety protection for that subject invention in any country.

(2) The Contractor shall require, by written agreement, its employees, other than clerical and nontechnical employees, to disclose promptly in writing to personnel identified as responsible for the administration of patent matters and in the Contractor's format, each subject invention in order that the Contractor can comply with the disclosure provisions of paragraph (c) of this clause, and to execute all papers necessary to file patent applications on subject inventions and to establish the Government's rights in the subject inventions. The disclosure format should require, as a minimum, the information required by paragraph (c)(1) of this clause. The Contractor shall instruct such employees, through employee agreements or other suitable educational programs, as to the importance of reporting inventions in sufficient time to permit the filing of patent applications prior to U.S. or foreign statutory bars.

(3) The Contractor shall notify the Contracting Officer of any decisions not to file a nonprovisional patent application, continue the prosecution of a patent application, pay maintenance fees, or defend in a reexamination or opposition proceeding on a patent, in any country, not less than 30 days before the expiration of the response or filing period required by the relevant patent office.

(4) The Contractor shall include, within the specification of any United States nonprovisional patent or plant variety protection application and any patent or plant variety protection certificate issuing thereon covering a subject invention, the following statement, ''This invention was made with Government support under (identify the contract) awarded by (identify the agency). The Government has certain rights in the invention.''

(f) *Reporting on utilization of subject inventions.* The Contractor shall submit, on request, periodic reports no more frequently than annually on the utilization of a subject invention or on efforts at obtaining utilization of the subject invention that are being made by the Contractor or its licensees or assignees. The reports shall include information regarding the status of development, date of first commercial sale or use, gross royalties received by the Contractor, and other data and information as the agency may reasonably specify. The Contractor also shall provide additional reports as may be requested by the agency in connection with any march-in proceeding undertaken by the agency in accordance with paragraph (h) of this clause. The Contractor also shall mark any utilization report as confidential/proprietary to help prevent inadvertent release outside the Government. As required by 35 U.S.C. 202(c)(5), the agency will not disclose that information to persons outside the Government without the Contractor's permission.

(g) *Preference for United States industry.* Notwithstanding any other provision of this clause, neither the Contractor nor any assignee shall grant to any person the exclusive right to use or sell any subject invention in the United States unless the person agrees that any products embodying the subject invention or produced through the use of the subject invention will be manufactured substantially in the United States. However, in individual cases, the requirement for an agreement may be waived by the agency upon a showing by the Contractor or its assignee that reasonable but unsuccessful efforts have been made to grant licenses on similar terms to potential licensees that would be likely to manufacture substantially in the United States, or that under the circumstances domestic manufacture is not commercially feasible.

(h) *March-in rights.* The Contractor acknowledges that, with respect to any subject invention in which it has retained ownership, the agency has the right to require licensing pursuant to 35 U.S.C. 203 and 210(c), and in accordance with the procedures in 37 CFR 401.6 and any supplemental regulations of the agency in effect on the date of contract award.

(i) *Special provisions for contracts with nonprofit organizations.* If the Contractor is a nonprofit organization, it shall—

(1) Not assign rights to a subject invention in the United States without the written approval of the agency, except where an assignment is made to an organization that has as one of its primary functions the management of inventions, *provided*, that the assignee shall be subject to the same provisions as the Contractor;

(2) Share royalties collected on a subject invention with the inventor, including Federal employee co-inventors (but through their agency if the agency deems it appropriate) when the subject invention is assigned in accordance with 35 U.S.C. 202(e) and 37 CFR 401.10;

(3) Use the balance of any royalties or income earned by the Contractor with respect to subject inventions, after payment of expenses (including payments to inventors) incidental to the administration of subject inventions for the support of scientific research or education; and

(4) Make efforts that are reasonable under the circumstances to attract licensees of subject inventions that are small business concerns, and give a preference to a small business concern when licensing a subject invention if the Contractor determines that the small business concern has a plan or proposal for marketing the invention which, if executed, is equally as likely to bring the invention to practical application as any plans or proposals from applicants that are not small business concerns; *provided*, that the Contractor is also satisfied that the small business concern has the capability and resources to carry out its plan or proposal. The decision whether to give a preference in any specific case will be at the discretion of the Contractor.

(5) Allow the Secretary of Commerce to review the Contractor's licensing program and decisions regarding small business applicants, and negotiate changes to its licensing policies, procedures, or practices with the Secretary of Commerce when the Secretary's review discloses that the Contractor could take reasonable steps to more effectively implement the requirements of paragraph (i)(4) of this clause.

(j) *Communications.* [*Complete according to agency instructions.*]

(k) *Subcontracts.* (1) The Contractor shall include the substance of this clause, including this paragraph (k), in all subcontracts for experimental, developmental, or research work to be performed by a small business concern or nonprofit organization.

(2) The Contractor shall include in all other subcontracts for experimental, developmental, or research work the substance of the patent rights clause required by FAR Subpart 27.3.

(3) At all tiers, the patent rights clause must be modified to identify the parties as follows: references to the Government are not changed, and the subcontractor has all rights and obligations of the Contractor in the clause. The Contractor shall not, as part of the consideration for awarding the subcontract, obtain rights in the subcontractor's subject inventions.

(4) In subcontracts, at any tier, the agency, the subcontractor, and the Contractor agree that the mutual obligations of the parties created by this clause constitute a contract between the subcontractor and the agency with respect to the matters covered by the clause; provided, however, that nothing in this paragraph is intended to confer any jurisdiction under the Contract Disputes Act in connection with proceedings under paragraph (h) of this clause.

(End of clause)

Alternate I (Jun 1989). As prescribed in 27.303(b)(3), add the following sentence at the end of paragraph (d)(2) of the basic clause:

The license shall include the right of the Government to sublicense foreign governments, their nationals and international organizations pursuant to the following treaties or international agreements: _____*

[** Contracting Officer complete with the names of applicable existing treaties or international agreements. The above language is not intended to apply to treaties or agreements that are in effect on the date of the award but are not listed.*]

Alternate II (DEC 2007). As prescribed in 27.303(b)(4), add the following sentence at

the end of paragraph (d)(2) of the basic clause:

The agency reserves the right to unilaterally amend this contract to identify specific treaties or international agreements entered into by the Government before or after the effective date of the contract and effectuate those license or other rights that are necessary for the Government to meet its obligations to foreign governments, their nationals, and international organizations under the treaties or international agreements with respect to subject inventions made after the date of the amendment.

Alternate III (Jun 1989). As prescribed in 27.303(b)(5), substitute the following paragraph (i)(3) in place of paragraph (i)(3) of the basic clause:

(3) After payment of patenting costs, licensing costs, payments to inventors, and other expenses incidental to the administration of subject inventions, the balance of any royalties or income earned and retained by the Contractor during any fiscal year on subject inventions under this or any successor contract containing the same requirement, up to any amount equal to 5 percent of the budget of the facility for that fiscal year, shall be used by the Contractor for the scientific research, development, and education consistent with the research and development mission and objectives of the facility, including activities that increase the licensing potential of other inventions of the facility. If the balance exceeds 5 percent, 75 percent of the excess above 5 percent shall be paid by the Contractor to the Treasury of the United States and the remaining 25 percent shall be used by the Contractor only for the same purposes as described above. To the extent it provides the most effective technology transfer, the licensing of subject inventions shall be administered by Contractor employees on location at the facility.

Alternate IV (Jun 1989). As prescribed in 27.303(b)(6), include the following paragraph (e)(5) in paragraph (e) of the basic clause:

(5) The Contractor shall establish and maintain active and effective procedures to ensure that subject inventions are promptly identified and timely disclosed, and shall submit a description of the procedures to the Contracting Officer so that the Contracting Officer may evaluate and determine their effectiveness.

Alternate V (DEC 2007). As prescribed in 27.303(b)(7), include the following paragraph (d)(3) in paragraph (d) of the basic clause:

(d)(3) *CRADA licensing.* If the Contractor performs services at a Government owned and operated laboratory or at a Government owned and Contractor operated laboratory directed by the Government to fulfill the Government's obligations under a Cooperative Research and Development Agreement (CRADA) authorized by 15 U.S.C. 3710a, the Government may require the Contractor to negotiate an agreement with the CRADA collaborating party or parties regarding the allocation of rights to any subject invention the Contractor makes, solely or jointly, under the CRADA. The agreement shall be negotiated prior to the Contractor undertaking the CRADA work or, with the permission of the Government, upon the identification of a subject invention. In the absence of such an agreement, the Contractor agrees to grant the collaborating party or parties an option for a license in its inventions of the same scope and terms set forth in the CRADA for inventions made by the Government.

52.227–12 [Removed]

■ 20. Remove and reserve section 52.227–12.

■ 21. Revise sections 52.227–13 through 52.227–15 to read as follows:

52.227–13 Patent Rights—Ownership by the Government.

As prescribed at 27.303(e), insert the following clause:

PATENT RIGHTS—OWNERSHIP BY THE GOVERNMENT (DEC 2007)

(a) *Definitions.* As used in this clause—

Invention means any invention or discovery that is or may be patentable or otherwise protectable under title 35 of the U.S. Code or any variety of plant that is or may be protectable under the Plant Variety Protection Act (7 U.S.C. 2321, *et seq.*)

Made means—

(1) When used in relation to any invention other than a plant variety, means the conception or first actual reduction to practice of the invention; or

(2) When used in relation to a plant variety, means that the Contractor has at least tentatively determined that the variety has been reproduced with recognized characteristics.

Practical application, means to manufacture, in the case of a composition or product; to practice, in the case of a process or method; or to operate, in the case of a machine or system; and, in each case, under such conditions as to establish that the invention is being utilized and that its benefits are, to the extent permitted by law or Government regulations, available to the public on reasonable terms.

Subject invention, means any invention of the Contractor made in the performance of work under this contract.

(b) *Ownership.* (1) *Assignment to the Government.* The Contractor shall assign to the Government title throughout the world to each subject invention, except to the extent that rights are retained under paragraphs (b)(2) and (d) of this clause.

(2) Greater rights determinations. (i) The Contractor, or an employee-inventor after consultation with the Contractor, may request greater rights than the nonexclusive license provided in paragraph (d) of this clause. The request for a greater rights must be submitted to the Contracting Officer at the time of the first disclosure of the subject invention pursuant to paragraph (e)(2) of this clause, or not later than 8 months thereafter, unless a longer period is authorized in writing by the Contracting Officer for good cause shown in writing by the Contractor. Each determination of greater rights under this contract normally shall be subject to paragraph (c) of this clause, and to the reservations and conditions deemed to be appropriate by the agency.

(ii) Upon request, the Contractor shall provide the filing date, serial number and title, a copy of the patent application (including an English-language version if filed in a language other than English), and patent number and issue date for any subject invention in any country for which the Contractor has retained title.

(iii) Upon request, the Contractor shall furnish the agency an irrevocable power to inspect and make copies of the patent application file.

(c) *Minimum rights acquired by the Government.* (1) Regarding each subject invention to which the Contractor retains ownership, the Contractor agrees as follows:

(i) The Government will have a nonexclusive, nontransferable, irrevocable, paid-up license to practice, or have practiced for or on its behalf, the subject invention throughout the world.

(ii) The agency has the right to require licensing pursuant to 35 U.S.C. 203 and 210(c) and in accordance with the procedures set forth in 37 CFR 401.6 and any supplemental regulations of the agency in effect on the date of the contract award.

(iii) Upon request, the Contractor shall submit periodic reports no more frequently than annually on the utilization, or efforts to obtain utilization, of a subject invention by the Contractor or its licensees or assignees. The reports shall include information regarding the status of development, date of first commercial sale or use, gross royalties received by the Contractor, and any other data and information as the agency may reasonably specify. The Contractor also shall provide additional reports as may be requested by the agency in connection with any march-in proceedings undertaken by the agency in accordance with paragraph (c)(1)(ii) of this clause. To the extent data or information supplied under this section is considered by the Contractor, or its licensees, or assignees to be privileged and confidential and is so marked, the agency, to the extent permitted by law, will not disclose such information to persons outside the Government.

(iv) When licensing a subject invention, the Contractor shall—

(A) Ensure that no royalties are charged on acquisitions involving Government funds, including funds derived through a Military Assistance Program of the Government or otherwise derived through the Government;

(B) Refund any amounts received as royalty charges on a subject invention in acquisitions for, or on behalf of, the Government;

(C) Provide for this refund in any instrument transferring rights in the subject invention to any party.

(v) When transferring rights in a subject invention, the Contractor shall provide for the Government's rights set forth in paragraphs (c)(1)(i) through (c)(1)(iv) of this clause.

(2) Nothing contained in paragraph (c) of this clause shall be deemed to grant to the Government rights in any invention other than a subject invention.

(d) *Minimum rights to the Contractor.* (1) The Contractor is hereby granted a revocable, nonexclusive, paid-up license in each patent application filed in any country on a subject invention and any resulting patent in which the Government obtains title, unless the

Contractor fails to disclose the subject invention within the times specified in paragraph (e)(2) of this clause. The Contractor's license extends to any of its domestic subsidiaries and affiliates within the corporate structure of which the Contractor is a part, and includes the right to grant sublicenses to the extent the Contractor was legally obligated to do so at contract award. The license is transferable only with the written approval of the agency except when transferred to the successor of that part of the Contractor's business to which the subject invention pertains.

(2) The Contractor's license may be revoked or modified by the agency to the extent necessary to achieve expeditious practical application of the subject invention in a particular country in accordance with the procedures in FAR 27.302(i)(2) and 27.304–1(f).

(3) When the Government elects not to apply for a patent in any foreign country, the Contractor retains rights in that foreign country to apply for a patent, subject to the Government's rights in paragraph (c)(1) of this clause.

(e) *Invention identification, disclosures, and reports.* (1) The Contractor shall establish and maintain active and effective procedures to educate its employees in order to assure that subject inventions are promptly identified and disclosed to Contractor personnel responsible for patent matters. The procedures shall include the maintenance of laboratory notebooks or equivalent records and other records as are reasonably necessary to document the conception and/or the first actual reduction to practice of subject inventions, and records that show the procedures for identifying and disclosing subject inventions are followed. Upon request, the Contractor shall furnish the Contracting Officer a description of these procedures for evaluation and for a determination as to their effectiveness.

(2) The Contractor shall disclose in writing each subject invention to the Contracting Officer within 2 months after the inventor discloses it in writing to Contractor personnel responsible for patent matters or, if earlier, within 6 months after the Contractor becomes aware that a subject invention has been made, but in any event before any on sale (*i.e.*, sale or offer for sale), public use, or publication of the subject invention known to the Contractor. The disclosure shall identify the contract under which the subject invention was made and the inventor(s). It shall be sufficiently complete in technical detail to convey a clear understanding of the subject invention. The disclosure shall also identify any publication, on sale, or public use of the subject invention and whether a manuscript describing the subject invention has been submitted for publication and, if so, whether it has been accepted for publication. In addition, after disclosure to the agency, the Contractor shall promptly notify the Contracting Officer of the acceptance of any manuscript describing the subject invention for publication and any on sale or public use.

(3) The Contractor shall furnish the Contracting Officer the following:

(i) Interim reports every 12 months (or a longer period as may be specified by the Contracting Officer) from the date of the contract, listing subject inventions during that period, and stating that all subject inventions have been disclosed (or that there are none) and that the procedures required by paragraph (e)(1) of this clause have been followed.

(ii) A final report, within 3 months after completion of the contracted work, listing all subject inventions or stating that there were none, and listing all subcontracts at any tier containing a patent rights clause or stating that there were none.

(4) The Contractor shall require, by written agreement, its employees, other than clerical and nontechnical employees, to disclose promptly in writing to personnel identified as responsible for the administration of patent matters and in the Contractor's format each subject invention in order that the Contractor can comply with the disclosure provisions of paragraph (c) of this clause, and to execute all papers necessary to file patent applications on subject inventions and to establish the Government's rights in the subject inventions. This disclosure format should require, as a minimum, the information required by paragraph (e)(2) of this clause. The Contractor shall instruct such employees, through employee agreements or other suitable educational programs, as to the importance of reporting inventions in sufficient time to permit the filing of patent applications prior to U.S. or foreign statutory bars.

(5) Subject to FAR 27.302(i), the Contractor agrees that the Government may duplicate and disclose subject invention disclosures and all other reports and papers furnished or required to be furnished pursuant to this clause.

(f) *Examination of records relating to inventions.* (1) The Contracting Officer or any authorized representative shall, until 3 years after final payment under this contract, have the right to examine any books (including laboratory notebooks), records, and documents of the Contractor relating to the conception or first actual reduction to practice of inventions in the same field of technology as the work under this contract to determine whether—

(i) Any inventions are subject inventions;

(ii) The Contractor has established and maintains the procedures required by paragraphs (e)(1) and (e)(4) of this clause; and

(iii) The Contractor and its inventors have complied with the procedures.

(2) The Contractor shall disclose to the Contracting Officer, for the determination of ownership rights, any unreported invention that the Contracting Officer believes may be a subject invention.

(3) Any examination of records under paragraph (f) of this clause will be subject to appropriate conditions to protect the confidentiality of the information involved.

(g) *Withholding of payment. (This paragraph does not apply to subcontracts.)* (1) Any time before final payment under this contract, the Contracting Officer may, in the Government's interest, withhold payment until a reserve not exceeding $50,000 or 5 percent of the amount of this contract, whichever is less, shall have been set aside if, in the Contracting Officer's opinion, the Contractor fails to—

(i) Establish, maintain, and follow effective procedures for identifying and disclosing subject inventions pursuant to paragraph (e)(1) of this clause;

(ii) Disclose any subject invention pursuant to paragraph (e)(2) of this clause;

(iii) Deliver acceptable interim reports pursuant to paragraph (e)(3)(i) of this clause; or

(iv) Provide the information regarding subcontracts pursuant to paragraph (i)(4) of this clause.

(2) The Contracting Officer will withhold the reserve or balance until the Contracting Officer has determined that the Contractor has rectified whatever deficiencies exist and has delivered all reports, disclosures, and other information required by this clause.

(3) The Contracting Officer will not make final payment under this contract before the Contractor delivers to the Contracting Officer, as required by this clause, all disclosures of subject inventions, an acceptable final report, and all due confirmatory instruments.

(4) The Contracting Officer may decrease or increase the sums withheld up to the maximum authorized. The Contracting Officer will not withhold any amount under this paragraph while the amount specified by this paragraph is being withheld under other provisions of the contract. The withholding of any amount or the subsequent payment shall not be construed as a waiver of any Government rights.

