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Contents

Federal Register

Vol. 74, No. 221

Wednesday, November 18, 2009

Agriculture Department
See Food and Nutrition Service

Centers for Disease Control and Prevention
NOTICES
Meetings:
Board of Scientific Counselors, National Institute for Occupational Safety and Health (BSC, NIOSH), 59567–59568

Children and Families Administration
NOTICES
Award One Expansion Supplement Grant, 59560

Coast Guard
RULES
Drawbridge Operation Regulations:
Delaware River, Between Tacony, PA and Palmyra, NJ, 59476–59477
Three Mile Slough, Rio Vista, CA, 59477–59478
PROPOSED RULES
Meetings:
Implementation of 1995 Amendments to International Convention on Standards of Training, etc., 59502–59503
NOTICES
Certificates of Alternative Compliance:
Offshore Supply Vessel GRANT CANDIES, 59580–59581
Offshore Supply Vessel TERREL TIDE, 59580
Meetings:
National Offshore Safety Advisory Committee, 59581–59582

Commerce Department
See Foreign-Trade Zones Board
See International Trade Administration
See National Oceanic and Atmospheric Administration

Defense Department
See Navy Department

Education Department
RULES
Race to the Top Fund, 59688–59834
NOTICES
Applications for New Awards (FY 2010):
Business and International Education Program, 59527–59531
Race to the Top Fund, 59836–59872

Employment and Training Administration
NOTICES
Requests for Certification of Compliance:
Rural Industrialization Loan and Grant Program, 59586–59587

Energy Department
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 59531–59532
Application to Export Electric Energy:
Constellation NewEnergy, Inc., 59532–59533
NorthPoint Energy Solutions Inc., 59532

Environmental Protection Agency
RULES
Carbofuran; Order Denying FMC's Objections and Requests for Hearing, 59608–59686
PROPOSED RULES
Approval and Promulgation of Air Quality Implementation Plans:
California; Motor Vehicle Inspection and Maintenance Program, 59496–59497
Proposed Authorizations of State Hazardous Waste Management Program Revisions:
Oregon, 59497–59501
NOTICES
Meetings:
FIFRA Scientific Advisory Panel, 59533–59536
Pesticide Products:
Registration Applications for a New Active Ingredient Flutriafol, 59536–59537
Pesticide Registrations:
Xylene, 59537–59538

Executive Office of the President
See Presidential Documents

Export–Import Bank
NOTICES
Economic Impact Policy, 59538

Federal Aviation Administration
RULES
Class D and Class E Airspace; Amendment:
New Orleans NAS, LA, 59475
Class E Airspace; Amendment:
Mankato, MN, 59475–59476
PROPOSED RULES
Airworthiness Directives:
Airbus Model A300 B2 and A300 B4 Series Airplanes et al., 59483–59488
Boeing Model 747–100, 747–100B, 747–100B SUD, 747–200B, 747–300, 747SR, and 747SP Series Airplanes, 59488–59491
Bombardier Model CL–600–2B19 (Regional Jet Series 100 and 440) Airplanes, 59480–59483
Proposed Establishment of Class E Airspace:
Bryce Canyon, UT, 59492–59494
Monterey, CA, 59491–59492
NOTICES
Meetings:
RTCA Special Committee 206/EUROCAE WG 76 Plenary; AIS and MET Data Link Services, 59601–59602
Noise Compatibility Program (NCP):
Louisville International Airport, Louisville, KY (SDF), 59602

Federal Communications Commission
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 59538–59539
E911 Location Accuracy, 59539–59540

Federal Deposit Insurance Corporation
NOTICES
Determination of Insufficient Assets to Satisfy Claims Against Financial Institution in Receivership, 59540–59541

Federal Election Commission
NOTICES
Meetings; Sunshine Act, 59541

Federal Maritime Commission
NOTICES
Agreements Filed, 59541
Ocean Transportation Intermediary Licenses:
Applicants, 59541–59542
Reissuance, 59542
Revocations, 59542

Federal Reserve System
NOTICES
Meetings; Sunshine Act, 59541

Federal Trade Commission
NOTICES
Granting of Request for Early Termination of the Waiting Period under the Premerger Notification Rules, 59542–59544

Food and Drug Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 59545–59549, 59553–59560
Filing of Color Additive Petitions:
Sauflon Pharmaceuticals Ltd., 59560
Meetings:
Anti-Infective Drugs Advisory Committee; Admendment, 59570–59571
Risk Evaluation and Mitigation Strategies for Certain Opioid Drugs, 59568–59569
Memorandum of Understanding Between Food and Drug Administration and Waterfront Media, 59571–59578
Request for Comments and for Scientific Data and Information:
Acrylamide in Food, 59579

Food and Nutrition Service
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 59520–59523

Foreign-Trade Zones Board
NOTICES
Applications for Subzone:
Foreign-Trade Zone 119—Minneapolis, MN, 59523–59524
Foreign-Trade Zone 175—Cedar Rapids, IA, 59524

Health and Human Services Department
See Centers for Disease Control and Prevention
See Children and Families Administration
See Food and Drug Administration
See Health Resources and Services Administration
See Indian Health Service
See Indian Health Service
See National Institutes of Health
See Substance Abuse and Mental Health Services Administration
PROPOSED RULES
Total Inward Leakage Requirements for Respirators; Public Meeting, 59501–59502

Health Resources and Services Administration
NOTICES
Meetings:
Advisory Committee on Heritable Disorders in Newborns and Children, 59564

Homeland Security Department
See Coast Guard
See Transportation Security Administration
See U.S. Customs and Border Protection

Housing and Urban Development Department
NOTICES
Funding Availability (NOFA) for HUD's Fiscal Year (FY) 2009 HOPE VI Main Street Grants Program, 59582
HUD's Fiscal Year (FY) 2009 NOFA for Section 202 Supportive Housing for the Elderly:
Technical Correction, 59582
HUD's Fiscal Year (FY) 2009 NOFA for Section 811 Housing for Persons with Disabilities (Section 811 Program):
Technical Correction, 59582–59583

Indian Health Service
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 59544–59545
Loan Repayment Program for Repayment of Health Professions Educational Loans, 59561–59564

Interior Department
See National Park Service

International Trade Administration
NOTICES
Antidumping:
Brass Sheet and Strip from Germany, 59523
Countervailing Duty:
Polyethylene Terephthalate Film, Sheet, and Strip (PET Film) from India, 59526

International Trade Commission
NOTICES
Investigations:
Probe Card Assemblies, 59584–59585

Labor Department
See Employment and Training Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 59585–59586

National Aeronautics and Space Administration
RULES
Patents and Other Intellectual Property Rights, 59476
NOTICES
Meetings:
NASA Advisory Council; Science Committee; Planetary Science Subcommittee, 59587

National Highway Traffic Safety Administration
PROPOSED RULES
Petition for Approval of Alternate Odometer Disclosure Requirements, 59503–59508

National Institutes of Health
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 59557–59558
Government-Owned Inventions:
Availability for Licensing, 59560–59561
Meetings:
Advisory Committee to the Director, NIH, 59571
Center for Scientific Review, 59567, 59569–59570
Eunice Kennedy Shriver National Institute of Child Health and Human Development, 59565
National Cancer Institute, 59569
National Center for Complementary and Alternative Medicine, 59566
National Center for Research Resources, 59565–59566
National Heart, Lung, and Blood Institute, 59569–59570
National Institute of Biomedical Imaging and Bioengineering, 59564–59565
National Institute of Dental and Craniofacial Research, 59565
National Institute of Diabetes and Digestive and Kidney Diseases, 59566
National Institute of Neurological Disorders and Stroke, 59567

National Oceanic and Atmospheric Administration
RULES
Fisheries of the Exclusive Economic Zone Off Alaska:
Reallocation of Halibut in Gulf of Alaska, 59479
PROPOSED RULES
2010 Annual Determination for Sea Turtle Observer Requirement, 59508–59519
NOTICES
Applications:
Endangered Species; File No. 14510, 59525–59526
Marine Mammals; Photography Permit, 59524–59525
Meetings:
Gulf of Mexico Fishery Management Council, 59526–59527

National Park Service
NOTICES
National Register of Historic Places:
Pending Nominations and Related Actions, 59583–59584
Weekly Listing of Historic Properties, 59583