(h) *Preference for United States industry.* Unless provided otherwise, neither the Contractor nor any assignee shall grant to any person the exclusive right to use or sell any subject invention in the United States unless the person agrees that any products embodying the subject invention or produced through the use of the subject invention will be manufactured substantially in the United States. However, in individual cases, the requirement may be waived by the agency upon a showing by the Contractor or assignee that reasonable but unsuccessful efforts have been made to grant licenses on similar terms to potential licensees that would be likely to manufacture substantially in the United States or that, under the circumstances, domestic manufacture is not commercially feasible.

(i) *Subcontracts.* (1) The Contractor shall include the substance of the patent rights clause required by FAR Subpart 27.3 in all subcontracts for experimental, developmental, or research work. The prescribed patent rights clause must be modified to identify the parties as follows: references to the Government are not changed, and the subcontractor has all rights and obligations of the Contractor in the clause. The Contractor shall not, as part of the consideration for awarding the subcontract, obtain rights in the subcontractor's subject inventions.

(2) In the event of a refusal by a prospective subcontractor to accept the clause, the Contractor—

(i) Shall promptly submit a written notice to the Contracting Officer setting forth the subcontractor's reasons for such refusal and other pertinent information that may expedite disposition of the matter; and

(ii) Shall not proceed with such subcontract without the written authorization of the Contracting Officer.

(3) In subcontracts at any tier, the agency, the subcontractor, and the Contractor agree that the mutual obligations of the parties created by the patent rights clause constitute a contract between the subcontractor and the agency with respect to those matters covered by this clause.

(4) The Contractor shall promptly notify the Contracting Officer in writing upon the award of any subcontract at any tier containing a patent rights clause by identifying the subcontractor, the applicable patent rights clause, the work to be performed under the subcontract, and the dates of award and estimated completion. Upon request of the Contracting Officer, the Contractor shall furnish a copy of such subcontract, and, no more frequently than annually, a listing of the subcontracts that have been awarded.

(End of clause)

Alternate I (Jun 1989). As prescribed in 27.303(e) (4), add the following sentence at the end of paragraph (c)(1)(i) of the basic clause:

The license will include the right of the Government to sublicense foreign governments, their nationals, and international organizations pursuant to the following treaties or international agreements: _____*

[* *Contracting Officer complete with the names of applicable existing treaties or international agreements. The above language is not intended to apply to treaties or agreements that are in effect on the date of the award but are not listed.*]

Alternate II (DEC 2007). As prescribed in 27.303(e) (5), add the following sentence at the end of paragraph (c)(1)(i) of the basic clause:

The agency reserves the right to unilaterally amend this contract to identify specific treaties or international agreements entered into by the Government before or after the effective date of this contract, and effectuate those license or other rights that are necessary for the Government to meet its obligations to foreign governments, their nationals, and international organizations under treaties or international agreements with respect to subject inventions made after the date of the amendment.

52.227–14 Rights in Data—General.

As prescribed in 27.409(b)(1), insert the following clause with any appropriate alternates:

RIGHTS IN DATA—GENERAL (DEC 2007)

(a) *Definitions.* As used in this clause—

Computer database or *database* means a collection of recorded information in a form capable of, and for the purpose of, being stored in, processed, and operated on by a computer. The term does not include computer software.

Computer software—(1) Means (i) Computer programs that comprise a series of instructions, rules, routines, or statements, regardless of the media in which recorded, that allow or cause a computer to perform a specific operation or series of operations; and

(ii) Recorded information comprising source code listings, design details, algorithms, processes, flow charts, formulas, and related material that would enable the computer program to be produced, created, or compiled.

(2) Does not include computer databases or computer software documentation.

Computer software documentation means owner's manuals, user's manuals, installation instructions, operating instructions, and other similar items, regardless of storage medium, that explain the capabilities of the computer software or provide instructions for using the software.

Data means recorded information, regardless of form or the media on which it may be recorded. The term includes technical data and computer software. The term does not include information incidental to contract administration, such as financial, administrative, cost or pricing, or management information.

Form, fit, and function data means data relating to items, components, or processes that are sufficient to enable physical and functional interchangeability, and data identifying source, size, configuration, mating and attachment characteristics, functional characteristics, and performance requirements. For computer software it means data identifying source, functional characteristics, and performance requirements but specifically excludes the source code, algorithms, processes, formulas, and flow charts of the software.

Limited rights means the rights of the Government in limited rights data as set forth in the Limited Rights Notice of paragraph (g)(3) if included in this clause.

Limited rights data means data, other than computer software, that embody trade secrets or are commercial or financial and confidential or privileged, to the extent that such data pertain to items, components, or processes developed at private expense, including minor modifications.

Restricted computer software means computer software developed at private expense and that is a trade secret, is commercial or financial and confidential or privileged, or is copyrighted computer software, including minor modifications of the computer software.

Restricted rights, as used in this clause, means the rights of the Government in restricted computer software, as set forth in a Restricted Rights Notice of paragraph (g) if included in this clause, or as otherwise may be provided in a collateral agreement incorporated in and made part of this contract, including minor modifications of such computer software.

Technical data, means recorded information (regardless of the form or method of the recording) of a scientific or technical nature (including computer databases and computer software documentation). This term does not include computer software or financial, administrative, cost or pricing, or management data or other information incidental to contract administration. The term includes recorded information of a scientific or technical nature that is included in computer databases (See 41 U.S.C. 403(8)).

Unlimited rights means the rights of the Government to use, disclose, reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, in any manner and for any purpose, and to have or permit others to do so.

(b) *Allocation of rights.* (1) Except as provided in paragraph (c) of this clause, the Government shall have unlimited rights in—

(i) Data first produced in the performance of this contract;

(ii) Form, fit, and function data delivered under this contract;

(iii) Data delivered under this contract (except for restricted computer software) that constitute manuals or instructional and training material for installation, operation, or routine maintenance and repair of items, components, or processes delivered or furnished for use under this contract; and

(iv) All other data delivered under this contract unless provided otherwise for limited rights data or restricted computer software in accordance with paragraph (g) of this clause.

(2) The Contractor shall have the right to—

(i) Assert copyright in data first produced in the performance of this contract to the extent provided in paragraph (c)(1) of this clause;

(ii) Use, release to others, reproduce, distribute, or publish any data first produced or specifically used by the Contractor in the performance of this contract, unless provided otherwise in paragraph (d) of this clause;

(iii) Substantiate the use of, add, or correct limited rights, restricted rights, or copyright notices and to take other appropriate action, in accordance with paragraphs (e) and (f) of this clause; and

(iv) Protect from unauthorized disclosure and use those data that are limited rights data or restricted computer software to the extent provided in paragraph (g) of this clause.

(c) *Copyright*—(1) *Data first produced in the performance of this contract.* (i) Unless provided otherwise in paragraph (d) of this clause, the Contractor may, without prior approval of the Contracting Officer, assert copyright in scientific and technical articles based on or containing data first produced in the performance of this contract and published in academic, technical or professional journals, symposia proceedings, or similar works. The prior, express written permission of the Contracting Officer is required to assert copyright in all other data first produced in the performance of this contract.

(ii) When authorized to assert copyright to the data, the Contractor shall affix the applicable copyright notices of 17 U.S.C. 401 or 402, and an acknowledgment of Government sponsorship (including contract number).

(iii) For data other than computer software, the Contractor grants to the Government, and others acting on its behalf, a paid-up, nonexclusive, irrevocable, worldwide license in such copyrighted data to reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly by or on behalf of the Government. For computer software, the Contractor grants to the Government, and others acting on its behalf, a paid-up, nonexclusive, irrevocable, worldwide license in such copyrighted computer software to reproduce, prepare derivative works, and perform publicly and

display publicly (but not to distribute copies to the public) by or on behalf of the Government.

(2) *Data not first produced in the performance of this contract.* The Contractor shall not, without the prior written permission of the Contracting Officer, incorporate in data delivered under this contract any data not first produced in the performance of this contract unless the Contractor—

(i) Identifies the data; and

(ii) Grants to the Government, or acquires on its behalf, a license of the same scope as set forth in paragraph (c)(1) of this clause or, if such data are restricted computer software, the Government shall acquire a copyright license as set forth in paragraph (g)(4) of this clause (if included in this contract) or as otherwise provided in a collateral agreement incorporated in or made part of this contract.

(3) *Removal of copyright notices.* The Government will not remove any authorized copyright notices placed on data pursuant to this paragraph (c), and will include such notices on all reproductions of the data.

(d) *Release, publication, and use of data.* The Contractor shall have the right to use, release to others, reproduce, distribute, or publish any data first produced or specifically used by the Contractor in the performance of this contract, except—

(1) As prohibited by Federal law or regulation (*e.g.*, export control or national security laws or regulations);

(2) As expressly set forth in this contract; or

(3) If the Contractor receives or is given access to data necessary for the performance of this contract that contain restrictive markings, the Contractor shall treat the data in accordance with such markings unless specifically authorized otherwise in writing by the Contracting Officer.

(e) *Unauthorized marking of data.* (1) Notwithstanding any other provisions of this contract concerning inspection or acceptance, if any data delivered under this contract are marked with the notices specified in paragraph (g)(3) or (g) (4) if included in this clause, and use of the notices is not authorized by this clause, or if the data bears any other restrictive or limiting markings not authorized by this contract, the Contracting Officer may at any time either return the data to the Contractor, or cancel or ignore the markings. However, pursuant to 41 U.S.C. 253d, the following procedures shall apply prior to canceling or ignoring the markings.

(i) The Contracting Officer will make written inquiry to the Contractor affording the Contractor 60 days from receipt of the inquiry to provide written justification to substantiate the propriety of the markings;

(ii) If the Contractor fails to respond or fails to provide written justification to substantiate the propriety of the markings within the 60-day period (or a longer time approved in writing by the Contracting Officer for good cause shown), the Government shall have the right to cancel or ignore the markings at any time after said period and the data will no longer be made subject to any disclosure prohibitions.

(iii) If the Contractor provides written justification to substantiate the propriety of the markings within the period set in paragraph (e)(1)(i) of this clause, the Contracting Officer will consider such written justification and determine whether or not the markings are to be cancelled or ignored. If the Contracting Officer determines that the markings are authorized, the Contractor will be so notified in writing. If the Contracting Officer determines, with concurrence of the head of the contracting activity, that the markings are not authorized, the Contracting Officer will furnish the Contractor a written determination, which determination will become the final agency decision regarding the appropriateness of the markings unless the Contractor files suit in a court of competent jurisdiction within 90 days of receipt of the Contracting Officer's decision. The Government will continue to abide by the markings under this paragraph (e)(1)(iii) until final resolution of the matter either by the Contracting Officer's determination becoming final (in which instance the Government will thereafter have the right to cancel or ignore the markings at any time and the data will no longer be made subject to any disclosure prohibitions), or by final disposition of the matter by court decision if suit is filed.

(2) The time limits in the procedures set forth in paragraph (e)(1) of this clause may be modified in accordance with agency regulations implementing the Freedom of Information Act (5 U.S.C. 552) if necessary to respond to a request thereunder.

(3) Except to the extent the Government's action occurs as the result of final disposition of the matter by a court of competent jurisdiction, the Contractor is not precluded by paragraph (e) of the clause from bringing a claim, in accordance with the Disputes clause of this contract, that may arise as the result of the Government removing or ignoring authorized markings on data delivered under this contract.

(f) *Omitted or incorrect markings.* (1) Data delivered to the Government without any restrictive markings shall be deemed to have been furnished with unlimited rights. The Government is not liable for the disclosure, use, or reproduction of such data.

(2) If the unmarked data has not been disclosed without restriction outside the Government, the Contractor may request, within 6 months (or a longer time approved by the Contracting Officer in writing for good cause shown) after delivery of the data, permission to have authorized notices placed on the data at the Contractor's expense. The Contracting Officer may agree to do so if the Contractor—

(i) Identifies the data to which the omitted notice is to be applied;

(ii) Demonstrates that the omission of the notice was inadvertent;

(iii) Establishes that the proposed notice is authorized; and

(iv) Acknowledges that the Government has no liability for the disclosure, use, or reproduction of any data made prior to the addition of the notice or resulting from the omission of the notice.

(3) If data has been marked with an incorrect notice, the Contracting Officer may—

(i) Permit correction of the notice at the Contractor's expense if the Contractor identifies the data and demonstrates that the correct notice is authorized; or

(ii) Correct any incorrect notices.

(g) *Protection of limited rights data and restricted computer software.* (1) The Contractor may withhold from delivery qualifying limited rights data or restricted computer software that are not data identified in paragraphs (b)(1)(i), (ii), and (iii) of this clause. As a condition to this withholding, the Contractor shall—

(i) Identify the data being withheld; and

(ii) Furnish form, fit, and function data instead.

(2) Limited rights data that are formatted as a computer database for delivery to the Government shall be treated as limited rights data and not restricted computer software.

(3) [Reserved]

(h) *Subcontracting.* The Contractor shall obtain from its subcontractors all data and rights therein necessary to fulfill the Contractor's obligations to the Government under this contract. If a subcontractor refuses to accept terms affording the Government those rights, the Contractor shall promptly notify the Contracting Officer of the refusal and shall not proceed with the subcontract award without authorization in writing from the Contracting Officer.

(i) *Relationship to patents or other rights.* Nothing contained in this clause shall imply a license to the Government under any patent or be construed as affecting the scope of any license or other right otherwise granted to the Government.

(End of clause)

Alternate I (DEC 2007). As prescribed in 27.409(b)(2), substitute the following definition for *limited rights data* in paragraph (a) of the basic clause:

Limited rights data means data, other than computer software, developed at private expense that embody trade secrets or are commercial or financial and confidential or privileged.

Alternate II (DEC 2007). As prescribed in 27.409(b)(3), insert the following paragraph (g)(3) in the basic clause:

(g)(3) Notwithstanding paragraph (g)(1) of this clause, the contract may identify and specify the delivery of limited rights data, or the Contracting Officer may require by written request the delivery of limited rights data that has been withheld or would otherwise be entitled to be withheld. If delivery of that data is required, the Contractor shall affix the following ''Limited Rights Notice'' to the data and the Government will treat the data, subject to the provisions of paragraphs (e) and (f) of this clause, in accordance with the notice:

LIMITED RIGHTS NOTICE (DEC 2007)

(a) These data are submitted with limited rights under Government Contract No. _____ (and subcontract _____, if appropriate). These data may be reproduced and used by the Government with the express limitation that they will not, without written permission of the Contractor, be used for purposes of manufacture nor disclosed outside the Government; except that the Government may disclose these data outside the Government for the following purposes, if any; provided that the Government makes

such disclosure subject to prohibition against further use and disclosure: [*Agencies may list additional purposes as set forth in 27.404–2(c)(1) or if none, so state.*]

(b) This notice shall be marked on any reproduction of these data, in whole or in part.

(End of notice)

Alternate III (DEC 2007). As prescribed in 27.409(b)(4), insert the following paragraph (g)(4) in the basic clause:

(g)(4)(i) Notwithstanding paragraph (g)(1) of this clause, the contract may identify and specify the delivery of restricted computer software, or the Contracting Officer may require by written request the delivery of restricted computer software that has been withheld or would otherwise be entitled to be withheld. If delivery of that computer software is required, the Contractor shall affix the following ''Restricted Rights Notice'' to the computer software and the Government will treat the computer software, subject to paragraphs (e) and (f) of this clause, in accordance with the notice:

RESTRICTED RIGHTS NOTICE (DEC 2007)

(a) This computer software is submitted with restricted rights under Government Contract No. _____ (and subcontract _____, if appropriate). It may not be used, reproduced, or disclosed by the Government except as provided in paragraph (b) of this notice or as otherwise expressly stated in the contract.

(b) This computer software may be—

(1) Used or copied for use with the computer(s) for which it was acquired, including use at any Government installation to which the computer(s) may be transferred;

(2) Used or copied for use with a backup computer if any computer for which it was acquired is inoperative;

(3) Reproduced for safekeeping (archives) or backup purposes;

(4) Modified, adapted, or combined with other computer software, *provided* that the modified, adapted, or combined portions of the derivative software incorporating any of the delivered, restricted computer software shall be subject to the same restricted rights;

(5) Disclosed to and reproduced for use by support service Contractors or their subcontractors in accordance with paragraphs (b)(1) through (4) of this notice; and

(6) Used or copied for use with a replacement computer.

(c) Notwithstanding the foregoing, if this computer software is copyrighted computer software, it is licensed to the Government with the minimum rights set forth in paragraph (b) of this notice.

(d) Any other rights or limitations regarding the use, duplication, or disclosure of this computer software are to be expressly stated in, or incorporated in, the contract.

(e) This notice shall be marked on any reproduction of this computer software, in whole or in part.

(End of notice)

(ii) Where it is impractical to include the Restricted Rights Notice on restricted computer software, the following short-form notice may be used instead:

RESTRICTED RIGHTS NOTICE SHORT FORM (Jun 1987)

Use, reproduction, or disclosure is subject to restrictions set forth in Contract No. _____ (and subcontract, if appropriate) with _____ (name of Contractor and subcontractor).

(End of notice)

(iii) If restricted computer software is delivered with the copyright notice of 17 U.S.C. 401, it will be presumed to be licensed to the Government without disclosure prohibitions, with the minimum rights set forth in paragraph (b) of this clause.

Alternate IV (DEC 2007). As prescribed in 27.409(b)(5), substitute the following paragraph (c)(1) for paragraph (c)(1) of the basic clause:

(c) *Copyright*—(1) *Data first produced in the performance of the contract.* Except as otherwise specifically provided in this contract, the Contractor may assert copyright in any data first produced in the performance of this contract. When asserting copyright, the Contractor shall affix the applicable copyright notice of 17 U.S.C. 401 or 402, and an acknowledgment of Government sponsorship (including contract number), to the data when such data are delivered to the Government, as well as when the data are published or deposited for registration as a published work in the U.S. Copyright Office. For data other than computer software, the Contractor grants to the Government, and others acting on its behalf, a paid-up, nonexclusive, irrevocable, worldwide license for all such data to reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, by or on behalf of the Government. For computer software, the Contractor grants to the Government and others acting on its behalf, a paid-up, nonexclusive, irrevocable, worldwide license for all such computer software to reproduce, prepare derivative works, and perform publicly and display publicly (but not to distribute copies to the public), by or on behalf of the Government.