Navy Department
NOTICES
Meetings:
U.S. Naval Academy Board of Visitors, 59527

Nuclear Regulatory Commission
NOTICES
Environmental Impact Statements; Availability, etc.:
Naval Medical Research Center, Bethesda, MD, 59588–59590

Postal Service
PROPOSED RULES
Unpaid and Shortpaid Information Based Indicia Postage Meters and PC Postage Products, 59494–59496

Presidential Documents
PROCLAMATIONS
Special Observances:
America Recycles Day (Proc. 8453), 59473–59474

Securities and Exchange Commission
NOTICES
Self-Regulatory Organizations; Proposed Rule Changes:
Chicago Board Options Exchange, Inc., 59592–59594
New York Stock Exchange LLC, 59596–59599
NYSE Amex LLC, 59599–59601
NYSE Arca, Inc., 59590–59592, 59594–59596

Substance Abuse and Mental Health Services Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 59549–59553

Surface Transportation Board
NOTICES
Trackage Rights Exemption:
Union Pacific Railroad Co., 59602–59603

Thrift Supervision Office
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 59603–59604
Applications:
Northwest Bancshares, Inc., Warren, PA, 59604
Appointment of Receiver:
Home Federal Savings Bank, Detroit, MI, 59604

Transportation Department
See Federal Aviation Administration
See National Highway Traffic Safety Administration
See Surface Transportation Board
See Transportation Security Administration

Transportation Security Administration
PROPOSED RULES
Aircraft Repair Station Security, 59874–59890

Treasury Department
See Thrift Supervision Office
NOTICES
Accessibility to Department of Treasury Conducted Programs and Activities by Individuals with Disabilities:
Public Comments, 59603

U.S. Customs and Border Protection
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 59579–59580
Custom Brokers User Fee Payment (2010), 59581

Veterans Affairs Department
RULES
Servicemembers' Group Life Insurance—Dependent Coverage, 59478–59479
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 59604–59605

Separate Parts In This Issue

Part II
Environmental Protection Agency, 59608–59686

Part III
Education Department, 59688–59834

Part IV
Education Department, 59836–59872

Part V
Homeland Security Department, Transportation Security Administration, 59874–59890

Reader Aids

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

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

CFR PARTS AFFECTED IN THIS ISSUE

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

3 CFR

Proclamations:
8453.....59473

14 CFR
71 (2 documents) 59475
1245.....59476

Proposed Rules:
39 (3 documents) 59480, 59483, 59488
71 (2 documents) 59491, 59492

33 CFR
117 (2 documents) 59476, 59477

34 CFR
Ch. II.....59688

38 CFR
9.....59478

39 CFR

Proposed Rules:
111.....59494

40 CFR
180.....59608

Proposed Rules:
52.....59496
271.....59497

42 CFR

Proposed Rules:
84.....59501

46 CFR

Proposed Rules:
10.....59502
11.....59502
12.....59502
15.....59502

49 CFR

Proposed Rules:
580.....59503
1520.....59874
1554.....59874

50 CFR
679.....59479

Proposed Rules:
222.....59508

Federal Register
Vol. 74, No. 221
Wednesday, November 18, 2009

Presidential Documents

Title 3—

The President

Proclamation 8453 of November 13, 2009

America Recycles Day, 2009

By the President of the United States of America

A Proclamation

Every day, Americans who recycle conserve valuable resources while reducing our Nation's carbon footprint. The reprocessing of materials is fundamental to our future prosperity, as recycling helps preserve our natural environment and sustain our economy. Recycling in the United States is a $236 billion industry, employing 1.1 million workers nationwide in 56,000 businesses. On America Recycles Day, we celebrate the individuals, communities, local governments, and businesses that recycle their waste and continually think of innovative ways to use materials that might otherwise be discarded.

Recycling improves our daily lives and helps to protect our planet for the future. Through recycling, we conserve energy, consume less of our precious natural resources, decrease the amount of waste deposited in landfills, and reduce greenhouse gas emissions. Communities across America also benefit by avoiding the pollution associated with the extraction of raw materials and their processing into finished products.

If we are to manage materials and products on a life-cycle basis, we must responsibly use and reuse our resources. Curbside recycling, electronics collection drives, community composting programs, and other similar methods contribute to the success of our efforts. Our Nation's health and prosperity depends on the productive and sustainable use of our environment. By recommitting ourselves to recycling, we have the opportunity to secure our long-term success and ensure a bright future for the next generation of Americans.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim November 15, 2009, as America Recycles Day. I call upon the people of the United States to observe this day with appropriate programs and activities, and I encourage all Americans to continue their recycling efforts throughout the year.

IN WITNESS WHEREOF, I have hereunto set my hand this thirteenth day of November, in the year of our Lord two thousand nine, and of the Independence of the United States of America the two hundred and thirty-fourth.



[FR Doc. E9–27860
Filed 11–17–09; 8:45 am]
Billing code 3195–W9–P

Rules and Regulations

Federal Register
Vol. 74, No. 221
Wednesday, November 18, 2009

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

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.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2009–0405; Airspace Docket No. 09–ASW–12]

Amendment of Class D and Class E Airspace; New Orleans NAS, LA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; correction.

SUMMARY: This action corrects the geographic coordinates of a final rule that was published in the **Federal Register** October 16, 2009, amending Class D and Class E airspace at New Orleans NAS, Alvin Callender Field, LA.

DATES: Effective December 17, 2009. The Director of the Federal Register approves this incorporation by reference action under 1 CFR Part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

FOR FURTHER INFORMATION CONTACT: Scott Enander, Central Service Center, Operations Support Group, Federal Aviation Administration, Southwest Region, 2601 Meacham Blvd., Fort Worth, TX 76137; telephone (817) 321–7716.

SUPPLEMENTARY INFORMATION:

History

On October 16, 2009, the FAA published in the **Federal Register** a final rule amending Class D and Class E airspace at New Orleans NAS, Alvin Callender Field, LA (74 FR 53161, Docket No. FAA–2009–0405). Subsequent to publication, an error was discovered in the geographic coordinates for the airport's Class D and Class E airspace area. This action corrects that error. Class D and E airspace designations are published in paragraph 5000 and 6002, respectively, of FAA Order 7400.9T signed August 27, 2009, and effective September 15, 2009, which is incorporated by reference in 14 CFR Part 71.1. The Class D and Class E airspace designations listed in this document will be published subsequently in the Order.

Accordingly, pursuant to the authority delegated to me, the geographic coordinates for the Class D and Class E airspace areas at New Orleans NAS, Alvin Callender Field, LA, as published in the **Federal Register** October 16, 2009 (74 FR 53161), (FR Doc. E9–24626; page 53162, column 2), are corrected as follows:

§ 71.1 [Amended]

* * * * *

ASW LA D New Orleans NAS, Alvin Callender Field, LA [Corrected]

By removing ''(Lat. 29°49′31″ N., long. 90°02′06″ W.) and substituting (Lat. 29°49′38″N., long. 90°01′36″ W.)

* * * * *

ASW LA E2 New Orleans NAS, Alvin Callender Field, LA [Corrected]

By removing ''(Lat. 29°49′31″ N., long. 90°02′06″ W.) and substituting (Lat. 29°49′38″ N., long. 90°01′36″ W.)

* * * * *

Issued in Fort Worth, Texas, on October 30, 2009.

Anthony D. Roetzel,

Manager, Operations Support Group, ATO Central Service Center.

[FR Doc. E9–27515 Filed 11–17–09; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2009–0677; Airspace Docket No. 09–AGL–17]

Amendment of Class E Airspace; Mankato, MN

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action amends Class E airspace at Mankato, MN. Additional controlled airspace is necessary to accommodate Area Navigation (RNAV) Standard Instrument Approach Procedures (SIAP) at Mankato Regional Airport, Mankato, MN. The FAA is taking this action to enhance the safety and management of Instrument Flight Rule (IFR) operations at Mankato Regional Airport.

DATES: Effective 0901 UTC, February 11, 2010. The Director of the Federal Register approves this incorporation by reference action under 1 CFR Part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

FOR FURTHER INFORMATION CONTACT: Scott Enander, Central Service Center, Operations Support Group, Federal Aviation Administration, Southwest Region, 2601 Meacham Blvd., Fort Worth, TX 76137; telephone (817) 321–7716.

SUPPLEMENTARY INFORMATION:

History

On September 3, 2009, the FAA published in the **Federal Register** a notice of proposed rulemaking to amend Class E airspace at Mankato, MN, reconfiguring controlled airspace at Mankato Regional Airport, Mankato, MN. (74 FR 45574, Docket No. FAA–2009–0677). Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received. Class E airspace designations are published in paragraph 6005 of FAA Order 7400.9T signed August 27, 2009, and effective September 15, 2009, which is incorporated by reference in 14 CFR Part 71.1. The Class E airspace designations listed in this document will be published subsequently in the Order.

The Rule

This action amends Title 14 Code of Federal Regulations (14 CFR) Part 71 by amending Class E airspace at Mankato, MN, adding additional controlled airspace extending upward from 700 feet above the surface for SIAPs at Mankato Regional Airport, Mankato, MN, for the safety and management of IFR operations.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this regulation: (1) Is not a ''significant regulatory action''

under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the U.S. Code. Subtitle 1, Section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it amends controlled airspace at Mankato Regional Airport, Mankato, MN.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

■ In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR Part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for 14 CFR Part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E. O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR Part 71.1 of the Federal Aviation Administration Order 7400.9T, Airspace Designations and Reporting Points, signed August 27, 2009, and effective September 15, 2009:

Paragraph 6002 Class E Airspace designated as surface areas.

* * * * *

AGL MN E2 Mankato, MN [Amended]

Mankato Regional Airport, MN
(Lat. 44°13′22″ N., long. 93°55′10″ W.)
Mankato VOR/DME
(Lat. 44°13′12″ N., long. 93°54′45″ W.)

Within a 4.2-mile radius of Mankato Regional Airport and within 1.8 miles each side of the Mankato VOR/DME 167° radial extending from the 4.2-mile radius to 7 miles south of the VOR/DME; and within 2.7 miles each side of the Mankato VOR/DME 326° radial extending from the 4.2-mile radius to 7 miles northwest of the VOR/DME. This Class E airspace is effective during the specific dates and times established in advance by a Notice to Airmen. The effective date and time will thereafter be continuously published in the Airport/Facility Directory.

* * * * *

Paragraph 6005 Class E Airspace areas extending upward from 700 feet or more above the surface of the earth.

* * * * *

AGL MN E5 Mankato, MN [Amended]

Mankato Regional Airport, MN
(Lat. 44°13′22″ N., long. 93°55′10″ W.)
Immanuel-St. Joseph's Hospital, MN
Point In Space Coordinates
(Lat. 44°09′48″ N., long. 93°57′40″ W)

That airspace extending upward from 700 feet above the surface within a 7-mile radius of Mankato Regional Airport, and within 2 miles each side of the 047° bearing from the airport extending from the 7-mile radius to 8 miles northeast of the airport; and within 4 miles each side of the 020° bearing from the airport extending from the 7-mile radius to 11 miles north of the airport; and within a 6-mile radius of the point in space serving Immanuel-St. Joseph's Hospital.

* * * * *

Issued in Fort Worth, Texas, on October 30, 2009.

Anthony D. Roetzel,

Manager, Operations Support Group, ATO Central Service Center.

[FR Doc. E9–27514 Filed 11–17–09; 8:45 am]

BILLING CODE 4910–13–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (09–098)]

14 CFR Part 1245

RIN 2700–AD45

Patents and Other Intellectual Property Rights

AGENCY: National Aeronautics and Space Administration.

ACTION: Final rule.

SUMMARY: NASA is amending its regulations by removing a subpart concerning authority and delegations to take certain actions relating to patents and other intellectual property rights. The NASA General Counsel establishes Agency-wide legal policies and procedures in conjunction and coordination with the various Center Chief Counsels and determines best methods and practices for providing legal advice, assistance, and functional guidance inherent in rendering legal services.

DATES: *Effective Date:* November 18, 2009.

FOR FURTHER INFORMATION CONTACT: Robert F. Rotella, Office of the General Counsel, NASA Headquarters, telephone (202) 358–2066, fax (202) 358–4341.

SUPPLEMENTARY INFORMATION: NASA Policy Directive NPD 2000.1F, ''Authority to Take Certain Actions for The General Counsel,'' serves as the delegation from, and governs such delegated authority by, the General Counsel to the various designated Agency counsel to carry out such duties and responsibilities. NPD 2000.1 provides greater implementation details of the delegation as compared to 14 CFR part 1245, subpart 5. Accordingly, 14 CFR part 1245, subpart 5 is superfluous and can be eliminated.

List of Subjects in 14 CFR Part 1245

Authority delegations (Government agencies), inventions and patents.

■ Under the authority, 42 U.S.C. 2473, 14 CFR Part 1245 is amended as follows:

PART 1245—PATENTS AND OTHER INTELLECTUAL PROPERTY RIGHTS

■ 1. The authority citation for Part 1245 continues to read as follows:

Authority: 42 U.S.C. 2457

Subpart 5—[Removed and Reserved]

■ 2. Remove and reserve Subpart 5, consisting of §§ 1245.500 through 1245.504.

Charles F. Bolden, Jr.,

Administrator.

[FR Doc. E9–27687 Filed 11–17–09; 8:45 am]

BILLING CODE 7510–13–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2009–0976]

Drawbridge Operation Regulation; Delaware River, Between Tacony, PA and Palmyra, NJ

AGENCY: Coast Guard, DHS.

ACTION: Notice of temporary deviation from regulations.

SUMMARY: The Commander Fifth Coast Guard District has issued a temporary deviation from the regulations governing the operation of the Tacony-Palmyra Bridge (Route 73), across the Delaware River, mile 107.2 between the townships of Tacony, PA and Palmyra, NJ. The deviation is necessary to facilitate the resurfacing of the bridge roadway. This deviation reduces the vertical clearance of the bridge in the closed position by three feet and restricts operation of the draw span.

DATES: This deviation is effective from 9 p.m. on November 16, 2009, until 5 a.m. on December 23, 2009.

ADDRESSES: Documents mentioned in this preamble as being available in the docket are part of docket USCG–2009–0976 and are available online by going to *http://www.regulations.gov,* inserting USCG–2009–0976 in the ''Keyword'' box and then clicking ''Search.'' They are also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or e-mail Terrance Knowles, Environmental Protection Specialist, Fifth Coast Guard District; telephone 757–398–6587, e-mail *Terrance.A.Knowles@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION: The Burlington County Bridge Commission, who owns and operates this bascule drawbridge, has requested a temporary deviation from the current operating regulations set out in 33 CFR 117.5 and 117.716(b) to facilitate the resurfacing of the bridge roadway.

The Tacony-Palmyra Bridge (Route 73) at mile 107.2, across the Delaware River, between Tacony, PA and Palmyra, NJ, has a vertical clearance in the closed position to vessels of 53 feet above mean high water (MHW). This clearance will be reduced for safety netting by approximately three feet to 50 feet above MHW.

Under this temporary deviation, the resurfacing repairs will restrict the operation of the draw span on the following dates and times:

Closed-to-navigation each day from 9 p.m. to 5 a.m., from 9 p.m. on November 16, 2009 to 5 a.m. on November 24, 2009; and from 9 p.m. on November 30, 2009 to 5 a.m. on December 23, 2009; except vessel openings will be provided with at least four hours advance notice given to the bridge operator at (856) 829–3002 or via marine radio on Channel 13. The drawbridge will open in the event of an emergency. Vessels that can pass under the bridge without a bridge opening may do so at all times. There are no alternate routes for vessels transiting this section of the Delaware River.

The Coast Guard has coordinated the restrictions with the Delaware River Pilots Association and will inform the other users of the waterways through our Local and Broadcast Notices to Mariners of the closure periods for the bridge so that vessels can arrange their transits to minimize any impact caused by the temporary deviation.

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

Dated: November 6, 2009.

Waverly W. Gregory, Jr.,

Chief, Bridge Administration Branch, by direction of the Commander, Fifth Coast Guard District.

[FR Doc. E9–27635 Filed 11–17–09; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2009–0967]

Drawbridge Operation Regulation; Three Mile Slough, Rio Vista, CA

AGENCY: Coast Guard, DHS.

ACTION: Notice of temporary deviation from regulations.