Alternate V (DEC 2007). As prescribed in 27.409(b)(6), add the following paragraph (j) to the basic clause:

(j) The Contractor agrees, except as may be otherwise specified in this contract for specific data deliverables listed as not subject to this paragraph, that the Contracting Officer may, up to three years after acceptance of all deliverables under this contract, inspect at the Contractor's facility any data withheld pursuant to paragraph (g)(1) of this clause, for purposes of verifying the Contractor's assertion of limited rights or restricted rights status of the data or for evaluating work performance. When the Contractor whose data are to be inspected demonstrates to the Contracting Officer that there would be a possible conflict of interest if a particular representative made the inspection, the Contracting Officer shall designate an alternate inspector.

52.227–15 Representation of Limited Rights Data and Restricted Computer Software.

As prescribed in 27.409(c), insert the following provision:

REPRESENTATION OF LIMITED RIGHTS DATA AND RESTRICTED COMPUTER SOFTWARE (DEC 2007)

(a) This solicitation sets forth the Government's known delivery requirements for data (as defined in the clause at 52.227–14, Rights in Data—General). Any resulting contract may also provide the Government the option to order additional data under the Additional Data Requirements clause at 52.227–16, if included in the contract. Any data delivered under the resulting contract will be subject to the Rights in Data—General clause at 52.227–14 included in this contract. Under the latter clause, a Contractor may withhold from delivery data that qualify as limited rights data or restricted computer software, and deliver form, fit, and function data instead. The latter clause also may be used with its Alternates II and/or III to obtain delivery of limited rights data or restricted computer software, marked with limited rights or restricted rights notices, as appropriate. In addition, use of Alternate V with this latter clause provides the Government the right to inspect such data at the Contractor's facility.

(b) By completing the remainder of this paragraph, the offeror represents that it has reviewed the requirements for the delivery of technical data or computer software and states [*offeror check appropriate block*]—

( ) None of the data proposed for fulfilling the data delivery requirements qualifies as limited rights data or restricted computer software; or

( ) Data proposed for fulfilling the data delivery requirements qualify as limited rights data or restricted computer software and are identified as follows:

_____

_____

_____

(c) Any identification of limited rights data or restricted computer software in the offeror's response is not determinative of the status of the data should a contract be awarded to the offeror.

(End of provision)

52.227–16 [Amended]

■ 22. Amend section 52.227–16 by removing from the introductory paragraph ''27.409(h)'' and adding ''27.409(d)'' in its place.

■ 23. Revise section 52.227–17 to read as follows:

52.227–17 Rights in Data—Special Works.

As prescribed in 27.409(e), insert the following clause:

RIGHTS IN DATA—SPECIAL WORKS (DEC 2007)

(a) *Definitions.* As used in this clause—

Data means recorded information, regardless of form or the media on which it may be recorded. The term includes technical data and computer software. The term does not include information incidental to contract administration, such as financial, administrative, cost or pricing, or management information.

Unlimited rights means the rights of the Government to use, disclose, reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, in any manner and for any purpose, and to have or permit others to do so.

(b) *Allocation of Rights.* (1) The Government shall have—

(i) Unlimited rights in all data delivered under this contract, and in all data first produced in the performance of this contract, except as provided in paragraph (c) of this clause.

(ii) The right to limit assertion of copyright in data first produced in the performance of this contract, and to obtain assignment of copyright in that data, in accordance with paragraph (c)(1) of this clause.

(iii) The right to limit the release and use of certain data in accordance with paragraph (d) of this clause.

(2) The Contractor shall have, to the extent permission is granted in accordance with paragraph (c)(1) of this clause, the right to assert claim to copyright subsisting in data first produced in the performance of this contract.

(c) *Copyright*—(1) *Data first produced in the performance of this contrac*t. (i) The Contractor shall not assert or authorize others to assert any claim to copyright subsisting in any data first produced in the performance of this contract without prior written permission of the Contracting Officer. When copyright is asserted, the Contractor shall affix the appropriate copyright notice of 17 U.S.C. 401 or 402 and acknowledgment of Government sponsorship (including contract number) to the data when delivered to the Government, as well as when the data are published or deposited for registration as a published work in the U.S. Copyright Office. The Contractor grants to the Government, and others acting on its behalf, a paid-up, nonexclusive, irrevocable, worldwide license for all delivered data to reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, by or on behalf of the Government.

(ii) If the Government desires to obtain copyright in data first produced in the performance of this contract and permission has not been granted as set forth in paragraph (c)(1)(i) of this clause, the Contracting Officer shall direct the Contractor to assign (with or without registration), or obtain the assignment of, the copyright to the Government or its designated assignee.

(2) *Data not first produced in the performance of this contract.* The Contractor shall not, without prior written permission of the Contracting Officer, incorporate in data delivered under this contract any data not first produced in the performance of this contract and that contain the copyright notice of 17 U.S.C. 401 or 402, unless the Contractor identifies such data and grants to the Government, or acquires on its behalf, a license of the same scope as set forth in paragraph (c)(1) of this clause.

(d) *Release and use restrictions.* Except as otherwise specifically provided for in this contract, the Contractor shall not use, release, reproduce, distribute, or publish any data first produced in the performance of this contract, nor authorize others to do so, without written permission of the Contracting Officer.

(e) *Indemnity.* The Contractor shall indemnify the Government and its officers, agents, and employees acting for the Government against any liability, including costs and expenses, incurred as the result of the violation of trade secrets, copyrights, or right of privacy or publicity, arising out of the creation, delivery, publication, or use of any data furnished under this contract; or any libelous or other unlawful matter contained in such data. The provisions of this paragraph do not apply unless the Government provides notice to the Contractor as soon as practicable of any claim or suit, affords the Contractor an opportunity under applicable laws, rules, or regulations to participate in the defense of the claim or suit, and obtains the Contractor's consent to the settlement of any claim or suit other than as required by final decree of a court of competent jurisdiction; and these provisions do not apply to material furnished to the Contractor by the Government and incorporated in data to which this clause applies.

(End of clause)

52.227–18 [Amended]

■ 24. Amend section 52.227–18 by—

■ a. Removing from the introductory paragraph ''27.409(j)'' and adding ''27.409(f)'' in its place;

■ b. Revising the date of the clause to read ''(DEC 2007)''; and

■ c. Removing from paragraph (b) ''thereof'' and adding ''of the claim or suit'' in its place, and removing ''suit or claim'' and adding ''claim or suit'' in its place.

■ 25. Revise sections 52.227–19 thru 52.227–21 to read as follows:

52.227–19 Commercial Computer Software License.

As prescribed in 27.409(g), insert the following clause:

COMMERCIAL COMPUTER SOFTWARE LICENSE (DEC 2007)

(a) Notwithstanding any contrary provisions contained in the Contractor's standard commercial license or lease agreement, the Contractor agrees that the Government will have the rights that are set forth in paragraph (b) of this clause to use, duplicate or disclose any commercial computer software delivered under this contract. The terms and provisions of this contract shall comply with Federal laws and the Federal Acquisition Regulation.

(b)(1) The commercial computer software delivered under this contract may not be used, reproduced, or disclosed by the Government except as provided in paragraph (b)(2) of this clause or as expressly stated otherwise in this contract.

(2) The commercial computer software may be—

(i) Used or copied for use with the computer(s) for which it was acquired, including use at any Government installation to which the computer(s) may be transferred;

(ii) Used or copied for use with a backup computer if any computer for which it was acquired is inoperative;

(iii) Reproduced for safekeeping (archives) or backup purposes;

(iv) Modified, adapted, or combined with other computer software, provided that the modified, adapted, or combined portions of the derivative software incorporating any of the delivered, commercial computer software shall be subject to same restrictions set forth in this contract;

(v) Disclosed to and reproduced for use by support service Contractors or their subcontractors, subject to the same restrictions set forth in this contract; and

(vi) Used or copied for use with a replacement computer.

(3) If the commercial computer software is otherwise available without disclosure restrictions, the Contractor licenses it to the Government without disclosure restrictions.

(c) The Contractor shall affix a notice substantially as follows to any commercial computer software delivered under this contract:

Notice—Notwithstanding any other lease or license agreement that may pertain to, or accompany the delivery of, this computer software, the rights of the Government regarding its use, reproduction and disclosure are as set forth in Government Contract No. _____.

(End of clause)

52.227–20 Rights in Data—SBIR Program.

As prescribed in 27.409(h), insert the following clause:

RIGHTS IN DATA—SBIR PROGRAM (DEC 2007)

(a) *Definitions.* As used in this clause—

Computer database or *database* means a collection of recorded information in a form capable of, and for the purpose of, being stored in, processed, and operated on by a computer. The term does not include computer software.

Computer software—(1) Means (i) Computer programs that comprise a series of instructions, rules, routines, or statements, regardless of the media in which recorded, that allow or cause a computer to perform a specific operation or series of operations; and

(ii) Recorded information comprising source code listings, design details, algorithms, processes, flow charts, formulas, and related material that would enable the computer program to be produced, created, or compiled.

(2) Does not include computer databases or computer software documentation.

Computer software documentation means owner's manuals, user's manuals, installation instructions, operating instructions, and other similar items, regardless of storage medium, that explain the capabilities of the computer software or provide instructions for using the software.

Data means recorded information, regardless of form or the media on which it may be recorded. The term includes technical data and computer software. The term does not include information incidental to contract administration, such as financial, administrative, cost or pricing or management information.

Form, fit, and function data means data relating to items, components, or processes that are sufficient to enable physical and functional interchangeability, and data identifying source, size, configuration, mating and attachment characteristics, functional characteristics, and performance requirements. For computer software it

means data identifying source, functional characteristics, and performance requirements but specifically excludes the source code, algorithms, processes, formulas, and flow charts of the software.

Limited rights data means data (other than computer software) developed at private expense that embody trade secrets or are commercial or financial and confidential or privileged.

Restricted computer software means computer software developed at private expense and that is a trade secret, is commercial or financial and confidential or privileged, or is copyrighted computer software, including minor modifications of the computer software.

SBIR data means data first produced by a Contractor that is a small business concern in performance of a small business innovation research contract issued under the authority of 15 U.S.C. 638, which data are not generally known, and which data without obligation as to its confidentiality have not been made available to others by the Contractor or are not already available to the Government.

SBIR rights means the rights in SBIR data set forth in the SBIR Rights Notice of paragraph (d) of this clause.

Technical data means recorded information (regardless of the form or method of the recording) of a scientific or technical nature (including computer databases and computer software documentation). This term does not include computer software or financial, administrative, cost or pricing, or management data or other information incidental to contract administration. The term includes recorded information of a scientific or technical nature that is included in computer databases. (See 41 U.S.C. 403(8).)

Unlimited rights means the right of the Government to use, disclose, reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, in any manner and for any purpose whatsoever, and to have or permit others to do so.

(b) *Allocation of rights.* (1) Except as provided in paragraph (c) of this clause regarding copyright, the Government shall have unlimited rights in—

(i) Data specifically identified in this contract as data to be delivered without restriction;

(ii) Form, fit, and function data delivered under this contract;

(iii) Data delivered under this contract (except for restricted computer software) that constitute manuals or instructional and training material for installation, operation, or routine maintenance and repair of items, components, or processes delivered or furnished for use under this contract; and

(iv) All other data delivered under this contract unless provided otherwise for SBIR data in accordance with paragraph (d) of this clause or for limited rights data or restricted computer software in accordance with paragraph (f) of this clause.

(2) The Contractor shall have the right to—

(i) Assert copyright in data first produced in the performance of this contract to the extent provided in paragraph (c)(1) of this clause;

(ii) Protect SBIR rights in SBIR data delivered under this contract in the manner and to the extent provided in paragraph (d) of this clause;

(iii) Substantiate use of, add, or correct SBIR rights or copyright notices and to take other appropriate action, in accordance with paragraph (e) of this clause; and

(iv) Withhold from delivery those data which are limited rights data or restricted computer software to the extent provided in paragraph (f) of this clause.

(c) *Copyright*—(1) *Data first produced in the performance of this contract.* (i) Except as otherwise specifically provided in this contract, the Contractor may assert copyright subsisting in any data first produced in the performance of this contract.

(ii) When asserting copyright, the Contractor shall affix the applicable copyright notice of 17 U.S.C. 401 or 402 and an acknowledgment of Government sponsorship (including contract number).

(iii) For data other than computer software, the Contractor grants to the Government, and others acting on its behalf, a paid-up nonexclusive, irrevocable, worldwide license to reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, by or on behalf of the Government. For computer software, the Contractor grants to the Government, and others acting on its behalf, a paid-up, nonexclusive, irrevocable, worldwide license in such copyrighted computer software to reproduce, prepare derivative works, and perform publicly and display publicly, by or on behalf of the Government.

(2) *Data not first produced in the performance of this contract.* The Contractor shall not, without prior written permission of the Contracting Officer, incorporate in data delivered under this contract any data that are not first produced in the performance of this contract unless the Contractor (i) identifies such data and (ii) grants to the Government, or acquires on its behalf, a license of the same scope as set forth in paragraph (c)(1) of this clause.

(3) *Removal of copyright notices.* The Government will not remove any copyright notices placed on data pursuant to this paragraph (c), and will include such notices on all reproductions of the data.

(d) *Rights to SBIR data.* (1) The Contractor is authorized to affix the following ''SBIR Rights Notice'' to SBIR data delivered under this contract and the Government will treat the data, subject to the provisions of paragraphs (e) and (f) of this clause, in accordance with the notice:

SBIR RIGHTS NOTICE (DEC 2007)

These SBIR data are furnished with SBIR rights under Contract No._____ (and subcontract _____, if appropriate). For a period of 4 years, unless extended in accordance with FAR 27.409(h), after acceptance of all items to be delivered under this contract, the Government will use these data for Government purposes only, and they shall not be disclosed outside the Government (including disclosure for procurement purposes) during such period without permission of the Contractor, except that, subject to the foregoing use and disclosure prohibitions, these data may be disclosed for use by support Contractors. After the protection period, the Government has a paid-up license to use, and to authorize others to use on its behalf, these data for Government purposes, but is relieved of all disclosure prohibitions and assumes no liability for unauthorized use of these data by third parties. This notice shall be affixed to any reproductions of these data, in whole or in part.

(End of notice)

(2) The Government's sole obligation with respect to any SBIR data shall be as set forth in this paragraph (d).

(e) *Omitted or incorrect markings.* (1) Data delivered to the Government without any notice authorized by paragraph (d) of this clause shall be deemed to have been furnished with unlimited rights. The Government assumes no liability for the disclosure, use, or reproduction of such data.

(2) If the unmarked data has not been disclosed without restriction outside the Government, the Contractor may request, within 6 months (or a longer time approved by the Contracting Officer in writing for good cause shown) after delivery of the data, permission to have authorized notices placed on the data at the Contractor's expense, and the Contracting Officer may agree to do so if the Contractor—

(i) Identifies the data to which the omitted notice is to be applied;

(ii) Demonstrates that the omission of the notice was inadvertent;

(iii) Establishes that the use of the proposed notice is authorized; and

(iv) Acknowledges that the Government has no liability with respect to the disclosure or use of any such data made prior to the addition of the notice or resulting from the omission of the notice.

(3) If the data has been marked with an incorrect notice, the Contracting Officer may—

(i) Permit correction of the notice at the Contractor's expense, if the Contractor identifies the data and demonstrates that the correct notice is authorized, or

(ii) Correct any incorrect notices.

(f) *Protection of limited rights data and restricted computer software.* The Contractor may withhold from delivery qualifying limited rights data and restricted computer software that are not identified in paragraphs (b)(1)(i), (ii), and (iii) of this clause. As a condition to this withholding, the Contractor shall identify the data being withheld, and furnish form, fit, and function data instead.

(g) *Subcontracting.* The Contractor shall obtain from its subcontractors all data and rights therein necessary to fulfill the Contractor's obligations to the Government under this contract. If a subcontractor refuses to accept terms affording the Government those rights, the Contractor shall promptly notify the Contracting Officer of the refusal and not proceed with the subcontract award without further authorization in writing from the Contracting Officer.

(h) *Relationship to patents.* Nothing contained in this clause shall imply a license to the Government under any patent or be construed as affecting the scope of any license or other right otherwise granted to the Government.

(End of clause)

52.227–21 Technical Data Declaration, Revision, and Withholding of Payment—Major Systems.

As prescribed in 27.409(j), insert the following clause:

TECHNICAL DATA DECLARATION, REVISION, AND WITHHOLDING OF PAYMENT—MAJOR SYSTEMS (DEC 2007)

(a) *Scope of declaration.* The Contractor shall provide, in accordance with 41 U.S.C. 418a (d)(7), the following declaration with respect to all technical data that relate to a major system and that are delivered or required to be delivered under this contract or that are delivered within 3 years after acceptance of all items (other than technical data) delivered under this contract unless a different period is set forth in the contract. The Contracting Officer may release the Contractor from all or part of the requirements of this clause for specifically identified technical data items at any time during the period covered by this clause.

(b) *Technical data declaration.* (1) All technical data that are subject to this clause shall be accompanied by the following declaration upon delivery:

Technical Data Declaration (Jan 1997)

The Contractor, _____, hereby declares that, to the best of its knowledge and belief, the technical data delivered herewith under Government contract No. _____ (and subcontract _____, if appropriate) are complete, accurate, and comply with the requirements of the contract concerning such technical data.

(End of declaration)

(2) The Government may, at any time during the period covered by this clause, direct correction of any deficiencies that are not in compliance with contract requirements. The corrections shall be made at the expense of the Contractor. Unauthorized markings on data shall not be considered a deficiency for the purpose of this clause, but will be treated in accordance with paragraph (e) of the Rights in Data—General clause included in this contract.

(c) *Technical data revision.* The Contractor also shall, at the request of the Contracting Officer, revise technical data that are subject to this clause to reflect engineering design changes made during the performance of this contract and affecting the form, fit, and function of any item (other than technical data) delivered under this contract. The Contractor may submit a request for an equitable adjustment to the terms and conditions of this contract for any revisions to technical data made pursuant to this paragraph.

(d) *Withholding of payment.* (1) At any time before final payment under this contract the Contracting Officer may withhold payment as a reserve up to an amount not exceeding $100,000 or 5 percent of the amount of this contract, whichever is less, if the Contractor fails to—

(i) Make timely delivery of the technical data;

(ii) Provide the declaration required by paragraph (b)(1) of this clause;

(iii) Make the corrections required by paragraph (b)(2) of this clause; or

(iv) Make revisions requested under paragraph (c) of this clause.

(2) The Contracting Officer may withhold the reserve until the Contractor has complied with the direction or requests of the Contracting Officer or determines that the deficiencies relating to delivered data, arose out of causes beyond the control of the Contractor and without the fault or negligence of the Contractor.