SUMMARY: The Commander, Eleventh Coast Guard District, has issued a temporary deviation from the regulation governing the operation of the California Route 160 Drawbridge across Three Mile Slough, mile 0.1, near Rio Vista, CA. The deviation is necessary to allow Caltrans to conduct drawbridge maintenance. This deviation allows the bridge to remain in the closed-to-navigation position during the maintenance period.

DATES: This deviation is effective from 8 a.m. on November 18, 2009 through 4 p.m. on November 20, 2009.

ADDRESSES: Documents mentioned in this preamble as being available in the docket are part of docket USCG–2009–0967 and are available online by going to *http://www.regulations.gov*, inserting USCG–2009–0967 in the ''Keyword'' box and then clicking ''Search.'' This material is also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or e-mail David H. Sulouff, Chief, Bridge Section, Eleventh Coast Guard District; telephone 510–437–3516, e-mail *David.H.Sulouff@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION: Caltrans requested a time extension to the temporary change to the operation of the California Route 160 Drawbridge, mile 0.1, Three Mile Slough, near Rio Vista, CA. Reference docket USCG–2009–0896. The drawbridge navigation span provides a vertical clearance of 12 feet above Mean High Water in the closed-to-navigation position. The drawbridge opens on signal as required by 33 CFR 117.5. Navigation on the waterway is commercial and recreational.

The drawbridge will be secured in the closed-to-navigation position from 8 a.m. through 4 p.m. Monday through Friday, from November 18, 2009 through November 20, 2009, to allow Caltrans to replace the industrial staircase leading to the control house. At all other times during this period, and on November 11, 2009, Veterans Day Holiday, the drawbridge will open on signal as required by 33 CFR 117.5. This temporary deviation has been coordinated with commercial and recreational waterway users. There is no anticipated levee maintenance during this deviation period. No objections to the proposed temporary deviation were raised.

Vessels that can transit the drawbridge, while in the closed-to-navigation position, may continue to do so at any time.

In the event of an emergency the drawbridge can be opened with 4 hours advance notice.

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

Dated: November 4, 2009.

J.R. Castillo,

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

[FR Doc. E9–27638 Filed 11–17–09; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 9

RIN 2900–AN39

Servicemembers' Group Life Insurance—Dependent Coverage

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs (VA) is amending its Servicemembers' Group Life Insurance (SGLI) regulations in order to implement sec. 402 of the Veterans' Benefits Improvement Act of 2008. Section 402 of the Veterans' Benefits Improvement Act of 2008 extended SGLI dependent coverage to an insured member's stillborn child. This final rule defines the term ''member's stillborn child.''

DATES: *Effective Date:* November 18, 2009.

Applicability Date: VA will apply this rule to deaths occurring on or after October 10, 2008, the date of enactment of the Veterans' Benefits Improvement Act of 2008.

FOR FURTHER INFORMATION CONTACT: Greg Hosmer, Senior Attorney-Advisor, Department of Veterans Affairs Regional Office and Insurance Center (310/290B), P.O. Box 8079, Philadelphia, Pennsylvania 19101, (215) 842–2000, ext 4280. (This is not a toll free number.)

SUPPLEMENTARY INFORMATION: The Veterans' Survivor Benefits Improvements Act of 2001, Public Law 107–14, established a program of family insurance coverage under Servicemembers' Group Life Insurance (SGLI) through which the dependents of SGLI-insured service members could also be insured. Section 4 of Public Law 107–14 amended section 1965 of title 38, United States Code (U.S.C.), which defines various terms for SGLI purposes, to define the term ''insurable dependent'' as a member's spouse or a member's child (as defined in 38 U.S.C. 101(4)(A)). Section 101(4)(A) defines the term ''child'' in part as an unmarried person who: (1) Is under the age of 18 years; (2) became permanently incapable of self support before attaining the age of 18; or (3) after attaining the age of 18 and until completion of education or training (but not after attaining the age of 23) is pursuing a course of instruction at an approved educational institution. Under Public Law 107–14, stillborn children were not eligible for coverage under SGLI as insurable dependents. Effective October 10, 2008, section 402 of the Veterans' Benefits Improvement Act of 2008, Public Law 110–389, amended 38 U.S.C. 1965(10) to include a service member's stillborn child as an insurable dependent under the SGLI program.

We are adding to 38 CFR 9.1 a new paragraph (k) to define the term ''member's stillborn child'' as a member's natural child whose death occurs before expulsion, extraction, or delivery and: (1) Whose fetal weight is 350 grams or more; or (2) if the fetal weight is unknown, whose duration in utero was 20 or more completed weeks of gestation, calculated from the date the last normal menstrual period began to the date of expulsion, extraction, or delivery. Our definition of the term excludes a fetus or child extracted for purposes of an abortion.

Our definition is consistent with Congressional intent that VA issue regulations that define the term ''stillborn child'' consistently with the 1992 recommended reporting requirements of the Model State Vital Statistics Act and Regulations (Model Act) as drafted by the Centers for Disease Control and Prevention's National Center for Health Statistics. S. Rep. No. 110–449, at 41 (2008); Joint Explanatory Statement on Amendment to Senate Bill, S. 3023, as Amended, 154 Cong. Rec. S10,445, S10,452 (daily ed. Oct. 2, 2008). Congress did not intend the term ''stillborn child'' to cover the deaths of fetuses or children at any gestational age or under every circumstance. S. Rep. No. 110–449, at 41. The Model Act recommends a state reporting requirement of fetal deaths involving fetuses weighing 350 grams or more, or if weight is unknown, of 20 completed weeks or more of gestation, calculated from the date the last normal menstrual period began to the date of delivery. Model Act section 15. The Model Act defines ''fetal death'' to mean ''death prior to the complete expulsion or extraction from its mother of a product of human conception, irrespective of the duration of pregnancy and which is not an induced termination of pregnancy. The death is indicated by the fact that[,] after such expulsion or extraction, the fetus does not breathe or show any other evidence of life, such as beating of the heart, pulsation of the umbilical cord, or definite movement of voluntary muscles. Heartbeats are to be distinguished from transient cardiac contractions; respirations are to be distinguished from fleeting respiratory efforts or gasps.'' Model Act section (1)(b). We do not include in § 9.1(k) the portion of the Model Act definition that describes what indicates death because a child who is not stillborn but later dies, is already a dependent covered under SGLI. Therefore, nuanced distinctions are unnecessary. Pursuant to Congressional intent, our definition fully complies with the Model Act.

Administrative Procedure Act

Because this final rule merely interprets a statutory term, it is an interpretive rule exempt from the prior notice-and-comment and delayed-effective-date requirements of 5 U.S.C. 553(b).

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in an expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any one year. This rule would have no such effect on State, local, and tribal governments, or the private sector.

Paperwork Reduction Act

This final rule contains no provisions constituting a collection of information under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

Executive Order 12866

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). The Executive Order classifies as a ''significant regulatory action,'' requiring review by the Office of Management and Budget (OMB) unless OMB waives such review, any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more, or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or

planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

VA has examined the interagency, economic, legal, and policy implications of this final rule and has determined that it is not a significant regulatory action under the Executive Order because it merely interprets existing law and does not raise any novel legal or policy issues and will have little to no effect on the economy.

Regulatory Flexibility Act

The Secretary hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* This final rule will directly affect only individuals and will not directly affect small entities. Therefore, pursuant to 5 U.S.C. 605(b), this final rule is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Catalog of Federal Domestic Assistance

The catalog of Federal Domestic Assistance Program number and the title for this regulation is 64.103, Life Insurance for Veterans.

List of Subjects in 38 CFR Part 9

Life insurance, Military personnel, Veterans.

Approved: October 6, 2009.

John R. Gingrich,

Chief of Staff, Department of Veterans Affairs.

■ For the reasons stated in the preamble, the Department of Veterans Affairs is amending 38 CFR part 9 as follows:

PART 9—SERVICEMEMBERS' GROUP LIFE INSURANCE AND VETERANS' GROUP LIFE INSURANCE

■ 1. The authority citation for part 9 is revised to read as follows:

Authority: 38 U.S.C. 501, 1965–1980A, unless otherwise noted.

■ 2. Section 9.1 is amended by adding paragraph (k) to read as follows:

§ 9.1 Definitions.