(3) The withholding of any reserve under this clause, or the subsequent payment of the reserve, shall not be construed as a waiver of any Government rights.

(End of clause)

52.227–22 [Amended]

■ 26. Amend section 52.227–22 by removing from the introductory paragraph ''27.409(r)'' and adding '' 27.409(k)'' in its place.

52.227–23 [Amended]

■ 27. Amend section 52.227–23 by removing from the introductory paragraph ''27.409(s)'' and adding ''27.409(l)'' in its place.

[FR Doc. 07–5475 Filed 11–6–07; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 4, 5, and 13

[FAC 2005–21; FAR Case 2006–015; Item IV; Docket 2007–0001; Sequence 10]

RIN 9000–AK68

Federal Acquisition Regulation; FAR Case 2006–015, Federal Computer Network (FACNET) Architecture

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to delete references to FACNET.

DATES: *Effective Date:* December 7, 2007

FOR FURTHER INFORMATION CONTACT Mr. Ernest Woodson, Procurement Analyst, at (202) 501–3775 for clarification of content. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755. Please cite FAC 2005–21, FAR case 2006–015.

SUPPLEMENTARY INFORMATION:

A. Background

The Councils published a proposed rule with request for comments in the **Federal Register** at 72 FR 4675 on February 1, 2007, to amend the FAR to remove FACNET references and provide the opportunity to recognize the evolution of alternative technologies and processes, etc., that Federal agencies are using and will use to satisfy their acquisition needs without removing the use of FACNET for Federal agencies that may use the system. The comment period closed April 2, 2007. No public comments were received on the rule. The Councils have agreed to adopt the proposed rule as final without change.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

DoD, GSA, and NASA certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule addresses the deletion of a term used to describe a system for the electronic data interchange of acquisition information between the private sector and the Federal Government without removing the use of the system. The rule does not present new requirements that impose a burden on contractors. No comments were received with regard to an impact on small business.

C. Paperwork Reduction Act

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

List of Subjects in 48 CFR Parts 2, 4, 5, and 13.

Government procurement.

Dated: October 31, 2007.

Al Matera,

Director, Office of Acquisition Policy.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 2, 4, 5, and 13 as set forth below:

■ 1. The authority citation for 48 CFR parts 2, 4, 5, and 13 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 2—DEFINITIONS OF WORDS AND TERMS

2.101 [Amended]

■ 2. Amend section 2.101(b)(2) by removing the definition ''Federal Acquisition Computer (Network FACNET) Architecture.''

PART 4—ADMINISTRATIVE MATTERS

■ 3. Amend section 4.502 by revising paragraph (b)(2) to read as follows:

4.502 Policy.

* * * * *

(b) * * *

(2) Are implemented only after considering the full or partial use of existing infrastructures;

* * * * *

PART 5—PUBLICIZING CONTRACT ACTIONS

5.101 [Amended]

■ 4. Amend section 5.101 by removing from paragraph (a)(2)(ii) the words ''or Federal Acquisition Computer Network (FACNET)''.

■ 5. Amend section 5.102 by revising paragraph (a)(3) to read as follows:

5.102 Availability of solicitations.

(a) * * *

(3) The contracting officer must ensure that solicitations transmitted using electronic commerce are forwarded to the GPE to satisfy the requirements of paragraph (a)(1) of this section.

* * * * *

■ 6. Amend section 5.201 by revising paragraph (b)(2) to read as follows:

5.201 General.

* * * * *

(b) * * *

(2) When transmitting notices using electronic commerce, contracting officers must ensure the notice is forwarded to the GPE.

* * * * *

5.203 [Amended]

■ 7. Amend section 5.203 in paragraph (b) by removing the words ''via FACNET or for which'' and adding the word ''where'' in its place.

PART 13—SIMPLIFIED ACQUISITION PROCEDURES

13.104 [Amended]

■ 8. Amend section 13.104 by removing from paragraph (b) the words ''using either FACNET or''.

■ 9. Amend section 13.105 by revising paragraph (a) to read as follows:

13.105 Synopsis and posting requirements.

(a) The contracting officer must comply with the public display and synopsis requirements of 5.101 and 5.203 unless an exception in 5.202 applies.

* * * * *

■ 10. Amend section 13.106–1 by revising paragraph (f) to read as follows:

13.106–1 Soliciting competition.

* * * * *

(f) *Inquiries.* An agency should respond to inquiries received through any medium (including electronic commerce) if doing so would not interfere with the efficient conduct of the acquisition.

13.106–2 [Amended]

■ 11. Amend section 13.106–2 by removing from paragraph (b)(4) introductory text the words ''FACNET or''.

13.106–3 [Amended]

■ 12. Amend section 13.106–3 by removing from paragraph (c) the words ''FACNET or''.

13.307 [Amended]

■ 13. Amend section 13.307 by removing from paragraph (b)(1) ''via FACNET,'' and the comma after ''electronically''.

[FR Doc. 07–5479 Filed 11–6–07; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 4, 15, 17, 22, and 52

[FAC 2005–21; FAR Case 2001–004; Item V; Docket 2007–0001, Sequence 6]

RIN 9000–AK82

Federal Acquisition Regulation; FAR Case 2001–004, Exemption of Certain Service Contracts from the Service Contract Act (SCA)

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Interim rule with request for comments.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on an interim rule amending the Federal Acquisition Regulation (FAR) to revise the current SCA exemption and to add a SCA exemption for contracts for certain additional services that meet specific criteria.

DATES: *Effective Date*: November 7, 2007.

Comment Date: Interested parties should submit written comments to the FAR Secretariat on or before January 7, 2008 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAC 2005–21, FAR case 2001–004, by any of the following methods:

• Federal eRulemaking Portal: *http://www.regulations.gov*. To search for any document, first select under ''Step 1,'' ''Documents with an Open Comment Period'' and select under ''Optional Step 2,'' ''Federal Acquisition Regulation'' as the agency of choice. Under ''Optional Step 3,'' select ''Rules''. Under ''Optional Step 4,'' from the drop down list, select ''Document Title'' and type the FAR case number ''2001–004''. Click the ''Submit'' button. Please include your name and company name (if any) inside the document.

You may also search for any document by clicking on the ''Search for Documents'' tab at the top of the screen. Select from the agency field ''Federal Acquisition Regulation'', and type ''2001–004'' in the ''Document Title'' field. Select the ''Submit'' button.

• Fax: 202–501–4067.

• Mail: General Services Administration, Regulatory Secretariat (VIR), 1800 F Street, NW, Room 4035, ATTN: Laurieann Duarte, Washington, DC 20405.

Instructions: Please submit comments only and cite FAC 2005–21, FAR case 2001–004, in all correspondence related to this case. All comments received will be posted without change to *http://www.regulations.gov*. Please include your name and company name (if any) inside the document.

FOR FURTHER INFORMATION CONTACT: Mr. Ernest Woodson, Procurement Analyst, at (202) 501–3775 for clarification of content. Please cite FAC 2005–21, FAR case 2001–004. For information pertaining to status or publication

schedules, contact the FAR Secretariat at (202) 501–4755.

SUPPLEMENTARY INFORMATION:

A. Background

On January 18, 2001, the Wage and Hour Division of the U.S. Department of Labor's Employment Standards Administration, issued a final rule amending the regulations at 29 CFR part 4 to exempt certain contracts for services meeting specific criteria from coverage under the SCA (66 FR 5327). The Councils opened FAR case 2001–004 to implement the Department of Labor (DoL) rule.

The FAR currently exempts contracts (or subcontracts) principally for the maintenance, calibration, or repair of certain equipment if—

• The items of equipment are items which are used regularly for other than Government purposes and are sold or traded by the contractor in substantial quantities to the general public in the course of normal business operations.

• The contract services are furnished at prices which are, or are based on, established catalog or market prices (see 29 CFR 4.123(e)(1)(ii)(B)).

• The contractor utilizes the same compensation (wage and fringe benefits) plan for all service employees performing work under the contract as the contractor uses for equivalent employees servicing the same equipment of commercial customers.

• The contractor certifies in the contract that it meets these criteria.

This interim FAR rule incorporates slight revisions to this current exemption for consistency with the current DoL regulations and clarification of appropriate course of action for the contracting officer.

The interim FAR rule does not refer to these services as commercial services, because the specified criteria are not exactly the same as the FAR definition of ''commercial item.'' Rather than redefining ''commercial item,'' this rule imposes the DoL criteria and does not utilize the term ''commercial services.''

In addition to this first category of service contracts, in order to implement the new DoL regulations, the FAR interim rule establishes a new category of exemption for contracts for certain services that includes the following:

• Automobile or other vehicle (*e.g.*, aircraft) maintenance services (other than contracts or subcontracts to operate a Government motor pool or similar facility).

• Financial services involving the issuance and servicing of cards (including credit cards, debit cards, purchase cards, smart cards, and similar card services).

• Hotel/motel services for conferences, including lodging and/or meals, that are part of the contract or subcontract for the conference (which must not include ongoing contracts for lodging on an as needed or continuing basis).

• Maintenance, calibration, repair, and/or installation (where the installation is not subject to the Davis-Bacon Act, as provided in 29 CFR 4.116(c)(2)) services for all types of equipment where the services are obtained from the manufacturer or supplier of the equipment under a contract awarded on a sole source basis.

• Transportation by common carrier of persons by air, motor vehicle, rail, or marine vessel on regularly scheduled routes or via standard commercial services (not including charter services).

• Real estate services, including real property appraisal services, related to housing Federal agencies or disposing of real property owned by the Government.

• Relocation services, including services of real estate brokers and appraisers to assist Federal employees or military personnel in buying and selling homes (which shall not include actual moving or storage of household goods and related services).

In order for these contracts for services to be exempt, the contract must meet all the criteria for the other services in the first category (substituting ''services'' for ''item of equipment'' in the first criterion, and removing other specific references to ''equipment'' and ''manufacturer''), but the contract must also meet the following criteria:

• The services under the contract (or subcontract) will be awarded on a sole-source basis or the contractor will be selected for award based on other factors in addition to price or cost, with the combination of other factors at least as important as price or cost in selecting the contractor.

• Each service employee who will perform the services under the contract (or subcontract) will spend only a small portion of his or her time (a monthly average of less than 20 percent of the available hours on an annualized basis, or less than 20 percent of available hours during the contract period if the contract period is less than a month) servicing the Government contract (or subcontract).

• The contracting officer (or contractor with respect to a subcontract) determines in advance, based on the nature of the contract (or subcontract) requirements and knowledge of the practices of likely offerors, that all or nearly all offerors will meet the conditions. If the services are currently being performed under contract (or subcontract), the contracting officer (or contractor with respect to a subcontract) shall consider the practices of the existing contractor (or subcontractor) in making a determination regarding the conditions.

• The apparent successful offeror certifies, the contracting officer has no reason to doubt the certification, and the contracting officer determines that the same certification is obtained from substantially all other offerors that are—

• In the competitive range, if discussions are to be conducted (see FAR 15.306)(c)); or

• Considered responsive, if award is to be made without discussions (see FAR 15.306(a)).

Council representatives discussed with DoL the implementation of the DoL rule for these contracts for services at the point of receipt of offers. The FAR rule attempts to minimize the occurrence of the situation in which it will be necessary to revise the solicitation after receipt of offers to remove the exemption provision and require use of the SCA clauses, even though the apparent successful offeror certified to criteria for the exemption. The FAR rule uses the term ''substantially all'' to indicate that there could be a slightly different interpretation of the phrase ''all or nearly all'' than at the beginning of the process. DoL concurs that the contracting officer will have the discretion to interpret this term, as long as the intention reflected in the preamble to the SCA regulations (66 FR 5327) controls the contracting officer's exercise of discretion. DoL also concurs that it is not necessary to consider offerors that did not certify if these offerors were not in the competitive range or not responsive. Therefore, the FAR rule adds this condition when considering whether substantially all offerors have certified.

The exemption for the second category of contracts for services does not apply to solicitations and contracts (subcontracts)—

• Awarded under the Javits-Wagner-O'Day Act, 41 U.S.C. 47.

• For the operation of a Government facility, or part of a Government facility (but may be applicable to subcontracts for services that meet all of the criteria); or

• Subject to Section 4(c) of the Service Contract Act (see 22.1002–3).

Whether the contracts for services fall in the first or second category, the Department of Labor retains the right to review those contracts that claim exemption from the SCA. If the Department of Labor determines after award of the contract (or subcontract)

that any condition for exemption has not been met, the exemption shall be deemed inapplicable, and the contract (or subcontract) becomes subject to the Service Contract Act. In such case, the procedures at 29 CFR 4.123(e)(2)(iii) and 29 CFR 4.5(c) will be followed.

In accordance with Section 29 of the Office of Federal Procurement Policy Act, the Federal Acquisition Regulatory Council (FAR Council) has obtained the approval of the Administrator of the Office of Federal Procurement Policy for the inclusion of two nonstatutory certifications in this interim FAR rule, as required by the Department of Labor Regulations at 29 CFR 4.123(e)(1)(ii)(D) and (e)(2)(ii)(G).

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 this rule exempts certain service contracts from the Service Contract Act for both contractors and subcontractors. An Initial Regulatory Flexibility Analysis (IRFA) has been prepared. The analysis is summarized as follows:

This interim rule implements 29 CFR 4.123(e) of the Department of Labor (DoL) regulation regarding Administrative limitations, variance, tolerances, and exemptions. Paragraph (e) provides exemption for contracts for certain services that meet specific criteria.

The objective of the DoL final rule was to further the commitment of the Administration to be more commercial-like, encourage broader participation in Government procurement by companies doing business in the commercial sector, and reinforce our commitment to reduce Government-unique terms and conditions, without compromising the purpose of the SCA to protect prevailing labor standards.

The interim FAR rule should have a positive economic impact on the small contractors and subcontractors that meet the exemption criteria to be exempt from the SCA for certain services, because it may provide additional opportunities for work on Federal projects; enable these contractors to compete in a more commercial-like environment, and alleviate the burden of complying with Government-unique terms and conditions for these types of contracts.

Pursuant to Section (4)(b) of the SCA, the Secretary of Labor may grant reasonable exemptions to the provisions of the SCA, but only in special circumstances where the exemption is necessary and proper in the public interest, and is in accord with the remedial purposes of the Act to protect prevailing labor standards.

This interim FAR rule will apply to all large and small entities that seek award of Federal service contracts in the service categories identified. The Councils relied on the DoL regulatory flexibility analysis (66 FR 5339), which determined that a majority of contracts affected by the proposed exemption would likely be performed by small businesses. Federal Procurement Data System (FPDS) does not provide an accurate estimate of the contracts potentially covered by the exemption, but DoL estimates that the total value of the exempt contracts could be relatively small, and that the SCA would no longer apply to only a relatively small number of contracts that currently contain SCA wage determination provisions.

The interim rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no practical alternatives that will accomplish the objectives of this interim rule. However, the exemption is expected to have a positive impact on small entities, because it does not contain any new reporting or recordkeeping or other compliance requirements applicable to small business. Rather, the exemption would relieve small businesses and other contractors from the requirements of the SCA on certain contracts.

The FAR Secretariat has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. Interested parties may obtain a copy from the FAR Secretariat. The Councils will consider comments from small entities concerning the affected FAR Parts 4, 15, 17, 22, and 52 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.*, (FAC 2005–21, FAR case 2001–004), in the correspondence.

C. Paperwork Reduction Act

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

D. Determination to Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary to incorporate the Department of Labor's final rule, which was effective March 19, 2001, into the Federal Acquisition Regulation. Although there has been delay while seeking appropriate implementation of the DoL final rule, industries that provide services in these categories are seeking to take advantage of the offered exemptions without further delay. However, pursuant to Public Law 98–577 and FAR 1.501, the Councils will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Parts 4, 15, 17, 22, and 52

Government procurement.

Dated: October 31, 2007.

Al Matera,

Director, Office of Acquisition Policy.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 4, 15, 17, 22, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 4, 15, 17, 22, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 4—ADMINISTRATIVE MATTERS

4.1201 [Amended]

■ 2. Amend section 4.1201 by removing from paragraph (c) ''52.212–3(k)'' and adding ''52.212–3(l)'' in its place.

■ 3. Amend section 4.1202 by revising paragraph (q) to read as follows:

4.1202 Solicitation provision and contract clause.

* * * * *

(q) 52.222–48, Exemption from Application of the Service Contract Act to Contracts for Maintenance, Calibration, or Repair of Certain Equipment Certification.

* * * * *

PART 15—CONTRACTING BY NEGOTIATION

15.102 [Amended]

■ 4. Amend section 15.102 by removing from paragraph (b) ''52.212–3(k)'' and adding ''52.212–3(l)'' in its place.

PART 17—SPECIAL CONTRACTING METHODS

17.109 [Amended]

■ 5. Amend section 17.109 by removing from paragraph (b)(1) '', as amended''.

PART 22—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

■ 6. Amend section 22.1003–4 by removing paragraph (b)(4); and by adding paragraphs (c) and (d) to read as follows:

22.1003–4 Administrative limitations, variations, tolerances, and exemptions.

* * * * *

(c) *Contracts for maintenance, calibration or repair of certain equipment.*— (1) *Exemption.* The Secretary of Labor has exempted from the Act contracts and subcontracts in which the primary purpose is to furnish maintenance, calibration, or repair of the following types of equipment, if the conditions at paragraph (c)(2) of this subsection are met:

(i) Automated data processing equipment and office information/word processing systems.

(ii) Scientific equipment and medical apparatus or equipment if the application of micro-electronic circuitry or other technology of at least similar sophistication is an essential element (for example, Federal Supply Classification (FSC) Group 65, Class 6515, ''Medical Diagnostic Equipment;'' Class 6525, ''X-Ray Equipment;'' FSC Group 66, Class 6630, ''Chemical Analysis Instruments;'' and Class 6665, ''Geographical and Astronomical Instruments,'' are largely composed of the types of equipment exempted in this paragraph).

(iii) Office/business machines not otherwise exempt pursuant to paragraph (c)(1)(i) of this subsection, if such services are performed by the manufacturer or supplier of the equipment.

(2) *Conditions.* The exemption at paragraph (c)(1) of this subsection applies if all the following conditions are met for a contract (or a subcontract):

(i) The items of equipment to be serviced under the contract are used regularly for other than Government purposes and are sold or traded by the contractor in substantial quantities to the general public in the course of normal business operations.

(ii) The services will be furnished at prices which are, or are based on, established catalog or market prices for the maintenance, calibration, or repair of such equipment. As defined at 29 CFR 4.123(e)(1)(ii)(B)—

(A) An established catalog price is a price included in a catalog price list, schedule, or other form that is regularly maintained by the manufacturer or the contractor, is either published or otherwise available for inspection by customers, and states prices at which sales currently, or were last, made to a significant number of buyers constituting the general public.

(B) An established market price is a current price, established in the usual course of trade between buyers and sellers free to bargain, which can be substantiated from sources independent of the manufacturer or contractor.

(iii) The contractor will use the same compensation (wage and fringe benefits) plan for all service employees performing work under the contract as the contractor uses for these employees and equivalent employees servicing the same equipment of commercial customers.

(iv) The apparent successful offeror certifies to the conditions in paragraph (c)(2)(i) through (iii) of this subsection. (See 22.1006(e).)

(3) *Affirmative determination and contract award.* (i) For source selections where the contracting officer has established a competitive range, if the contracting officer determines that one or more of the conditions in paragraphs 22.1003–4 (c)(2)(i) through (iii) of an offeror's certification will not be met, the contracting officer shall identify the deficiency to the offeror before receipt of the final proposal revisions. Unless the offeror provides a revised offer acknowledging applicability of the Service Contract Act or demonstrating to the satisfaction of the contracting officer an ability to meet all required conditions for exemption, the offer will not be further considered for award.

(ii) The contracting officer shall determine in writing the applicability of this exemption to the contract before contract award. If the apparent successful offeror will meet all conditions in paragraph (c)(2) of this subsection, the contracting officer shall make an affirmative determination and award the contract without the otherwise applicable Service Contract Act clause(s).

(iii) If the apparent successful offeror does not certify to the conditions in paragraph (c)(2)(i) through (iii) of this subsection, the contracting officer shall incorporate in the contract the Service Contract Act clause (see 22.1006(a)(2)) and, if the contract will exceed $2,500, the appropriate Department of Labor wage determination (see 22.1007).

(4) *Department of Labor determination.* (i) If the Department of Labor determines after award of the contract that any condition for exemption in paragraph (c)(2) of this subsection has not been met, the exemption shall be deemed inapplicable, and the contract shall become subject to the Service Contract Act, effective as of the date of the Department of Labor determination. In such case, the procedures at 29 CFR 4.123(e)(1)(iv) and 29 CFR 4.5(c) shall be followed.

(ii) If the Department of Labor determines after award of the subcontract that any conditions for exemption in paragraph (c)(2) of this subsection have not been met, the exemption shall be deemed inapplicable. The contractor may be responsible for ensuring that the subcontractor complies with the Act, effective as of the date of the subcontract award.

(d) *Contracts for certain services.*— (1) *Exemption.* Except as provided in paragraph (d)(5) of this subsection, the Secretary of Labor has exempted from the Act contracts and subcontracts in which the primary purpose is to provide the following services, if the conditions in paragraph (d)(2) of this subsection are met:

(i) Automobile or other vehicle (*e.g.*, aircraft) maintenance services (other than contracts or subcontracts to operate a Government motor pool or similar facility).

(ii) Financial services involving the issuance and servicing of cards (including credit cards, debit cards, purchase cards, smart cards, and similar card services).

(iii) Hotel/motel services for conferences, including lodging and/or meals, that are part of the contract or subcontract for the conference (which must not include ongoing contracts for lodging on an as needed or continuing basis).

(iv) Maintenance, calibration, repair, and/or installation (where the installation is not subject to the Davis-Bacon Act, as provided in 29 CFR 4.116(c)(2)) services for all types of equipment where the services are obtained from the manufacturer or supplier of the equipment under a contract awarded on a sole source basis.

(v) Transportation by common carrier of persons by air, motor vehicle, rail, or marine vessel on regularly scheduled routes or via standard commercial services (not including charter services).

(vi) Real estate services, including real property appraisal services, related to housing Federal agencies or disposing of real property owned by the Government.

(vii) Relocation services, including services of real estate brokers and appraisers to assist Federal employees or military personnel in buying and selling homes (which shall not include actual moving or storage of household goods and related services).

(2) *Conditions.* The exemption for the services in paragraph (d)(1) of this subsection applies if all the following conditions are met for a contract (or for a subcontract):

(i)(A) The contract will be awarded on a sole-source basis; or

(B) Except for services identified in paragraph (d)(1)(iv) of this subsection, the contractor will be selected for award

based on other factors in addition to price or cost, with the combination of other factors at least as important as price or cost in selecting the contractor.

(ii) The services under the contract are offered and sold regularly to non-Governmental customers, and are provided by the contractor (or subcontractor in the case of an exempt subcontract) to the general public in substantial quantities in the course of normal business operations.

(iii) The contract services are furnished at prices that are, or are based on, established catalog or market prices. As defined at 29 CFR 4.123(e)(2)(ii)(C)—

(A) An established catalog price is a price included in a catalog, price list, schedule, or other form that is regularly maintained by the contractor, is either published or otherwise available for inspection by customers, and states prices at which sales are currently, or were last, made to a significant number of buyers constituting the general public; and

(B) An established market price is a current price, established in the usual course of trade between buyers and sellers free to bargain, which can be substantiated from sources independent of the manufacturer or contractor.

(iv) Each service employee who will perform the services under the contract will spend only a small portion of his or her time (a monthly average of less than 20 percent of the available hours on an annualized basis, or less than 20 percent of available hours during the contract period if the contract period is less than a month) servicing the Government contract.

(v) The contractor will use the same compensation (wage and fringe benefits) plan for all service employees performing work under the contract as the contractor uses for these employees and equivalent employees servicing commercial customers.

(vi) The contracting officer (or contractor with respect to a subcontract) determines in advance, based on the nature of the contract requirements and knowledge of the practices of likely offerors, that all or nearly all offerors will meet the conditions in paragraph (d)(2)(ii) through (v) of this subsection. If the services are currently being performed under contract, the contracting officer (or contractor with respect to a subcontract) shall consider the practices of the existing contractor in making a determination regarding the conditions in paragraphs (d)(2)(ii) through (v) of this subsection.

(vii)(A) The apparent successful offeror certifies that the conditions in paragraphs (d)(2)(ii) through (v) will be met; and

(B) For other than sole source awards, the contracting officer determines that the same certification is obtained from substantially all other offerors that are—

(*1*) In the competitive range, if discussions are to be conducted (see FAR 15.306)(c)); or

(*2*) Considered responsive, if award is to be made without discussions (see FAR 15.306(a)).

(3) *Contract award or resolicitation.* (i) If the apparent successful offeror does not certify to the conditions, the contracting officer shall insert in the contract the applicable Service Contract Act clause(s) (see 22.1006(a)(2)) and, if the contract will exceed $2,500, the appropriate Department of Labor wage determination (see 22.1007).

(ii) The contracting officer shall award the contract without the otherwise applicable Service Contract Act clause(s) if—

(A) The apparent successful offeror certifies to the conditions in paragraphs (d)(2)(ii) through (v) of this subsection;

(B) The contracting officer determines that the same certification is obtained from substantially all other offerors that are—

(*1*) In the competitive range, if discussions are to be conducted (see FAR 15.306); or

(*2*) Considered responsive, if award is to be made without discussions (see FAR 15.306(a)); and

(C) The contracting officer has no reason to doubt the certification.

(iii) If the conditions in paragraph (d)(3)(ii) of this subsection are not met, then the contracting officer shall resolicit, amending the solicitation by removing the exemption provision from the solicitation (see 22.1006(e)(4)), and inserting in the contract the applicable Service Contract Act clause(s) (see 22.1006(a)(2)) and, if the contract will exceed $2,500, the appropriate Department of Labor wage determination (see 22.1007).

(4) *Department of Labor determination.* (i) If the Department of Labor determines after award of the contract that any conditions for exemption at paragraph (d)(2) of this subsection have not been met, the exemption shall be deemed inapplicable, and the contract shall become subject to the Service Contract Act. In such case, the procedures at 29 CFR 4.123(e)(2)(iii) and 29 CFR 4.5(c) shall be followed.

(ii) If the Department of Labor determines that any conditions in paragraph (d)(2) of this subsection have not been met with respect to a subcontract, the exemption shall be deemed inapplicable and the contractor may be responsible for ensuring that the subcontractor complies with the Act, effective as of the date of the subcontract award.

(5) *Exceptions.* The exemption at paragraph (d)(1) of this subsection does not apply to solicitations and contracts (subcontracts)—

(i) Awarded under the Javits-Wagner-O'Day Act, 41 U.S.C. 47 (see Subpart 8.7).

(ii) For the operation of a Government facility, or part of a Government facility (but may be applicable to subcontracts for services); or

(iii) Subject to Section 4(c) of the Service Contract Act (see 22.1002–3).

22.1003–5 [Amended]

■ 7. Amend section 22.1003–5 by removing from paragraph (k) ''22.1003–4(b)(4)'' and adding ''22.1003(c)(1) and (d)(1)(iv)'' in its place.

22.1003–6 [Amended]

■ 8. Amend section 22.1003–6 by removing from paragraph (b)(2) ''22.1003–4(b)(4)'' and adding ''22.1003(c)(1) and (d)(1)(iv)'' in its place.

■ 9. Amend section 22.1004 by revising paragraph (h) to read as follows:

22.1004 Department of Labor responsibilities and regulations.

* * * * *

(h) Practice before the Administrative Review Board (29 CFR part 8).

■ 10. Amend section 22.1006 by—
■ a. Revising the section heading;
■ b. Revising paragraph (a);
■ c. Removing from paragraphs (c)(1) and (c)(2) ''as amended,''; and
■ d. Revising paragraph (e) to read as follows:

22.1006 Solicitation provisions and contract clauses.

(a)(1) The contracting officer shall insert the clause at 52.222–41, Service Contract Act of 1965, in solicitations and contracts if the contract is subject to the Act and is—

(i) Over $2,500; or

(ii) For an indefinite dollar amount and the contracting officer does not know in advance that the contract amount will be $2,500 or less.

(2) If the solicitation includes the provision at 52.222–48, Exemption from Application of the Service Contract Act to Contracts for Maintenance, Calibration, or Repair of Certain Equipment—Certification, or 52.222–52, Exemption from Application of the Service Contract Act to Contracts for Certain Services—Certification, the contracting officer shall not insert the clause at 52.222–41 (or any of the associated Service Contract Act clauses

prescribed in this section for possible use when 52.222–41 applies) in the resultant contract unless the contracting officer determines, in accordance with paragraphs (c)(3) or (d)(3) of subsection 22.1003–4, that the Service Contract Act applies to the contract. (In such case, do not insert the clause at 52.222–51, Exemption from Application of the Service Contract Act to Contracts for Maintenance, Calibration, or Repair of Certain Equipment—Requirements, or 52.222–53, Exemption from Application of the Service Contract Act to Contracts for Certain Services—Requirements, in the contract, in accordance with the prescription at paragraph (e)(2) or (e)(4) of this subsection).

* * * * *

(e)(1) The contracting officer shall insert the provision at 52.222–48, Exemption from Application of the Service Contract Act to Contracts for Maintenance, Calibration, or Repair of Certain Equipment—Certification, in solicitations that include the clause at 52.222–41, Service Contract Act of 1965, but the contract may be exempt from the Service Contract Act in accordance with 22.1003–4(c).

(2) The contracting officer shall insert the clause at 52.222–51, Exemption from Application of the Service Contract Act to Contracts for Maintenance, Calibration, or Repair of Certain Equipment—Requirements, in solicitations that include the provision at 52.222–48, and resulting contracts in which the contracting officer has determined, in accordance with 22.1003–4(c)(3), that the Service Contract Act does not apply.

(3) Insert the provision at 52.222–52, Exemption from Application of the Service Contract Act to Contracts for Certain Services—Certification, in solicitations that include the clause at 52.222–41, Service Contract Act of 1965, but the contract may be exempt from the Service Contract Act in accordance with 22.1003–4(d).

(4) The contracting officer shall insert the clause at 52.222–53, Exemption from Application of the Service Contract Act to Contracts for Certain Services—Requirements, in solicitations that include the provision at 52.222–52, and resulting contracts in which the contracting officer has determined, in accordance with 22.1003–4(d)(3), that the Service Contract Act does not apply.

* * * * *

22.1008–2 [Amended]

■ 11. Amend section 22.1008–2 by removing from the last sentence of paragraph (d)(1) '', as amended''.

22.1018 [Amended]

■ 12. Amend section 22.1018 by removing from paragraph (b) '', as amended''.

22.1019 [Amended]

■ 13. Amend section 22.1019 by removing from paragraphs (a), in the first sentence, and (c) '', as amended''.

22.1020 [Amended]

■ 14. Amend section 22.1020 by removing '', as amended''.

22.1022 [Amended]

■ 15. Amend section 22.1022 by removing ''Assistant'' and ''Board of Service Contract Appeals'' and adding ''Deputy'' and ''Administrative Review Board'' in their places, respectively.

22.1023 [Amended]

■ 16. Amend section 22.1023 by removing '', as amended''.

22.1026 [Amended]

■ 17. Amend section 22.1026 by removing ''as amended,''.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

52.212–1 [Amended]

■ 18. Amend section 52.212–1 by revising the date of the clause to read ''(Nov 2007)''; and by removing from paragraph (b)(8) ''52.212–3(k)'' and adding ''52.212–3(l)'' in its place.

■ 19. Amend section 52.212–3 by—

■ a. Revising the date of the clause;

■ b. Removing from the introductory text of the clause ''paragraph (k)'' and ''through (j)'' and adding ''paragraph (l)'' and ''through (k)'' in its place, respectively;

■ c. Redesignating paragraph (k) as paragraph (l); removing from the newly designated paragraph (l)(1) ''paragraph (k)(2)'' and adding ''paragraph (l)(2)'' in its place, and in the newly designated paragraph (l)(2), in the bracketed paragraph, removing ''through (j)'' and adding ''through (k)'' in its place; and

■ d. Adding a new paragraph (k) to read as follows:

52.212—3 Offeror Representations and Certifications—Commercial Items.

* * * * *

OFFEROR REPRESENTATIONS AND CERTIFICATIONS—COMMERCIAL ITEMS ''(Nov 2007)''

* * * * *

(k) *Certificates regarding exemptions from the application of the Service Contract Act.* (Certification by the offeror as to its compliance with respect to the contract also constitutes its certification as to compliance by its subcontractor if it subcontracts out the exempt services.) [*The contracting officer is to check a box to indicate if paragraph (k)(1) or (k)(2) applies.*]

☐ (1) Maintenance, calibration, or repair of certain equipment as described in FAR 22.1003–4(c)(1). The offeror ☐ does ☐ does not certify that—

(i) The items of equipment to be serviced under this contract are used regularly for other than Governmental purposes and are sold or traded by the offeror in substantial quantities to the general public in the course of normal business operations;

(ii) The services will be furnished at prices which are, or are based on, established catalog or market prices (see FAR 22.1003–4(c)(2)(ii)) for the maintenance, calibration, or repair of such equipment; and

(iii) The compensation (wage and fringe benefits) plan for all service employees performing work under the contract will be the same as that used for these employees and equivalent employees servicing the same equipment of commercial customers.

☐ (2) Certain services as described in FAR 22.1003–4(d)(1). The offeror ☐ does ☐ does not certify that—

(i) The services under the contract are offered and sold regularly to non-Governmental customers, and are provided by the offeror (or subcontractor in the case of an exempt subcontract) to the general public in substantial quantities in the course of normal business operations;

(ii) The contract services will be furnished at prices that are, or are based on, established catalog or market prices (see FAR 22.1003–4(d)(2)(iii));

(iii) Each service employee who will perform the services under the contract will spend only a small portion of his or her time (a monthly average of less than 20 percent of the available hours on an annualized basis, or less than 20 percent of available hours during the contract period if the contract period is less than a month) servicing the Government contract; and

(iv) The compensation (wage and fringe benefits) plan for all service employees performing work under the contract is the same as that used for these employees and equivalent employees servicing commercial customers.

(3) If paragraph (k)(1) or (k)(2) of this clause applies—

(i) If the offeror does not certify to the conditions in paragraph (k)(1) or (k)(2) and the Contracting Officer did not attach a Service Contract Act wage determination to the solicitation, the offeror shall notify the Contracting Officer as soon as possible; and

(ii) The Contracting Officer may not make an award to the offeror if the offeror fails to execute the certification in paragraph (k)(1) or (k)(2) of this clause or to contact the Contracting Officer as required in paragraph (k)(3)(i) of this clause.

* * * * *

■ 20. Amend section 52.212–5 by—

■ a. Revising the date of the clause;

■ b. Revising paragraph (c)(1), redesignating paragraph (c)(5) as (c)(7), and adding new paragraphs (c)(5) and (c)(6); and

■ c. Revising paragraph (e)(1)(vi), and redesignating paragraph (e)(1)(viii) as

(e)(1)(x), and adding new paragraphs (e)(1)(viii) and (e)(1)(ix).

■ The revised and added text reads as follows:

52.212–5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

* * * * *

CONTRACT TERMS AND CONDITIONS REQUIRED TO IMPLEMENT STATUTES OR EXECUTIVE ORDERS—COMMERCIAL ITEMS ''(Nov 2007)''

* * * * *

(c) * * *

_____ (1) 52.222–41, Service Contract Act of 1965 ''(Nov 2007)'' (41 U.S.C. 351, *et seq.*).

* * * * *

_____ (5) 52.222–51, Exemption from Application of the Service Contract Act to Contracts for Maintenance, Calibration, or Repair of Certain Equipment—Requirements ''([Insert Abbreviated Month and Year of Date of Publication in the **Federal Register**]'' (41 U.S.C. 351, *et seq.*).

_____ (6) 52.222–53, Exemption from Application of the Service Contract Act to Contracts for Certain Services—Requirements ''(Nov 2007)'' (41 U.S.C. 351, *et seq.*).

* * * * *

(e)(1) * * *

(vi) 52.222–41, Service Contract Act of 1965 ''([Insert Abbreviated Month and Year of Date of Publication in the **Federal Register**])'' (41 U.S.C. 351, *et seq.*).

* * * * *

(viii) 52.222–51, Exemption from Application of the Service Contract Act to Contracts for Maintenance, Calibration, or Repair of Certain Equipment—Requirements ''(Nov 2007)'' (41 U.S.C. 351, *et seq.*).

(ix) 52.222–53, Exemption from Application of the Service Contract Act to Contracts for Certain Services—Requirements ''(Nov 2007)'' (41 U.S.C. 351, *et seq.*).

* * * * *

■ 21. Amend section 52.213–4 by revising the date of the clause; and revising the first sentence of paragraph (b)(1)(vi) to read as follows:

52.213–4 Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items).