* * * * *

(k)(1) The term *member's stillborn child* means a member's natural child—

(i) Whose death occurs before expulsion, extraction, or delivery; and

(ii) Whose—

(A) Fetal weight is 350 grams or more; or

(B) Ff fetal weight is unknown, duration in utero is 20 completed weeks of gestation or more, calculated from the date the last normal menstrual period began to the date of expulsion, extraction, or delivery.

(2) The term does not include any fetus or child extracted for purposes of an abortion.

* * * * *

[FR Doc. E9–27644 Filed 11–17–09; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 09100091344–9056–02]

RIN 0648–XS89

Fisheries of the Exclusive Economic Zone Off Alaska; Reallocation of Halibut in the Gulf of Alaska

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

ACTION: Temporary rule; reallocation.

SUMMARY: NMFS is reallocating the projected unused amount of halibut prohibited species catch (PSC) from rockfish cooperatives in the Central Gulf of Alaska (GOA) Rockfish Pilot Program to vessels using trawl gear in the GOA. This action is necessary to provide the opportunity to vessels using trawl gear to harvest available GOA groundfish total allowable catch (TAC) under existing PSC limits.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), November 15, 2009, through 2400 hrs, A.l.t., December 31, 2009.

FOR FURTHER INFORMATION CONTACT: Steve Whitney, 907–586–7269.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the GOA according to the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The 2009 allocation of halibut PSC to vessels using trawl gear in the GOA is 2,000 metric tons (mt) as established by the final 2009 and 2010 harvest specifications for groundfish in the GOA (74 FR 7333, February 17, 2009). Under § 679.81(c)(1), 170 mt of halibut PSC is allocated to catcher/processor and catcher vessel rockfish cooperatives in the Central GOA. The website at *http://www.alaskafisheries.noaa.gov/sustainablefisheries/goarat/09rppallocations.xls* lists this amount. The remaining 1,830 mt of halibut PSC is allocated to vessels using trawl gear not in a rockfish cooperative.

As of November 9, 2009, the Administrator, Alaska Region, NMFS (Regional Administrator), has determined that rockfish cooperatives in the Central GOA have not used 139 mt of the allocation. Therefore, in accordance with § 679.21(d)(5)(iii)(B)(*1*), NMFS is reallocating 139 mt of halibut PSC from rockfish cooperatives in the Central GOA to the last seasonal apportionment for vessels using trawl gear in the GOA.

Therefore, the harvest specifications for halibut PSC are revised as follows: 31 mt to rockfish cooperatives in the Central GOA and 1,969 mt to vessels using trawl gear.

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the reallocation of projected unused amounts of halibut PSC in the GOA. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of November 9, 2009.

The AA also finds good cause to waive the 30-day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: November 12, 2009

Emily H. Menashes,

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

[FR Doc. E9–27668 Filed 11–13–09; 4:15 pm]

BILLING CODE 3510–22–S

Proposed Rules

Federal Register
Vol. 74, No. 221
Wednesday, November 18, 2009

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

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2009–1068; Directorate Identifier 2009–NM–042–AD]

RIN 2120–AA64

Airworthiness Directives; Bombardier Model CL–600–2B19 (Regional Jet Series 100 & 440) Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for the products listed above that would supersede an existing AD. This proposed AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

The heating capability of several Angle Of Attack (AOA) transducer heating elements removed from in-service aircraft have been found to be below the minimum requirement. Also, it was discovered that a large number of AOA transducers repaired in an approved maintenance facility were not calibrated accurately.

Inaccurate calibration of the AOA transducer and/or degraded AOA transducer heating elements can result in early or late activation of the stall warning, stick shaker and stick pusher by the Stall Protection Computer (SPC).

* * * * *

The unsafe condition is reduced controllability of the airplane. The proposed AD would require actions that are intended to address the unsafe condition described in the MCAI.

DATES: We must receive comments on this proposed AD by January 4, 2010.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–40, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Bombardier, Inc., 400 Côte-Vertu Road West, Dorval, Québec H4S 1Y9, Canada; telephone 514–855–5000; fax 514–855–7401; e-mail *thd.crj@aero.bombardier.com;* Internet *http://www.bombardier.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221 or 425–227–1152.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Operations office 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 Operations 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: Wing Chan, Aerospace Engineer, Systems and Flight Test Branch, ANE–172, FAA, New York Aircraft Certification Office, 1600 Stewart Avenue, Suite 410, Westbury, New York 11590; telephone (516) 228–7311; fax (516) 794–5531.

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–2009–1068; Directorate Identifier 2009–NM–042–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 based on those comments.

We have lengthened the 30-day comment period for proposed ADs that address MCAI originated by aviation authorities of other countries to provide adequate time for interested parties to submit comments. The comment period for these proposed ADs is now typically 45 days, which is consistent with the comment period for domestic transport ADs.

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

On February 5, 2009, we issued AD 2009–04–11, Amendment 39–15817 (74 FR 7789, February 20, 2009). That AD required actions intended to address an unsafe condition on the products listed above.

Note 1 of AD 2009–04–11 stated that we were differing from Canadian Airworthiness Directive CF–2008–35, dated December 22, 2008, by not including or requiring certain actions that have planned compliance times that would allow enough time to provide notice and opportunity for prior public comment on the merits of those actions. We were considering further rulemaking at that time to address the unsafe condition. Since then, we have determined that further rulemaking is necessary and are proposing to mandate a one-time inspection of certain angle of attack (AOA) transducers, replacement of transducers having certain serial numbers, repetitive inspections of the inrush current for certain AOA transducers, and replacement of inaccurately calibrated AOA transducers.

Relevant Service Information

Bombardier has issued Service Bulletin 601R–27–154, dated December 1, 2008. The actions described in this service information are intended to

correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of This Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.

Differences Between This AD and the MCAI or Service Information

We have reviewed the MCAI and related service information and, in general, agree with their substance. But we might have found it necessary to use different words from those in the MCAI to ensure the AD is clear for U.S. operators and is enforceable. In making these changes, we do not intend to differ substantively from the information provided in the MCAI and related service information.

We might also have proposed different actions in this AD from those in the MCAI in order to follow FAA policies. Any such differences are highlighted in a NOTE within the proposed AD.

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 613 products of U.S. registry.

The actions that are required by AD 2009–04–11 and retained in this proposed AD take about 1 work-hour per product, at an average labor rate of $80 per work hour. Based on these figures, the estimated cost of the currently required actions is $80 per product.

We estimate that it would take about 1 work-hour per product to comply with the new basic requirements of this proposed AD. The average labor rate is $80 per work-hour. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $49,040, or $80 per product.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

We prepared a regulatory evaluation of the estimated costs to comply with this proposed AD and placed it in the AD docket.

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. The FAA amends § 39.13 by removing Amendment 39–15817 (74 FR 7789, February 20, 2009) and adding the following new AD:

Bombardier, Inc. (Formerly Canadair): Docket No. FAA–2009–1068; Directorate Identifier 2009–NM–042–AD.

Comments Due Date

(a) We must receive comments by January 4, 2010.

Affected ADs

(b) The proposed AD supersedes AD 2009–04–11, Amendment 39–15817.

Applicability

(c) This AD applies to Bombardier Model CL–600–2B19 (Regional Jet Series 100 & 440) airplanes, serial numbers 7003 and subsequent, certificated in any category, that are equipped with Thales angle of attack (AOA) transducers having part number (P/N) 45150340 or C16258AA.

Subject

(d) Air Transport Association (ATA) of America Code 27: Flight controls.

Reason

(e) The mandatory continued airworthiness information (MCAI) states:

The heating capability of several Angle Of Attack (AOA) transducer heating elements removed from in-service aircraft have been found to be below the minimum requirement. Also, it was discovered that a large number of AOA transducers repaired in an approved maintenance facility were not calibrated accurately.

Inaccurate calibration of the AOA transducer and/or degraded AOA transducer heating elements can result in early or late activation of the stall warning, stick shaker and stick pusher by the Stall Protection Computer (SPC).

This [Canadian] directive mandates a periodic inspection of the inrush current to verify the AOA heating capability and replacement of the inaccurately calibrated AOA transducers.

The unsafe condition is reduced controllability of the airplane. The required actions also include a one-time inspection for certain AOA transducers and replacement of transducers having certain serial numbers.