* * * * *

TERMS AND CONDITIONS—SIMPLIFIED ACQUISITIONS (OTHER THAN COMMERCIAL ITEMS) ''(Nov 2007)''

* * * * *

(b) * * *

(1) * * *

(vi) 52.222–41, Service Contract Act of 1965 ''(Nov 2007)'' (41 U.S.C. 351, *et seq.*).

* * *

* * * * *

■ 22. Amend section 52.222–41 by—

■ a. Revising the section heading;

■ b. Revising the clause heading and the date; and

■ c. Amending paragraph (a) by—

■ 1. Revising the introductory text;

■ 2. Revising the definitions ''Act'' and ''Contractor'';

■ 3. Removing from the definition ''Service employee'' the words '', as used in this clause,''; and

■ 4. Removing from paragraph (f) ''Board of Service Contract Appeals'' and adding ''Administrative Review Board'' in its place.

■ The revised text reads as follows:

52.222–41 Service Contract Act of 1965.

* * * * *

SERVICE CONTRACT ACT OF 1965 ''(Nov 2007)''

(a) *Definitions.* As used in this clause—

Act means the Service Contract Act of 1965 (41 U.S.C. 351, *et seq.*)

Contractor when this clause is used in any subcontract, shall be deemed to refer to the subcontractor, except in the term ''Government Prime Contractor.''

* * * * *

■ 23. Revise section 52.222–48 to read as follows:

52.222–48 Exemption from Application of the Service Contract Act to Contracts for Maintenance, Calibration, or Repair of Certain Equipment Certification.

As prescribed in 22.1006(e)(1), insert the following provision:

EXEMPTION FROM APPLICATION OF THE SERVICE CONTRACT ACT TO CONTRACTS FOR MAINTENANCE, CALIBRATION, OR REPAIR OF CERTAIN EQUIPMENT CERTIFICATION ''(Nov 2007)''

(a) The offeror shall check the following certification:

CERTIFICATION

The offeror □ does □ does not certify that—

(1) The items of equipment to be serviced under this contract are used regularly for other than Government purposes, and are sold or traded by the offeror in substantial quantities to the general public in the course of normal business operations;

(2) The services will be furnished at prices which are, or are based on, established catalog or market prices for the maintenance, calibration, or repair of equipment.

(i) An ''established catalog price'' is a price included in a catalog, price list, schedule, or other form that is regularly maintained by the manufacturer or the offeror, is either published or otherwise available for inspection by customers, and states prices at which sales currently, or were last, made to a significant number of buyers constituting the general public.

(ii) An ''established market price'' is a current price, established in the usual course of trade between buyers and sellers free to bargain, which can be substantiated from sources independent of the manufacturer or offeror; and

(3) The compensation (wage and fringe benefits) plan for all service employees performing work under the contract are the same as that used for these employees and equivalent employees servicing the same equipment of commercial customers.

(b) Certification by the offeror as to its compliance with respect to the contract also constitutes its certification as to compliance by its subcontractor if it subcontracts out the exempt services. If the offeror certifies to the conditions in paragraph (a) of this provision, and the Contracting Officer determines in accordance with FAR 22.1003–4(c)(3) that the Service Contract Act—

(1) Will not apply to this offeror, then the Service Contract Act of 1965 clause in this solicitation will not be included in any resultant contract to this offeror; or

(2) Will apply to this offeror, then the clause at 52.222–51, Exemption from Application of the Service Contract Act to Contracts for Maintenance, Calibration, or Repair of Certain Equipment—Requirements, in this solicitation will not be included in any resultant contract awarded to this offeror, and the offeror may be provided an opportunity to submit a new offer on that basis.

(c) If the offeror does not certify to the conditions in paragraph (a) of this provision—

(1) The clause in this solicitation at 52.222–51, Exemption from Application of the Service Contract Act to Contracts for Maintenance, Calibration, or Repair of Certain Equipment—Requirements, will not be included in any resultant contract awarded to this offeror; and

(2) The offeror shall notify the Contracting Officer as soon as possible, if the Contracting Officer did not attach a Service Contract Act wage determination to the solicitation.

(d) The Contracting Officer may not make an award to the offeror, if the offeror fails to execute the certification in paragraph (a) of this provision or to contact the Contracting Officer as required in paragraph (c) of this provision.

(End of provision)

■ 24. Add sections 52.222–51, 52.222–52, and 52.222–53 to read as follows:

52.222–51 Exemption from Application of the Service Contract Act to Contracts for Maintenance, Calibration, or Repair of Certain Equipment—Requirements.

As prescribed in 22.1006(e)(2), insert the following clause:

EXEMPTION FROM APPLICATION OF THE SERVICE CONTRACT ACT TO CONTRACTS FOR MAINTENANCE, CALIBRATION, OR REPAIR OF CERTAIN EQUIPMENT—REQUIREMENTS ''(Nov 2007)''

(a) The items of equipment to be serviced under this contract are used regularly for other than Government purposes, and are sold or traded by the Contractor in substantial quantities to the general public in the course of normal business operations.

(b) The services shall be furnished at prices which are, or are based on, established catalog or market prices for the maintenance, calibration, or repair of equipment.

(1) An ''established catalog price'' is a price included in a catalog, price list, schedule, or other form that is regularly maintained by the manufacturer or the Contractor, is either published or otherwise available for inspection by customers, and states prices at which sales currently, or were last, made to a significant number of buyers constituting the general public.

(2) An ''established market price'' is a current price, established in the usual course of trade between buyers and sellers free to bargain, which can be substantiated from sources independent of the manufacturer or Contractor.

(c) The compensation (wage and fringe benefits) plan for all service employees performing work under the contract shall be the same as that used for these employees and for equivalent employees servicing the same equipment of commercial customers.

(d) The Contractor is responsible for compliance with all the conditions of this exemption by its subcontractors. The Contractor shall determine the applicability of this exemption to any subcontract on or before subcontract award. In making a judgment that the exemption applies, the Contractor shall consider all factors and make an affirmative determination that all of the conditions in paragraphs (a) through (c) of this clause will be met.

(e) If the Department of Labor determines that any conditions for exemption in paragraphs (a) through (c) of this clause have not been met, the exemption shall be deemed inapplicable, and the contract shall become subject to the Service Contract Act. In such case, the procedures at 29 CFR 4.123(e)(1)(iv) and 29 CFR 4.5(c) will be followed.

(f) The Contractor shall include the substance of this clause, including this paragraph (f), in subcontracts for exempt services under this contract.

(End of clause)

52.222–52 Exemption from Application of the Service Contract Act to Contracts for Certain Services—Certification.

As prescribed in 22.1006(e)(3), insert the following provision:

EXEMPTION FROM APPLICATION OF THE SERVICE CONTRACT ACT TO CONTRACTS FOR CERTAIN SERVICES—CERTIFICATION ''(Nov 2007)''

(a) The offeror shall check the following certification:

CERTIFICATION

The offeror □ does □ does not certify that—

(1) The services under the contract are offered and sold regularly to non-Governmental customers, and are provided by the offeror (or subcontractor in the case of an exempt subcontract) to the general public in substantial quantities in the course of normal business operations;

(2) The contract services are furnished at prices that are, or are based on, established catalog or market prices. An ''established catalog price'' is a price included in a catalog, price list, schedule, or other form that is regularly maintained by the manufacturer or the offeror, is either published or otherwise available for inspection by customers, and states prices at which sales currently, or were last, made to a significant number of buyers constituting the general public. An ''established market price'' is a current price, established in the usual course of ordinary and usual trade between buyers and sellers free to bargain, which can be substantiated from sources independent of the manufacturer or offeror;

(3) Each service employee who will perform the services under the contract will spend only a small portion of his or her time (a monthly average of less than 20 percent of the available hours on an annualized basis, or less than 20 percent of available hours during the contract period if the contract period is less than a month) servicing the Government contract; and

(4) The offeror uses the same compensation (wage and fringe benefits) plan for all service employees performing work under the contract as the offeror uses for these employees and for equivalent employees servicing commercial customers.

(b) Certification by the offeror as to its compliance with respect to the contract also constitutes its certification as to compliance by its subcontractor if it subcontracts out the exempt services. If the offeror certifies to the conditions in paragraph (a) of this provision, and the Contracting Officer determines in accordance with FAR 22.1003–4(d)(3) that the Service Contract Act—

(1) Will not apply to this offeror, then the Service Contract Act of 1965 clause in this solicitation will not be included in any resultant contract to this offeror; or

(2) Will apply to this offeror, then the clause at FAR 52.222–53, Exemption from Application of the Service Contract Act to Contracts for Certain Services—Requirements, in this solicitation will not be included in any resultant contract awarded to this offer, and the offeror may be provided an opportunity to submit a new offer on that basis.

(c) If the offeror does not certify to the conditions in paragraph (a) of this provision—

(1) The clause of this solicitation at 52.222–53, Exemption from Application of the Service Contract Act to Contracts for Certain Services—Requirements, will not be included in any resultant contract to this offeror; and

(2) The offeror shall notify the Contracting Officer as soon as possible if the Contracting Officer did not attach a Service Contract Act wage determination to the solicitation.

(d) The Contracting Officer may not make an award to the offeror, if the offeror fails to execute the certification in paragraph (a) of this provision or to contact the Contracting Officer as required in paragraph (c) of this provision.

(End of provision)

52.222–53 Exemption from Application of the Service Contract Act to Contracts for Certain Services—Requirements.

As prescribed in 22.1006(e)(4), insert the following clause:

EXEMPTION FROM APPLICATION OF THE SERVICE CONTRACT ACT TO CONTRACTS FOR CERTAIN SERVICES—REQUIREMENTS ''(Nov 2007)''

(a) The services under this contract are offered and sold regularly to non-Governmental customers, and are provided by the Contractor to the general public in substantial quantities in the course of normal business operations.

(b) The contract services are furnished at prices that are, or are based on, established catalog or market prices. An ''established catalog price'' is a price included in a catalog, price list, schedule, or other form that is regularly maintained by the manufacturer or the Contractor, is either published or otherwise available for inspection by customers, and states prices at which sales currently, or were last, made to a significant number of buyers constituting the general public. An ''established market price'' is a current price, established in the usual course of ordinary and usual trade between buyers and sellers free to bargain, which can be substantiated from sources independent of the manufacturer or Contractor.

(c) Each service employee who will perform the services under the contract will spend only a small portion of his or her time (a monthly average of less than 20 percent of the available hours on an annualized basis, or less than 20 percent of available hours during the contract period if the contract period is less than a month) servicing the Government contract.

(d) The Contractor uses the same compensation (wage and fringe benefits) plan for all service employees performing work under the contract as the Contractor uses for these employees and for equivalent employees servicing commercial customers.

(e)(1) Any subcontract for these exempt services shall be awarded on a sole-source basis; or

(2) Except for services identified in FAR 22.1003–4(d)(1)(iv), the subcontractor shall be selected for award based on other factors in addition to price or cost with the combination of other factors at least as important as price or cost in selecting the Contractor.

(f) The Contractor is responsible for compliance with all the conditions of this exemption by its subcontractors. The Contractor shall determine in advance, based on the nature of the subcontract requirements and knowledge of the practices of likely subcontractors, that all or nearly all likely subcontractors will meet the conditions in paragraphs (a) through (d) of this clause. If the services are currently being performed under a subcontract, the Contractor shall consider the practices of the existing subcontractor in making a determination regarding the conditions in paragraphs (a) through (d) of this clause. If the Contractor has reason to doubt the validity of the certification, the requirements of the Service Contract Act shall be included in the subcontract.

(g) If the Department of Labor determines that any conditions for exemption at paragraphs (a) through (e) of this clause have not been met, the exemption shall be deemed inapplicable, and the contract shall become subject to the Service Contract Act. In such case, the procedures in at 29 CFR 4.123(e)(2)(iii) and 29 CFR 4.5(c) will be followed.

(h) The Contractor shall include the substance of this clause, including this paragraph (h), in subcontracts for exempt services under this contract.

(End of clause)

[FR Doc. 07–5481 Filed 11–6–07; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 5, 6, 12, 18, 26, and 52

[FAC 2005–21; FAR Case 2006–014; Item VI; Docket 2007–0001, Sequence 7]

RIN 9000–AK54

Federal Acquisition Regulation; FAR Case 2006–014, Local Community Recovery Act of 2006

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Interim rule with request for comments.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a second interim rule amending the Federal Acquisition Regulation (FAR) to implement amendments to the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act). The Local Community Recovery Act of 2006 amended the Stafford Act to authorize set-asides for major disaster or emergency assistance acquisitions to businesses that reside or primarily do business in the geographic area affected by the disaster or emergency. Section 694 of the Department of Homeland Security (DHS) Appropriations Act of 2007, Pub. L 109–295, enacted requirements for transitioning work under existing contracts.

DATES: *Effective Date:* November 7, 2007.

Comment Date: Interested parties should submit written comments to the FAR Secretariat on or before January 7, 2008 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAC 2005–21, FAR case 2006–014, by any of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov*. To search for any document, first select under ''Step 1,'' ''Documents with an Open Comment Period'' and select under ''Optional Step 2,'' ''Federal Acquisition Regulation'' as the agency of choice. Under ''Optional Step 3,'' select ''Rules''. Under ''Optional Step 4,'' from the drop down list, select ''Document Title'' and type the FAR case number ''2006–014''. Click the ''Submit'' button. Please include your name and company name (if any) inside the document. You may also search for any document by clicking on the ''Search for Documents'' tab at the top of the screen. Select from the agency field ''Federal Acquisition Regulation'', and type ''2006–014'' in the ''Document Title'' field. Select the ''Submit'' button.
- Fax: 202–501–4067.
- Mail: General Services Administration, Regulatory Secretariat (VIR), 1800 F Street, NW, Room 4035, ATTN: Laurieann Duarte, Washington, DC 20405.

Instructions: Please submit comments only and cite FAC 2005–21, FAR case 2006–014, in all correspondence related to this case. All comments received will be posted without change to *http://www.regulations.gov*. Please include your name and company name (if any) inside the document.

FOR FURTHER INFORMATION CONTACT Mr. William Clark, Procurement Analyst, at (202) 219–1813, for clarification of content. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755. Please cite FAC 2005–21, FAR case 2006–014.

SUPPLEMENTARY INFORMATION:

A. Background

An interim rule was published August 4, 2006 (71 FR 44546), implementing an amendment to the Stafford Act at 42 U.S.C. 5150. This second interim rule is necessary because of a later statutory amendment to this section. This second rule also addresses the public comments received on the first rule. The Councils request comments on the new language added for this second interim rule, and on whether branch offices should qualify for the set-aside.

Local area set-aside. The first interim rule implemented the 42 U.S.C. 5150 authorization of set-asides for debris clearance, distribution of supplies, reconstruction, and other major disaster or emergency assistance acquisitions to businesses that reside or primarily do business in the geographic area affected by the disaster or emergency. The set-aside may be used together with other authorized set-asides, for example, those in FAR Part 19 for small businesses. The contracting officer determines the geographic area for a specific local area set-aside. The local area set-aside may be the whole of, or some subpart of, the affected area (*e.g.*, one or more counties, including across state lines). However, it may not be outside of the declared major disaster or emergency area.

Residing or doing business primarily in the area. Congress directed that preference be given to ''organizations, firms, and individuals residing or doing business primarily in the area affected by such major disaster or emergency,'' without defining the terms. The Councils consider that an offeror who in the last twelve months had its main operating office in the area, which generated at least half of the offeror's gross revenues and employed at least half of the offeror's permanent employees is, therefore, residing or primarily doing business in the set-aside area.

Branch offices. A public comment questioned the exclusion of branch offices. The Councils believe the intent of Congress was to favor firms in the local area who hire local people. A local branch office is local and hires local people, but the contract would not be restricted to the branch office, because the branch office is not the contracting entity. The Councils invite further comment on this issue.

Transition of work; justification. The recent amendment to 42 U.S.C. 5150 provided: (1) that any expenditure of funds on contracts not awarded to local area organizations, firms or individuals must be justified in writing in the contract file; and (2) that work performed under contracts already in effect be transitioned to local area organizations, firms or individuals, unless the head of the agency determines it is not feasible or practicable.

This second interim rule implements these requirements. The rule emphasizes the wisdom of awarding contracts in advance of an emergency, but not awarding orders so lengthy that they make transition to a local firm awkward.

The rule also gives factors for the agencies to consider prior to determining that a transition is not feasible or practicable. The determination not to transition may be done within a reasonable time. Class determinations and class justifications are allowed.

Competition justification. The first interim rule established a new FAR Subpart 6.6 to clarify the competition justification requirements for Stafford Act acquisitions, but that was to be revisited in the final (now second interim) rule. This second interim rule moves to section 6.207 the section declaring that no competition justification is needed for the local area set-aside. The rest of the subpart has been deleted as unnecessary. No justification for other than full and open competition is needed for the use of an evaluation factor if preference is afforded local firms through such a mechanism. The revised statute

establishes a new justification, but this is not a full and open competition justification, so it is being placed in Part 26, not Part 6.

Definitions. The Councils established a new definition for ''Major disaster or emergency area'' to clarify the role of the Presidential declaration and DHS. DHS has a website where the public and contracting officers can easily find information on recently declared major disasters and recently declared emergencies. This website is added to the definition.

New definitions are also added for ''emergency response contract'' and ''local firm'' to clarify how these concepts are used in the rule.

The term ''designated area'' was not defined in the first interim rule. To avoid confusion, the second interim rule changes it everywhere to more precisely read ''set-aside area.''

A reference to the Small Business Administration (SBA) regulatory definitions of terms used in the ''Restrictions on Subcontracting Outside Disaster or Emergency Area'' clause is added to that clause.

Public comments. No public comments were received in response to the Councils' request in the first rule for views on whether the ''Restrictions on Subcontracting Outside Disaster or Emergency Area'' and the ''Disaster or Emergency Area Representation'' should apply to preferences other than local area set asides; or whether the percentages for general or specialty construction should be raised.

The Councils received nine public comments from four respondents regarding the first interim rule. A summary of the comments and the Councils' responses follows.

1. *Comment:* One respondent recommended that it would be more appropriate to create a new section within FAR Subpart 6.2 (*i.e.*, section 6.207) for consistency with the content of sections 6.205 and 6.206 which describes set-asides as a type of full and open competition after the exclusion of sources rather than to maintain the interim rule FAR Subpart 6.6, Stafford Act Preference for Local Area Contractor. The recommendation also suggested removal of FAR section 6.603 entirely since it implies that implementing the local area preference by using an evaluation factor would qualify as other than full and open competition.