Restatement of Requirements of AD 2009–04–11, With No Changes

(f) Unless already done, do the following actions:

(1) For airplanes equipped with a transducer having accumulated more than 7,500 total flight hours as of March 9, 2009 (the effective date of AD 2009–04–11): Within 250 flight hours after March 9, 2009, measure the inrush current of both AOA transducers in accordance with Part A of the Accomplishment Instructions of Bombardier Service Bulletin 601R–27–153, Revision A, dated December 16, 2008.

(i) If both AOA transducers are found to have an inrush current of 1.60 amps or more, repeat the measurement thereafter at intervals not to exceed the applicable interval specified in Table 1 of this AD. Do the measurement in accordance with Part A of the Accomplishment Instructions of Bombardier Service Bulletin 601R–27–153, Revision A, dated December 16, 2008.

TABLE 1—REPETITIVE MEASUREMENT INTERVALS

If the last inrush current measurement of the serviceable AOA transducer is—	Then repeat the measurement—
More than or equal to 1.90 amps	Within 2,000 flight hours after the last measurement.
More than or equal to 1.80 amps but less than 1.90 amps	Within 1,500 flight hours after the last measurement.
More than or equal to 1.70 amps but less than 1.80 amps	Within 1,000 flight hours after the last measurement.
More than or equal to 1.60 amps but less than 1.70 amps	Within 500 flight hours after the last measurement.

(ii) If one AOA transducer is found to have an inrush current below 1.60 amps, and the other AOA transducer is found to have an inrush current of 1.60 amps or more: Do the actions required by paragraphs (f)(1)(ii)(A) and (f)(1)(ii)(B) of this AD.

(A) For the AOA transducer having an inrush current of 1.60 amps or more: Repeat the measurement thereafter at intervals not to exceed the applicable interval specified in Table 1 of this AD. Do the measurement in accordance with Part A of the Accomplishment Instructions of Bombardier Service Bulletin 601R–27–153, Revision A, dated December 16, 2008.

(B) For the AOA transducer having an inrush current below 1.60 amps (''degraded'' transducer): Within 1,000 flight hours after March 9, 2009, replace that transducer in accordance with Part C of the Accomplishment Instructions of Bombardier Service Bulletin 601R–27–153, Revision A, dated December 16, 2008. At the applicable time specified in Table 1 of this AD if the degraded transducer was replaced with a serviceable transducer, or within 2,000 flight hours after replacement if the degraded transducer was replaced with a new transducer, do the measurement for that replacement transducer and repeat the measurements thereafter at intervals not to exceed the applicable interval specified in Table 1 of this AD. Do the measurement in accordance with Part A of the Accomplishment Instructions of Bombardier Service Bulletin 601R–27–153, Revision A, dated December 16, 2008.

(iii) If both AOA transducers are found to have an inrush current below 1.60 amps, do the action specified in paragraph (f)(1)(iii)(A) or (f)(1)(iii)(B) of this AD.

(A) Before further flight, replace one of the degraded AOA transducers with a new or serviceable transducer; and replace the other degraded transducer with a new or serviceable transducer within 1,000 flight hours after the measurement required by paragraph (f)(1) of this AD; in accordance with Part C of the Accomplishment Instructions of Bombardier Service Bulletin 601R–27–153, Revision A, dated December 16, 2008. At the applicable time specified in Table 1 of this AD, if the degraded transducer was replaced with a serviceable transducer; or within 2,000 flight hours after replacement if the degraded transducer was replaced with a new transducer: Do the measurement for that replacement transducer and repeat the measurement thereafter at intervals not to exceed the applicable interval specified in Table 1 of this AD. Do the measurements in accordance with Part A of the Accomplishment Instructions of Bombardier Service Bulletin 601R–27–153, Revision A, dated December 16, 2008.

(B) Within 1,000 flight hours after the measurement required by paragraph (f) of this AD, replace both degraded AOA transducers with new or serviceable transducers in accordance with Part C of the Accomplishment Instructions of Bombardier Service Bulletin 601R–27–153, Revision A, dated December 16, 2008. Until the replacement is done, dispatch with two degraded AOA transducers is allowed, provided that the applicable Limitations section of the airplane flight manual (AFM) is revised to include the following statement or a copy of this AD is inserted into the applicable Limitations section of the AFM.

''Dispatch is allowed if:

(a) Operations are not conducted in visible moisture (including standing water and slush) in any form,

(b) Operations are not conducted in known or forecast icing conditions,

(c) Both Ice Detection Systems are operative; and,

(d) Operations are conducted in day VMC conditions only.''

After the replacement has been accomplished, the statement or the copy of this AD may be removed from the AFM. At the applicable time specified in Table 1 of this AD, if the degraded transducer was replaced with a serviceable transducer; or within 2,000 flight hours after replacement with a new transducer: Do the measurement for that replacement transducer and repeat the measurement thereafter at intervals not to exceed the applicable interval specified in Table 1 of this AD. Do the measurement in accordance with Part A of Accomplishment Instructions of Bombardier Service Bulletin 601R–27–153, Revision A, dated December 16, 2008.

(2) If, during any repetitive measurement required by paragraphs (f)(1)(i), (f)(1)(ii), and (f)(1)(iii) of this AD, any AOA transducer is found to have an inrush current below 1.60 amps, before further flight, replace that transducer in accordance with Part C of the Accomplishment Instructions of Bombardier Service Bulletin 601R–27–153, Revision A, dated December 16, 2008. At the applicable time specified in Table 1 of this AD, if the degraded transducer was replaced with a serviceable transducer; or within 2,000 flight hours after replacement if the degraded transducer was replaced with a new transducer: Do the measurement for that replacement transducer as specified in paragraph (f)(1)(ii)(B) of this AD and repeat the measurement thereafter at intervals not to exceed the applicable interval specified in Table 1 of this AD.

(3) Actions done before March 9, 2009, in accordance with Bombardier Service Bulletin 601R–27–153, dated October 17, 2008, are acceptable for compliance with the corresponding requirements of paragraphs (f)(1) and (f)(2) of this AD.

New Requirements of This AD: Actions and Compliance

(g) Unless already done, do the following actions.

(1) For airplanes equipped with a transducer having accumulated 7,500 or fewer flight hours as of March 9, 2009, except transducers that have been measured in accordance with paragraph (f)(1) of this AD: Do the actions specified in paragraph (f)(1) of this AD before the transducer accumulates 7,500 total flight hours, or within 500 flight hours after the effective date of this AD, whichever occurs later.

(2) Within 900 flight hours after the effective date of this AD, inspect AOA transducers having P/N 45150340 or C16258AA to determine the serial numbers.

(i) If the serial number is not identified in paragraph 1.A.(1) of Bombardier Service Bulletin 601R–27–154, dated December 1, 2008, no further action is required by this paragraph.

(ii) If the part number and serial number are identified in one of the tables in paragraph 1.A.(1) of Bombardier Service Bulletin 601R–27–154, dated December 1, 2008, and have the suffix ''A,'' no further action is required by this paragraph.

Note 1: Bombardier Service Bulletin 601R–27–154, dated December 1, 2008, references Thales Avionics Service Bulletins 45150340–31–004 and C16258A–27–002, both dated November 28, 2008, as additional sources of information for part and serial number information.

(iii) If the part number and serial number are identified in a table in paragraph 1.A.(1) of Bombardier Service Bulletin 601R–27–154, dated December 1, 2008, before further flight, replace the AOA transducer with a new or serviceable transducer, in accordance with the Accomplishment Instructions of Bombardier Service Bulletin 601R–27–154, dated December 1, 2008.

(3) As of the effective date of this AD, no person may install a replacement AOA transducer having P/N 45150340 or P/N C16258AA with a serial number identified in paragraph 1.A.(1) of Bombardier Service Bulletin 601R–27–154, dated December 1, 2008, unless the serial number has the suffix ''A.''

FAA AD Differences

Note 2: This AD differs from the MCAI and/or service information as follows: No Differences.

Other FAA AD Provisions

(h) The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, New York Aircraft Certification Office (ACO), ANE–170, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Program Manager, Continuing Operational Safety, FAA, New York ACO, 1600 Stewart Avenue, Suite 410, Westbury, New York 11590; telephone (516) 228–7300; fax (516) 794–5531. Before using any approved AMOC on any airplane to which the AMOC applies, notify your principal maintenance inspector (PMI) or principal avionics inspector (PAI), as appropriate, or lacking a principal inspector, your local Flight Standards District Office. The AMOC approval letter must specifically reference this AD.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(3) *Reporting Requirements:* For any reporting requirement in this AD, under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), the Office of Management and Budget (OMB) has approved the information collection requirements and has assigned OMB Control Number 2120–0056.