Response: The recommendation was accepted and this second interim rule moves to FAR 6.207 the section declaring that no competition justification is needed for the local area set-aside. The rest of the previous FAR Subpart 6.6 has been removed.

2. *Comment:* One respondent expressed an opinion that the instructions in FAR 12.301(e)(4) for FAR 52.226–4 and 52.226–5 were unnecessary because they are already included in the list of clauses contained in FAR 52.212–5, which is a mandatory clause in commercial item contracts. The respondent also suggested replacing the phrase, ''when setting aside under the Stafford Act'' due to its inconsistency with the language used in the FAR 26.203 prescription. A new FAR subparagraph 12.301(e)(4) was suggested as follows: ''The contracting officer shall insert the provision at 52.226–3, Disaster or Emergency Area Representation, in solicitations for acquisitions that are set-aside for a Disaster or Emergency Area under 26.203(a). This representation is not in the Online Representations and Certifications Application (ORCA) Database.''

Response: The recommendation was partially accepted in that only the provision, not the clauses, is mentioned at FAR subparagraph 12.301(e)(4). Regarding the suggested rewording of FAR subparagraph 12.301(e)(4), the Councils believe the reference to the Stafford Act should be kept, rather than adding a second reference to the ''Disaster or Emergency Area'' in the same sentence.

3. *Comment:* The rule should revise the text at FAR 26.202(a)(2) to state, ''A major disaster or emergency may result in numerous Presidential declarations spanning counties in several contiguous States'' for consistency with 6.602(a) and (b), which refer to both ''disasters'' and ''emergencies.''

Response: The respondent's comment was accepted. The second interim rule contains the correction as recommended.

4. *Comment:* A comment was submitted indicating that 26.203(a) content is inconsistent with FAR 26.203(b). The respondent suggested replacing paragraph (a) with the following, ''The contracting officer shall insert the provision at 52.226–3, Disaster or Emergency Area Representation, in solicitations for acquisitions that are set-aside for a Disaster or Emergency Area under 26.203(a). For commercial items see 12.301(e)(4).''

Response: Partially accepted. The prescription content was revised for consistency with the FAR conventions on prescription format.

5. *Comment:* FAR 52.212–5(b)(27) and (28) did not contain clause dates and ''Aug 2006'' should be inserted into parentheses after the title of each clause.

Response: Accepted, however the dates for both clauses have been revised due to amendment of the clauses.

6. *Comment:* The rule does not discuss whether the phrase, ''offerors residing or doing business primarily in the area affected * * *,'' excludes branch offices of corporations headquartered elsewhere. The comment described a scenario where a branch office could meet all of the tests imposed at FAR 52.226–3(c) and still not have the corporate business meet the adjective test of ''primarily'' doing business within the affected region. The respondent suggested adding the term ''* * * to include branches, divisions, or other sub units of corporation headquartered outside of the affected area * * *'' after ''* * * offerors residing or doing business primarily in the area affected'' in FAR 26.202, 52.226–3, 52.226–4, and 52.226–5.

Response: The recommendation was not adopted for the second interim rule. However, the Councils are seeking further public views on this comment as indicated in the Preamble to this rule.

7. *Comment:* Several respondents commented on the designation of FAR 52.226–4, Notice of Disaster or Emergency, as a ''provision'' vice a ''clause''. Another comment on the prescription for FAR 52.226–4 suggested clarifying the prescription by replacing the phrase, ''* * * that are set-aside for a Disaster or Emergency Area under 26.203(a)'' with ''* * * that contain the provision at 52.226–3.''

Response: The second interim rule changes FAR 52.226–4 to a ''clause.'' The prescription for FAR 52.226–4 and 52.226–5 are revised for consistency with the FAR conventions on prescription format.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The interim rule is not expected to have a significant Economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* This second interim rule continues the set-aside for local businesses in an area affected by a major disaster or emergency to promote economic recovery. The set-aside does not replace the small business set-aside. Both set-asides can apply to an acquisition. The local set-aside will encourage use of

local small businesses. The rule also implements a new requirement that work performed under contracts already in effect be transitioned to local area organizations, firms, or individuals, unless the agency head determines it is not feasible or practicable. The Councils expect that more work will be transitioned to small businesses than away from them. The Government Accountability Office (GAO) report on Hurricane Katrina Small Business Contracts (GAO–07–205) found that businesses in the three states primarily affected by the hurricane received $1.9 billion, which was 18% of the $11.6 billion spent by DHS, GSA, DoD and the Army Corps of Engineers between August 1, 2005, and June 30, 2006. Small businesses received 66% of the $1.9 billion awarded to those local businesses. The Councils believe this shows that small businesses would not be hurt by a local area set-aside.

Therefore, an Initial Regulatory Flexibility Analysis has not been performed. The Councils will consider comments from small entities concerning the affected FAR Parts 5, 6, 12, 18, 26, and 52 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C 601, *et seq.* (FAC 2005–21, FAR case 2006–014), in correspondence.

C. Paperwork Reduction Act

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

D. Determination to Issue an Interim Rule

A determination has been made under the authority of DoD, GSA, and NASA that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary because this interim rule implements the Local Community Recovery Act of 2006 (Pub. L. 109–218), and section 694 of the DHS Appropriations Act of 2007 (DHS Appropriations Act) (Pub. L. 109–295). These statutes amended the Stafford Act at 42 U.S.C. 5150, to authorize set-asides for major disaster or emergency assistance acquisitions to businesses that reside or primarily do business in the geographic area affected by the disaster or emergency. Section 694 of the DHS Appropriations Act enacted requirements for transitioning work under existing contracts to local area organizations, firms, or individuals. This action is necessary to improve the Government's ability to target local businesses and promote local economic recovery in an affected area. The statutes went into effect April 20, 2006, and October 4, 2006, respectively. However, pursuant to Pub. L. 98–577 and FAR 1.501, the Councils will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Parts 5, 6, 12, 18, 26, and 52

Government procurement.

Dated: October 31, 2007.

Al Matera,

Director, Office of Acquisition Policy.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 5, 6, 12, 18, 26, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 5, 6, 12, 18, 26, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 5–PUBLICIZING CONTRACT ACTIONS

■ 2. Amend section 5.207 by revising paragraph (d) to read as follows:

5.207 Preparation and transmittal of synopses.

* * * * *

(d) *Set-asides.* When the proposed acquisition provides for a total or partial small business set-aside, HUBZone small business set-aside, or a service-disabled veteran-owned small business set-aside, the appropriate Numbered Note will be cited. When the proposed acquisition provides for a local area set-aside (see Subpart 26.2) the contracting officer shall identify his set-aside in the synopsis.

* * * * *

PART 6—COMPETITION REQUIREMENTS

■ 3. Add section 6.207 to read as follows:

6.207 Set-asides for local firms during a major disaster or emergency.

(a) To fulfill the statutory requirements relating to 42 U.S.C. 5150, contracting officers may set aside solicitations to allow only offerors residing or doing business primarily in the area affected by such major disaster or emergency to compete (see Subpart 26.2).

(b) No separate justification or determination and findings is required under this part to set aside a contract action. The set-aside area specified by the contracting officer shall be a geographic area within the area identified in a Presidential declaration(s) of major disaster or emergency and any additional geographic areas identified by the Department of Homeland Security.

Subpart 6.6 [Removed]

■ 4. Remove subpart 6.6.

PART 12—ACQUISITION OF COMMERCIAL ITEMS

■ 5. Amend section 12.301 by revising paragraphs (b)(4) and (e)(4) to read as follows:

12.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

* * * * *

(b) * * *

(4) *The clause at 52.212–5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.* This clause incorporates by reference only those clauses required to implement provisions of law or executive orders applicable to the acquisition of commercial items. The contracting officer shall attach this clause to the solicitation and contract and, using the appropriate clause prescriptions, indicate which, if any, of the additional clauses cited in 52.212–5(b) or (c) are applicable to the specific acquisition. Some of the clauses require fill-in; the fill-in language should be inserted as directed by 52.104(d). When cost information is obtained pursuant to Part 15 to establish the reasonableness of prices for commercial items, the contracting officer shall insert the clauses prescribed for this purpose in an addendum to the solicitation and contract. This clause may not be tailored. Use the clause with its Alternate I when the head of the agency has waived the examination of records by the Comptroller General in accordance with 25.1001.

* * * * *

(e) * * *

(4) When setting aside under the Stafford Act (Subpart 26.2), include the provision at 52.226–3, Disaster or Emergency Area Representation, in the solicitation. The representation in this provision is not in the Online Representations and Certifications Application (ORCA) Database.

* * * * *

PART 18—EMERGENCY ACQUISITIONS

■ 6. Amend section 18.203 by:

■ a. Removing paragraph (a);
■ b. Redesignating paragraphs (b) and (c) as (a) and (b) respectively; and
■ c. Revising redesignated paragraph (a) to read as follows:

18.203 Incidents of national significance, emergency declaration, or major disaster declaration.

(a) *Disaster or emergency assistance activities.* Preference will be given to local organizations, firms, and individuals when contracting for major disaster or emergency assistance activities when the President has made a declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act. Preference may take the form of local area set-asides or an evaluation preference. (See 6.207 and Subpart 26.2.)

* * * * *

PART 26—OTHER SOCIOECONOMIC PROGRAMS

■ 7. Revise subpart 26.2 to read as follows:

Subpart 26.2—Disaster or Emergency Assistance Activities

Sec.
26.200 Scope of subpart.
26.201 Definitions.
26.202 Local area preference.
26.202–1 Local area set-aside.
26.202–2 Evaluation preference.
26.203 Transition of work.
26.204 Justification for expenditures to other than local firms.
26.205 Solicitation provision and contract clauses.

26.200 Scope of subpart.

This subpart implements the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5150), which provides a preference for local organizations, firms, and individuals when contracting for major disaster or emergency assistance activities.

26.201 Definitions.

*Emergency response contrac*t means a contract with private entities that supports assistance activities in a major disaster or emergency area, such as debris clearance, distribution of supplies, or reconstruction.

Local firm means a private organization, firm, or individual residing or doing business primarily in a major disaster or emergency area.

Major disaster or emergency area means the area included in the official Presidential declaration(s) and any additional areas identified by the Department of Homeland Security. Major disaster declarations and emergency declarations are published in the **Federal Register** and are available at *http://www.fema.gov/news/disasters.fema*.

26.202 Local area preference.

When awarding emergency response contracts during the term of a major disaster or emergency declaration by the President of the United States under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C.5121, et seq.), preference shall be given, to the extent feasible and practicable, to local firms. Preference may be given through a local area set-aside or an evaluation preference.

26.202–1 Local area set-aside.

The contracting officer may set aside solicitations to allow only local firms within a specific geographic area to compete (see 6.207).

(a) The contracting officer, in consultation with the requirements office, shall define the specific geographic area for the local set-aside.

(b) A major disaster or emergency area may span counties in several contiguous States. The set-aside area need not include all the counties in the declared disaster/emergency area(s), but cannot go outside it.

(c) The contracting officer shall also determine whether a local area set-aside should be further restricted to small business concerns in the set-aside area (see Part 19).

26.202–2 Evaluation preference.

The contracting officer may use an evaluation preference, when authorized in agency regulations.

26.203 Transition of work.

(a) In anticipation of potential emergency response requirements, agencies involved in response planning should consider awarding emergency response contracts before a major disaster or emergency occurs to ensure immediate response and relief. These contracts should be structured to respond to immediate emergency response needs, and should not be structured in any way that may inhibit the transition of emergency response work to local firms (*e.g.*, unnecessarily broad scopes of work or long periods of performance).

(b) 42 U.S.C. 5150(b)(2) requires that agencies performing response, relief, and reconstruction activities transition to local firms any work performed under contracts in effect on the date on which the President declares a major disaster or emergency, unless the head of such agency determines in writing that it is not feasible or practicable. This determination may be made on an individual contract or class basis. The written determination shall be prepared within a reasonable time given the circumstances of the emergency.

(c) In effecting the transition, agencies are not required to terminate or renegotiate existing contracts. Agencies should transition the work at the earliest practical opportunity after consideration of the following:

(1) The potential duration of the disaster or emergency.

(2) The severity of the disaster or emergency.

(3) The scope and structure of the existing contract, including its period of performance and the milestone(s) at which a transition is reasonable (*e.g.*, before exercising an option).

(4) The potential impact of a transition, including safety, national defense, and mobilization.

(5) The expected availability of qualified local offerors who can provide the products or services at a reasonable price.

(d) The agency shall transition the work to local firms using the local area set-aside identified in 26.202–1.

26.204 Justification for expenditures to other than local firms.

(a) 42 U.S.C. 5150(b)(1) requires that, subsequent to any Presidential declaration of a major disaster or emergency, any expenditure of Federal funds, under an emergency response contract not awarded to a local firm, must be justified in writing in the contract file. The justification should include consideration for the scope of the major disaster or emergency and the immediate requirements or needs of supplies and services to ensure life is protected, victims are cared for, and property is protected.

(b) The justification may be made on an individual or class basis. The contracting officer approves the justification.

26.205 Solicitation provision and contract clauses.

(a) The contracting officer shall insert the provision at 52.226–3, Disaster or Emergency Area Representation, in solicitations involving the local area set-aside. For commercial items, see 12.301(e)(4).

(b) The contracting officer shall insert the clause at 52.226–4, Notice of Disaster or Emergency Area Set-aside in solicitations and contracts involving local area set-asides.

(c) The contracting officer shall insert the clause at 52.226–5, Restrictions on Subcontracting Outside Disaster or

Emergency Area, in all solicitations and contracts that involve local area set-asides.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 8. Revise section 52.212–5 in clause heading and paragraphs (b)(30) and (b)(31) to read as follows:

52.212–5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

* * * * *

CONTRACT TERMS AND CONDITIONS REQUIRED TO IMPLEMENT STATUTES OR EXECUTIVE ORDERS—COMMERCIAL ITEMS (Nov 2007)

* * * * *

(b) * * *

____ (30) 52.226–4, Notice of Disaster or Emergency Area Set-Aside (Nov 2007) (42 U.S.C. 5150).

____ (31) 52.226–5, Restrictions on Subcontracting Outside Disaster or Emergency Area (Nov 2007) (42 U.S.C. 5150).

* * * * *

■ 9. Revise section 52.226–3 to read as follows:

52.226—3 Disaster or Emergency Area Representation.

As prescribed in 26.205(a), insert the following provision:

DISASTER OR EMERGENCY AREA REPRESENTATION (Nov 2007)

(a) *Set-aside area.* The area covered in this contract is: _____ [*Contracting Officer to fill in with definite geographic boundaries.*]

(b) *Representations.* The offeror represents that it _____does _____ does not reside or primarily do business in the set-aside area.

(c) An offeror is considered to be residing or primarily doing business in the set-aside area if, during the last twelve months—

(1) The offeror had its main operating office in the area; and

(2) That office generated at least half of the offeror's gross revenues and employed at least half of the offeror's permanent employees.

(d) If the offeror does not meet the criteria in paragraph (c) of this provision, factors to be considered in determining whether an offeror resides or primarily does business in the set-aside area include—

(1) Physical location(s) of the offeror's permanent office(s) and date any office in the set-aside area(s) was established;

(2) Current state licenses;

(3) Record of past work in the set-aside area(s) (*e.g.*, how much and for how long);

(4) Contractual history the offeror has had with subcontractors and/or suppliers in the set-aside area;

(5) Percentage of the offeror's gross revenues attributable to work performed in the set-aside area;

(6) Number of permanent employees the offeror employs in the set-aside area;

(7) Membership in local and state organizations in the set-aside area; and

(8) Other evidence that establishes the offeror resides or primarily does business in the set-aside area. For example, sole proprietorships may submit utility bills and bank statements.

(e) If the offeror represents it resides or primarily does business in the set-aside area, the offeror shall furnish documentation to support its representation if requested by the Contracting Officer. The solicitation may require the offeror to submit with its offer documentation to support the representation.

(End of provision)

■ 10. Revise section 52.226–4 to read as follows:

52.226—4 Notice of Disaster or Emergency Area Set-Aside.

As prescribed in 26.205(b), insert the following clause:

NOTICE OF DISASTER OR EMERGENCY AREA SET-ASIDE (Nov 2007)

(a) *Set-aside area.* Offers are solicited only from businesses residing or primarily doing business in _____ [*Contracting Officer to fill in with definite geographic boundaries.*] Offers received from other businesses shall not be considered.

(b) This set-aside is in addition to any small business set-aside contained in this contract.

(End of clause)

■ 11. Revise section 52.226–5 to read as follows:

52.226—5 Restrictions on Subcontracting Outside Disaster or Emergency Area.

As prescribed in 26.205(c), insert the following clause:

RESTRICTIONS ON SUBCONTRACTING OUTSIDE DISASTER OR EMERGENCY AREA (Nov 2007)

(a) *Definitions.* The definitions of the following terms used in this clause are found in the Small Business Administration regulations at 13 CFR 125.6(e): cost of the contract, cost of contract performance incurred for personnel, cost of manufacturing, cost of materials, personnel, and subcontracting.

(b) The Contractor agrees that in performance of the contract in the case of a contract for—

(1) *Services (except construction).* At least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the Contractor or employees of other businesses residing or primarily doing business in the clause at FAR 52.226—4, Notice of Disaster or Emergency Area Set-Aside;

(2) *Supplies (other than procurement from a nonmanufacturer of such supplies).* The Contractor or employees of other businesses residing or primarily doing business in the set-aside area shall perform work for at least 50 percent of the cost of manufacturing the supplies, not including the cost of materials;

(3) *General construction.* The Contractor will perform at least 15 percent of the cost of the contract, not including the cost of materials, with its own employees or employees of other businesses residing or primarily doing business in the set-aside area; or

(4) *Construction by special trade Contractors.* The Contractor will perform at least 25 percent of the cost of the contract, not including the cost of materials, with its own employees or employees of other businesses residing or primarily doing business in the set-aside area.

(End of clause)

[FR Doc. 07–5482 Filed 11–6–07; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 22

[FAC 2005–21; FAR Case 2007–001; Item VII; Docket 2007–0001; Sequence 9]

RIN 9000–AK81

Federal Acquisition Regulation; FAR Case 2007–001, Labor Standards for Contracts Containing Construction Requirements—Contract Pricing Method References

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to revise references to published pricing sources available to the contracting officer. The revision will

provide greater flexibilities for contracting officers when selecting sources of pricing data.

DATES: *Effective Date*: December 7, 2007.