Related Information

(i) Refer to MCAI Canadian Airworthiness Directive CF–2008–35, dated December 22, 2008; Bombardier Service Bulletin 601R–27–154, dated December 1, 2008; and Bombardier Service Bulletin 601R–27–153, Revision A, dated December 16, 2008; for related information.

Issued in Renton, Washington, on November 6, 2009.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E9–27625 Filed 11–17–09; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2009–1067; Directorate Identifier 2009–NM–071–AD]

RIN 2120–AA64

Airworthiness Directives; Airbus Model A300 B2 and A300 B4 Series Airplanes; A300 B4–600, B4–600R, and F4–600R Series Airplanes; and Model C4–605R Variant F Airplanes (Collectively Called A300–600 Series Airplanes)

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for the products listed above that would supersede an existing AD. This proposed AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

Following the occurrence of cracks on the MLG [main landing gear] rib 5 RH [right-hand] and LH [left-hand] attachment fitting lower flanges, DGAC [Direction Générale de l'Aviation Civile] France AD 2003–318(B) [parallel to part of FAA AD 2006–12–13] was issued to require repetitive inspections and, as terminating action * * *[.]

Subsequently, new cases of cracks were discovered during scheduled maintenance checks by operators of A300B4 and A300–600 type aeroplanes on which the terminating action * * * [was] embodied. This condition, if not corrected, could affect the structural integrity of those aeroplanes.

* * * * *

The proposed AD would require actions that are intended to address the unsafe condition described in the MCAI.

DATES: We must receive comments on this proposed AD by January 4, 2010.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–40, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Airbus SAS—EAW (Airworthiness Office), 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 44 51; e-mail: *account.airworth-eas@airbus.com;* Internet *http://www.airbus.com*. You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221 or 425–227–1152.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Operations office 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 Operations 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: Dan Rodina, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–2125; fax (425) 227–1149.

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–2009–1067; Directorate Identifier 2009–NM–071–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 based on those comments.

We have lengthened the 30-day comment period for proposed ADs that address MCAI originated by aviation authorities of other countries to provide adequate time for interested parties to submit comments. The comment period for these proposed ADs is now typically 45 days, which is consistent with the comment period for domestic transport ADs.

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

On May 31, 2006, we issued AD 2006–12–13, Amendment 39–14639 (71 FR 33994, June 13, 2006). That AD required actions intended to address an unsafe condition on the products listed above.

Since we issued AD 2006–12–13, the European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European

Community, has issued EASA Airworthiness Directive 2009–0081, dated April 6, 2009 (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

Following the occurrence of cracks on the MLG [main landing gear] rib 5 RH [right-hand] and LH [left-hand] attachment fitting lower flanges, DGAC [Direction Générale de l'Aviation Civile] France AD 2003–318(B) [parallel to part of FAA AD 2006–12–13] was issued to require repetitive inspections and, as terminating action, the embodiment of Airbus Service Bulletins (SB) A300–57–0235 and A300–57–6088 * * *.

Subsequently, new cases of cracks were discovered during scheduled maintenance checks by operators of A300B4 and A300–600 type aeroplanes on which the terminating action SBs were embodied. This condition, if not corrected, could affect the structural integrity of those aeroplanes.

To address and correct this condition, Airbus developed an inspection programme for aeroplanes modified in accordance with SB A300–57–0235 or A300–57–6088. This inspection programme was required to be implemented by DGAC France AD F–2005–113, original issue and later revision 1 [parallel to part of FAA AD 2006–12–13].

A new EASA AD 2008–0111, superseding DGAC France AD F–2005–113R1, was issued to reduce the applicability. For aeroplanes already compliant with DGAC France AD F–2005–113R1, no further action was required.

Since EASA AD 2008–0111 issuance, Airbus reviewed the inspection programmes of SB A300–57A0246 and SB A300–57A6101 to introduce repetitive inspections including a new inspection technique for holes 47 and 54 and to reduce inspections threshold and intervals from 700 Flight Cycles (FC) to 400 FC until a revised terminating action is made available.

Required actions include contacting Airbus for repair instructions, if necessary, and doing the repair. You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

Airbus has issued Mandatory Service Bulletin A300–57A0246, including Appendixes 1 and 2, Revision 03, dated March 11, 2009; and Mandatory Service Bulletin A300–57A6101, including Appendixes 1 and 2, Revision 03, dated March 11, 2009. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

Changes to Existing AD

This proposed AD would retain certain requirements of AD 2006–12–13. Since AD 2006–12–13 was issued, the AD format has been revised, and certain paragraphs have been rearranged. As a result, the corresponding paragraph identifiers have changed in this proposed AD, as listed in the following table:

REVISED PARAGRAPH IDENTIFIERS

Requirement in AD 2006–12–13	Corresponding requirement in this proposed AD
Paragraph (e)	paragraph (f).
Paragraph (f)	paragraph (g).
Paragraph (g)	paragraph (h).
Paragraph (h)	paragraph (i).
Paragraph (i)	paragraph (j).
Paragraph (j)	paragraph (k).
Paragraph (k)	paragraph (l).
Paragraph (l)	paragraph (m).

We have also revised paragraph (i) of this NPRM to clarify the compliance times for airplanes that have not had the modification required by paragraph (i) of this NPRM accomplished before July 18, 2006. We added the phrase, ''Except as required by paragraph (l) of this AD,'' to paragraph (i) of this NPRM. We have determined that this change will neither increase the economic burden on any operator nor increase the scope of the AD.

We have also revised paragraph (o) of this AD to specify that no reporting is required.

FAA's Determination and Requirements of This Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.

Differences Between This AD and the MCAI or Service Information

We have reviewed the MCAI and related service information and, in general, agree with their substance. But we might have found it necessary to use different words from those in the MCAI to ensure the AD is clear for U.S. operators and is enforceable. In making these changes, we do not intend to differ substantively from the information provided in the MCAI and related service information.

We might also have proposed different actions in this AD from those in the MCAI in order to follow FAA policies. Any such differences are highlighted in a NOTE within the proposed AD.

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 155 products of U.S. registry.

The actions that are required by AD 2006–12–13 and retained in this proposed AD take about 76 work-hours per product, at an average labor rate of $80 per work hour. Required parts cost about $10,270 per product. Based on these figures, the estimated cost of the currently required actions is $16,350 per product.

We estimate that it would take about 3 work-hours per product to comply with the new basic requirements of this proposed AD. The average labor rate is $80 per work-hour. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $37,200, or $240 per product.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

3. Will not have a significant economic impact, positive or negative,

on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this proposed AD and placed it in the AD docket.

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. The FAA amends § 39.13 by removing Amendment 39–14639 (71 FR 33994, June 13, 2006) and adding the following new AD:

Airbus: Docket No. FAA–2009–1067; Directorate Identifier 2009–NM–071–AD.

Comments Due Date

(a) We must receive comments by January 4, 2010.

Affected ADs

(b) The proposed AD supersedes AD 2006–12–13, Amendment 39–14639.

Applicability

(c) This AD applies to the airplanes, certificated in any category, identified in paragraph (c)(1) and (c)(2) of this AD; except airplanes on which Airbus Modification 11912 or 11932 has been installed.

(1) Airbus Model A300 B2–1C, B2K–3C, B2–203, B4–2C, B4–103, and B4–203 airplanes.

(2) Airbus Model A300 B4–601, B4–603, B4–620, B4–622, B4–605R, B4–622R, and F4–605R airplanes.

Subject

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

Reason

(e) The mandatory continuing airworthiness information (MCAI) states:

Following the occurrence of cracks on the MLG [main landing gear] rib 5 RH [right-hand] and LH [left-hand] attachment fitting lower flanges, DGAC [Direction Générale de l'Aviation Civile] France AD 2003–318(B) [parallel to part of FAA AD 2006–12–13] was issued to require repetitive inspections and, as terminating action, the embodiment of Airbus Service Bulletins (SB) A300–57–0235 and A300–57–6088 * * *.

Subsequently, new cases of cracks were discovered during scheduled maintenance checks by operators of A300B4 and A300–600 type aeroplanes on which the terminating action SB's were embodied. This condition, if not corrected, could affect the structural integrity of those aeroplanes.