FOR FURTHER INFORMATION CONTACT: Mr. Ernest Woodson, Procurement Analyst, at (202) 501–3775 for clarification of content. The TTY Federal Relay Number for further information is 1–800–877–8973. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755. Please cite FAC 2005–21, FAR case 2007–001.

SUPPLEMENTARY INFORMATION:

A. Background

FAR 22.404–12(c)(2) allows the contracting officer to include in the contract a separately specified pricing method that permits an adjustment to the contract price or contract labor unit price at the exercise of each option to extend the term of the contract. References to published pricing sources are included to assist the contracting officer in identifying pricing data to support the pricing method used to calculate the contract pricing adjustment. This final rule revises the language at FAR 22.404–12(c)(2) that references published pricing sources available to the contracting officer. The FAR currently references a single commercial product and the intent of this change is to not show favor to any commercial product. The revised language deletes the specified product and allows the contracting officer to choose any commercial product.

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 Regulatory Flexibility Act does not apply to this rule. This final rule does not constitute a significant FAR revision within the meaning of FAR 1.501 and Public Law 98–577, and publication for public comments is not required. However, the Councils will consider comments from small entities concerning the affected FAR Part 22 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.* (FAC 2005–21, FAR case 2007–001), in correspondence.

C. Paperwork Reduction Act

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

List of Subjects in 48 CFR Part 22

Government procurement.

Dated: October 31, 2007.

Al Matera,

Director, Office of Acquisition Policy.

■ Therefore, DoD, GSA, and NASA amend 48 CFR part 22 as set forth below:

PART 22—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

■ 1. The authority citation for 48 CFR part 22 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

■ 2. Amend section 22.404–12 by revising the third sentence of paragraph (c)(2) to read as follows:

22.404–12 Labor standards for contracts containing construction requirements and option provisions that extend the term of the contract.

* * * * *

(c) * * *

(2) * * * An example of a contract pricing method that the contracting officer might separately specify is incorporation in the solicitation and resulting contract of the pricing data from an annually published unit pricing book (*e.g.*, the U.S. Army Computer-Aided Cost Estimating System or similar commercial product), which is multiplied in the contract by a factor proposed by the contractor (*e.g.*, .95 or 1.1). * * *

* * * * * *

[FR Doc. 07–5483 Filed 11–6–07; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1, 25, 52, and 53

[FAC 2005–21; Item VIII; Docket FAR–2007–0003; Sequence 3]

Federal Acquisition Regulation; Technical Amendments

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: This document makes amendments to the Federal Acquisition Regulation (FAR) in order to make editorial changes.

DATES: *Effective Date*: November 7, 2007.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC, 20405, (202) 501–4755, for information pertaining to status or publication schedules. Please cite FAC 2005–21, Technical Amendments.

List of Subjects in 48 CFR Parts 1, 25, 52, and 53

Government procurement.

Dated: October 31, 2007.

Al Matera,

Director, Office of Acquisition Policy.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 1, 25, 52, and 53 as set forth below:

■ 1. The authority citation for 48 CFR parts 1, 25, 52, and 53 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

1.106 [Amended]

■ 2. Amend section 1.106 by removing FAR Segments 52.210–8 with OMB Control Number ''9000–0018'', 52.210–9 with OMB Control Number ''9000–0016'', 52.210–10 with OMB Control Number ''9000–0017'', and 52.212–1 and 52.212–2 with OMB Control Number ''9000–0043''; and adding, in numerical order, FAR Segments 52.211–8 and 52.211–9 with OMB Control Number ''9000–0043''.

PART 25—FOREIGN ACQUISITION

25.003 [Amended]

■ 3. Amend section 25.003 in the definition ''Caribbean Basin country end product'' by removing from paragraph (1)(ii)(B) ''*http://www.customs.ustreas.gov/impoexpo/impoexpo.htm*'' and adding ''*http://www.usitc.gov/tata/hts/*'' in its place.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

52.212–5 [Amended]

■ 4. Amend section 52.212–5 by—

■ a. Revising date of the clause to read ''(Nov 2007)'';

■ b. Removing from paragraph (b)(8)(i) ''(Sep 2007)'' and adding ''(Nov 2007)'' in its place; and

■ c. Removing from paragraph (b)(28) ''(Aug 2007)'' and adding ''(Nov 2007)'' in its place.

■ 5. Amend section 52.219–9 by revising the date of the clause and paragraph (d)(1) to read as follows:

52.219–9 Small Business Subcontracting Plan.

* * * * *

SMALL BUSINESS SUBCONTRACTING PLAN (Nov 2007)

* * * * *

(d) * * *

(1) Goals, expressed in terms of percentages of total planned subcontracting dollars, for the use of small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns as subcontractors. The offeror shall include all subcontracts that contribute to contract performance, and may include a proportionate share of products and services that are normally allocated as indirect costs. In accordance with 43 U.S.C. 1626:

* * * * *

52.225–5 [Amended]

■ 6. Amend section 52.225–5 by revising date of the clause to read ''(Nov 2007)''; and in paragraph (a) in the definition ''Caribbean Basin country end product'' by removing from paragraph (1)(ii)(B) ''*http://www.customs.ustreas.gov/impoexpo/impoexpo.htm*'' and adding ''*http://www.usitc.gov/tata/hts/*'' in its place.

52.225–17 [Amended]

■ 7. Amend section 52.225–17 by removing from the introductory text ''25.1103(d)'', and adding ''25.1103(c)'' in its place.

PART 53—FORMS

53.213 [Amended]

■ 8. Amend section 53.213 by removing from paragraph (f) ''OF 347 (Rev. 3/2005)'' and ''OF 348 (Rev. 10/83 Ed.)'' and adding ''OF 347 (Rev. 4/06)'' and ''OF 348 (Rev. 4/06)'' in its place, respectively.

■ 9. Revise section 53.302–347 to read as follows:

53.302–347 Order for Supplies or Services.

ORDER FOR SUPPLIES OR SERVICES

PAGE OF PAGES

IMPORTANT: Mark all packages and papers with contract and/or order numbers.

1. DATE OF ORDER	2. CONTRACT NO. *(If any)*
3. ORDER NO.	4. REQUISITION/REFERENCE NO.
5. ISSUING OFFICE *(Address correspondence to)*	
7. TO:	
a. NAME OF CONTRACTOR	
b. COMPANY NAME	
c. STREET ADDRESS	
d. CITY / e. STATE / f. ZIP CODE	
9. ACCOUNTING AND APPROPRIATION DATA	

6. SHIP TO:

a. NAME OF CONSIGNEE

b. STREET ADDRESS

c. CITY / d. STATE / e. ZIP CODE

f. SHIP VIA

8. TYPE OF ORDER

☐ a. PURCHASE

REFERENCE YOUR: _____

Please furnish the following on the terms and conditions specified on both sides of this order and on the attached sheet, if any, including delivery as indicated.

☐ b. DELIVERY -- Except for billing instructions on the reverse, this delivery order is subject to instructions contained on this side only of this form and is issued subject to the terms and conditions of the above-numbered contract.

10. REQUISITIONING OFFICE

11. BUSINESS CLASSIFICATION *(Check appropriate box(es))*

☐ a. SMALL ☐ b. OTHER THAN SMALL ☐ c. DISADVANTAGED ☐ g. SERVICE-DISABLED VETERAN-OWNED

☐ d. WOMEN-OWNED ☐ e. HUBZone ☐ f. EMERGING SMALL BUSINESS

12. F.O.B. POINT

13. PLACE OF		14. GOVERNMENT B/L NO.	15. DELIVER TO F.O.B. POINT ON OR BEFORE *(Date)*	16. DISCOUNT TERMS
a. INSPECTION	b. ACCEPTANCE			

17. SCHEDULE *(See reverse for Rejections)*

ITEM NO. (a)	SUPPLIES OR SERVICES (b)	QUANTITY ORDERED (c)	UNIT (d)	UNIT PRICE (e)	AMOUNT (f)	QUANTITY ACCEPTED (g)

SEE BILLING INSTRUCTIONS ON REVERSE	18. SHIPPING POINT	19. GROSS SHIPPING WEIGHT	20. INVOICE NO.	17(h) TOT *(Cont. pages)*
	21. MAIL INVOICE TO: a. NAME			
	b. STREET ADDRESS *(or P.O. Box)*			17(i) GRAND TOTAL
	c. CITY	d. STATE	e. ZIP CODE	

22. UNITED STATES OF AMERICA BY *(Signature)*

23. NAME *(Typed)*

TITLE: CONTRACTING/ORDERING OFFICER

AUTHORIZED FOR LOCAL REPRODUCTION
PREVIOUS EDITION NOT USABLE

OPTIONAL FORM 347 (REV. 4/2006)
Prescribed by GSA/FAR 48 CFR 53.213(f)

SUPPLEMENTAL INVOICING INFORMATION

If desired, this order (or a copy thereof) may be used by the Contractor as the Contractor's invoice, instead of a separate invoice, provided the following statement, (signed and dated) is on (or attached to) the order: "Payment is requested in the amount of $_____. No other invoice will be submitted." However, if the Contractor wishes to submit an invoice, the following information must be provided: contract number (if any), order number, item number(s), description of supplies or service, sizes, quantities, unit prices, and extended totals. Prepaid shipping costs will be indicated as a separate item on the invoice. Where shipping costs exceed $10 (except for parcel post), the billing must be supported by a bill of lading or receipt. When several orders are invoiced to an ordering activity during the same billing period, consolidated periodic billings are encouraged.

RECEIVING REPORT

Quantity in the "Quantity Accepted" column on the face of this order has been: ☐ inspected, ☐ accepted, ☐ received by me and conforms to contract. Items listed below have been rejected for the reasons indicated.

SHIPMENT NUMBER	PARTIAL		DATE RECEIVED	SIGNATURE OF AUTHORIZED U.S. GOV'T REP.	DATE
	FINAL				
TOTAL CONTAINERS		GROSS WEIGHT	RECEIVED AT	TITLE	

REPORT OF REJECTIONS

ITEM NO.	SUPPLIES OR SERVICES	UNIT	QUANTITY REJECTED	REASON FOR REJECTION

OPTIONAL FORM 347 (REV. 4/2006) **BACK**

■ 10. Revise section 53.302–348 to read as follows:

53.302–348 Order for Supplies or Services Schedule—Continuation.

BILLING CODE 6820–EP–S

ORDER FOR SUPPLIES OR SERVICES SCHEDULE - CONTINUATION	PAGE NO.

IMPORTANT: Mark all packages and papers with contract and/or order numbers.

DATE OF ORDER	CONTRACT NO.	ORDER NO.

ITEM NO. (a)	SUPPLIES OR SERVICES (b)	QUANTITY ORDERED (c)	UNIT (d)	UNIT PRICE (e)	AMOUNT (f)	QUANTITY ACCEPTED (g)
	TOTAL CARRIED FORWARD TO 1ST PAGE (ITEM 17h))					

AUTHORIZED FOR LOCAL REPRODUCTION
PREVIOUS EDITION NOT USABLE

OPTIONAL FORM 348 REV. (4/2006)
Prescribed by GSA - FAR (48 CFR) 53.213(f)

[FR Doc. 07–5484 Filed 11–6–07; 8:45 am]

BILLING CODE 6820–EP–C

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[Docket FAR—2007—0002, Sequence 6]

Federal Acquisition Regulation; Federal Acquisition Circular 2005–21; Small Entity Compliance Guide

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Small Entity Compliance Guide.

SUMMARY: This document is issued under the joint authority of the Secretary of Defense, the Administrator of General Services and the Administrator of the National Aeronautics and Space Administration. This *Small Entity Compliance Guide* has been prepared in accordance with Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. It consists of a summary of rules appearing in Federal Acquisition Circular (FAC) 2005–21 which amend the FAR. An asterisk (*) next to a rule indicates that a regulatory flexibility analysis has been prepared. Interested parties may obtain further information regarding these rules by referring to FAC 2005–21 which precedes this document. These documents are also available via the Internet at *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT Laurieann Duarte, FAR Secretariat, (202) 501-4225. For clarification of content, contact the analyst whose name appears in the table below.

LIST OF RULES IN FAC 2005–21

Item	Subject	FAR case	Analyst
I	SAFETY Act: Implementation of DHS Regulations (Interim)	2006–023	Loeb.
II	Biobased Products Preference Program	2004–032	Clark.
III	FAR Part 27 Rewrite in Plain Language	1999–402	Woodson.
IV	Federal Computer Network (FACNET) Architecture	2006–015	Woodson.
*V	Exemption of Certain Service Contracts from the Service Contract Act (SCA) (interim)	2001–004	Woodson.
VI	Local Community Recovery Act of 2006 (Interim)	2006–014	Clark.
VII	Labor Standards for Contracts Containing Construction Requirements-Contract Pricing Method References.	2007–001	Woodson.
VIII	Technical Amendments		

SUPPLEMENTARY INFORMATION:

Summaries for each FAR rule follow. For the actual revisions and/or amendments to these FAR cases, refer to the specific item number and subject set forth in the documents following these item summaries.

FAC 2005–21 amends the FAR as specified below:

Item I—SAFETY Act: Implementation of DHS Regulations (FAR Case 2006–023) (Interim)

This interim rule implements the SAFETY Act in the FAR. The SAFETY Act provides incentives for the development and deployment of anti-terrorism technologies by creating a system of ''risk management'' and a system of ''litigation management.'' The purpose of the SAFETY Act is to ensure that the threat of liability does not deter potential manufacturers or sellers of antiterrorism technologies from developing, deploying, and commercializing technologies that could save lives. Examples of Qualified Anti-Terrorism Technologies (QATT) identified by DHS include—

- Vulnerability assessment and countermeasure and counter-terrorism planning tools;
- First responder interoperability solution;
- Marine traffic management system;
- Security services, guidelines, systems, and standards;
- Vehicle and cargo inspection system;
- X-ray inspection system;
- Trace explosives detection systems and associated support services;
- Maintenance and repair of screening equipment;
- Risk assessment platform;
- Explosive and weapon detection equipment and services;
- Biological detection and filtration systems;
- Passenger screening services;
- Baggage screening services;
- Chemical, biological, or radiological agent release detectors;
- Vehicle barriers;
- First responder equipment; and
- Architectural and engineering ''hardening'' products and services.

Item II—Biobased Products Preference Program(FAR Case 2004–032)

This final rule amends the Federal Acquisition Regulation (FAR) to implement 7 U.S.C. 8102 as enacted by section 9002 of the Farm Security and Rural Investment Act of 2002 (FSRIA), as amended by Sections 205 and 943 of the Energy Policy Act of 2005. Entitled Federal Procurement of Biobased Products, section 7 U.S.C. 8102 requires that a procurement preference be afforded biobased products within items designated by the Secretary of Agriculture. This program applies to acquisitions by Federal agencies using Federal funds for procurement, as well as Government contractors that use USDA-designated items in performance of a Government contract. It will provide increased opportunities for entities, both large and small, that manufacture or sell biobased products, while decreasing opportunities for businesses that manufacture or sell similar non-biobased products or provide components for the manufacturing of such products. A list of USDA-designated items is available at *http://www.usda.gov/biopreferred*.

Item III—FAR Part 27 Rewrite in Plain Language(FAR Case 1999–402)

This final rule clarifies, streamlines, and updates text and clauses on Patents, Data, and Copyrights (FAR Part 27). This effort focused on rewriting the current FAR language into ''plain language,'' with the ultimate goal of making the policies and procedures more understandable to the reader. This rewrite was not intended to include substantive changes to Part 27 policies or procedures, except where necessary to comply with current statutory or regulatory requirements, or to resolve internal inconsistencies within FAR Part 27 and its associated clauses.

Item IV—Federal Computer Network (FACNET) Architecture (FAR Case 2006–015)

This final rule amends the Federal Acquisition Regulation (FAR) to remove FACNET references and provide the opportunity to recognize the evolution of alternative technologies, processes, etc. that Federal agencies are using and will use to satisfy their acquisition needs without removing the use of FACNET for Federal agencies that may use the system. Where necessary in the FAR, the term has been replaced with a more appropriate term that incorporates various electronic data interchange systems. The proposed rule published February 1, 2007 is adopted as final without change.

Item V—Exemption of Certain Service Contracts from the Service Contract Act (SCA) (2001–004) (Interim)

This interim rule amends Federal Acquisition Regulation (FAR) Parts 4, 15, 17, 22, and 52 to implement the U.S. Department of Labor's (DoL) final rule issued January 18, 2001 (66 FR 5327) amending the regulations at 29 CFR part 4 to exempt certain contracts for services meeting specific criteria from coverage under the Service Contract Act. This rule imposes the DoL criteria and does not utilize the term ''commercial services.'' The rule incorporates slight revisions to the current exemption for consistency with the current DoL regulations and clarification of appropriate course of action for the contracting officer.

Item VI—Local Community Recovery Act of 2006 (FAR Case 2006–014) (Interim)

The Civilian Agency Acquisition Council and the DefenseAcquisition Regulations Council (Councils) have agreed on a second interim rule amending the Federal Acquisition Regulation (FAR) to implement legislative amendments to the Stafford Act at 42 U.S.C. 5150.

The first rule implemented The Local Community Recovery Act of 2006, Pub.L. 109–218, which addressed set-asides for major disaster or emergency assistance acquisitions to businesses that reside or primarily do business in the geographic area affected by the disaster or emergency. This local area set-aside could be done along with a small business set-aside.

After the first rule was published for comments in August, 2006, Congress further amended the same area of the Stafford Act in the Department of Homeland Security Appropriations Act, 2007, Public Law 109–295. The amended statute contains requirements for transitioning work to local firms in the geographic area affected by the disaster or emergency and for justifications for expenditures to entities outside the major disaster or emergency area. This second interim rule encompasses all of these changes.

Item VII—Labor Standards for Contracts Containing Construction Requirements-Contract Pricing Method References (FAR Case 2007–001)

This final rule amends the Federal Acquisition Regulation (FAR) to revise references to published pricing sources available to the contracting officer in FAR 22.404–12(c)(2). The rule removes the reference to ''R.S. Means Cost Estimating System'' as a commercial source for pricing data. The revision will provide greater flexibilities for contracting officers when selecting sources of pricing data.

Item VIII—Technical Amendments

Editorial changes are made at FAR 1.106, 25.003, 52.212–5, 52.219-9, 52.225–5, 52.225–17, 53.213, 53.302–347, and 53.302–348 in order to update references.

Dated: October 31, 2007.

Al Matera,

Director, Office of Acquisition Policy.

[FR Doc. 07–5485 Filed 11–6–07; 8:45 am]

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index.html. Some laws may not yet be available.

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