To address and correct this condition, Airbus developed an inspection programme for aeroplanes modified in accordance with SB A300–57–0235 or A300–57–6088. This inspection programme was required to be implemented by DGAC France AD F–2005–113, original issue and later revision 1 [parallel to part of FAA AD 2006–12–13].

A new EASA [European Aviation Safety Agency] AD 2008–0111, superseding DGAC France AD F–2005–113R1, was issued to reduce the applicability. For aeroplanes already compliant with DGAC France AD F–2005–113R1, no further action was required.

Since EASA AD 2008–0111 issuance, Airbus reviewed the inspection programmes of SB A300–57A0246 and SB A300–57A6101 to introduce repetitive inspections including a new inspection technique for holes 47 and 54 and to reduce inspections threshold and intervals from 700 Flight Cycles (FC) to 400 FC until a revised terminating action is made available.

Required actions include contacting Airbus for repair instructions, if necessary, and doing the repair.

Restatement of Requirements of AD 2000–05–07:

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

Repetitive Inspections

(g) Perform a detailed inspection and a high-frequency eddy current (HFEC) inspection to detect cracks in Gear Rib 5 of the main landing gear (MLG) attachment fittings at the lower flange, in accordance with the Accomplishment Instructions of any applicable service bulletin listed in Table 1 and Table 2 of this AD, at the time specified in paragraph (g)(1) or (g)(2) of this AD. After April 12, 2000 (the effective date of AD 2000–05–07, amendment 39–11616), only the service bulletins listed in Table 2 of this AD may be used. Repeat the inspections thereafter at intervals not to exceed 1,500 flight cycles, until the actions specified in paragraph (i), (j), or (l) of this AD are accomplished.

TABLE 1—REVISION 01 OF SERVICE BULLETINS

Model—	Airbus Service Bulletin—	Revision level—	Dated—
A300 B4–601, B4–603, B4–620, B4–622, B4–605R, B4–622R, F4–605R, F4–622R, and A300 C4–605R Variant F airplanes.	A300–57–6087	01	March 11, 1998.
A300 B2 and A300 B4 series airplanes	A300–57–0234	01	March 11, 1998.

TABLE 2—OTHER REVISIONS OF SERVICE BULLETINS

Model—	Airbus Service Bulletin—	Revision level—	Dated—
A300 B4–601, B4–603, B4–620, B4–622, B4–605R, B4–622R, F4–605R, F4–622R, and A300 C4–605R Variant F airplanes.	A300–57A6087	02, including Appendix 01	June 24, 1999.
		03, including Appendix 01	May 19, 2000.
		04, including Appendix 01	February 19, 2002.
A300 B2 and A300 B4 series airplanes	A300–57A0234	02	June 24, 1999.
		03, including Appendix 01	September 2, 1999.
		04, including Appendix 01	May 19, 2000.
		05, including Appendix 01	February 19, 2002.

(1) For airplanes that have accumulated 20,000 or more total flight cycles as of March 9, 1998 (the effective date of AD 98–03–06, amendment 39–10298): Inspect within 500 flight cycles after March 9, 1998.

(2) For airplanes that have accumulated less than 20,000 total flight cycles as of March 9, 1998: Inspect prior to the accumulation of 18,000 total flight cycles, or within 1,500 flight cycles after March 9, 1998, whichever occurs later.

Note 1: For the purposes of this AD, a detailed inspection is defined as: ''An

intensive visual examination of a specific structural area, system, installation, or assembly to detect damage, failure, or irregularity. Available lighting is normally supplemented with a direct source of good lighting at intensity deemed appropriate by the inspector. Inspection aids such as mirror, magnifying lenses, etc., may be used. Surface cleaning and elaborate access procedures may be required.''

Note 2: Accomplishment of the initial detailed and HFEC inspections in accordance with Airbus Service Bulletin A300–57A0234 or A300–57A6087, both dated August 5, 1997, as applicable, is considered acceptable for compliance with the initial inspections required by paragraph (g) of this AD.

Repair for Any Crack Found During Inspections Required by Paragraph (g) of This AD

(h) If any crack is detected during any inspection required by paragraph (g) of this AD, prior to further flight, accomplish the requirements of paragraph (h)(1) or (h)(2) of this AD, as applicable.

(1) If a crack is detected at one hole only, and the crack does not extend out of the spotface of the hole, repair in accordance with the Accomplishment Instructions of the applicable service bulletin in Table 2 of this AD.

(2) If a crack is detected at more than one hole, or if any crack at any hole extends out of the spotface of the hole, repair in accordance with a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, or the European Aviation Safety Agency (EASA) (or its delegated agent).

Terminating Modification for Repetitive Inspections Required by Paragraphs (g) and (j) of This AD

(i) Except as required by paragraph (l) of this AD, prior to the accumulation of 21,000 total flight cycles, or within 2 years after October 20, 1999 (the effective date of AD 99–19–26, amendment 39–11313), whichever occurs later: Modify Gear Rib 5 of the MLG attachment fittings at the lower flange in accordance with the Accomplishment Instructions of the applicable service bulletin in Table 3 of this AD. After July 18, 2006 (the effective date of AD 2006–12–13), only Revision 04 of Airbus Service Bulletin A300–57–6088, and Revisions 04 and 05 of Airbus Service Bulletin A300–57–0235 may be used. Accomplishment of this modification constitutes terminating action for the repetitive inspection requirements of paragraphs (g) and (j) of this AD.

TABLE 3—SERVICE BULLETINS FOR TERMINATING MODIFICATION

Model—	Airbus Service Bulletin—	Revision level—	Dated—
A300 B4–601, B4–603, B4–620, B4–622, B4–605R, B4–622R, F4–605R, F4–622R, and A300 C4–605R Variant F airplanes.	A300–57–6088	01, including Appendix 01	February 1, 1999.
		02	September 5, 2002
		04	December 3, 2003.
A300 B2 and A300 B4 series airplanes	A300–57–0235	01, including Appendix 01	February 1, 1999.
		03	September 5, 2002
		04	March 13, 2003.
		05	December 3, 2003.

Note 3: Accomplishment of the modification required by paragraph (i) of this AD prior to April 12, 2000, in accordance with Airbus Service Bulletin A300–57–6088 or A300–57–0235, both dated August 5, 1998; as applicable; is acceptable for compliance with the requirements of that paragraph.

Restatement of Requirements of AD 2006–12–13:

Additional Repetitive Inspections

(j) For airplanes on which the modification specified in paragraph (i) or (l) of this AD has not been done before July 18, 2006 (the effective date of AD 2006–12–13, amendment 39–14639), perform a detailed and an HFEC inspection to detect cracks of the lower flange of Gear Rib 5 of the MLG at holes 43, 47, 48, 49, 50, 52, and 54, in accordance with the applicable service bulletin listed in Table 4 of this AD. Perform the inspections at the applicable time specified in paragraph (j)(1), (j)(2), (j)(3), or (j(4) of this AD. Repeat the inspections thereafter at intervals not to exceed 700 flight cycles until the terminating modification required by paragraph (l) of this AD is accomplished. Accomplishment of the inspections per paragraph (j) of this AD terminates the inspection requirements of paragraph (g) of this AD.

TABLE 4—SERVICE BULLETINS FOR REPETITIVE INSPECTIONS

Model—	Airbus Service Bulletin—	Revision level—	Dated—
A300 B4–601, B4–603, B4–620, B4–622, B4–605R, B4–622R, F4–605R, F4–622R, and C4–605R Variant F airplanes.	A300–57A6087	04, including Appendix 01	February 19, 2002.
A300 B2–1A, B2–1C, B2K–3C, B2–203, B4–2C, B4–103, and B4–203 airplanes.	A300–57A0234	05, including Appendix 01	February 19, 2002.

(1) For Model A300 B2–1A, B2–1C, B2K–3C, B2–203, B4–2C, B4–103, and B4–203 airplanes; Model A300 B4–601, B4–603, B4–620, B4–622, B4–605R, B4–622R, F4–605R, F4–622R, and C4–605R Variant F airplanes; and Model C4–605R Variant F airplanes that have accumulated 18,000 or more total flight cycles as of July 18, 2006: Within 700 flight cycles after July 18, 2006.

(2) For Model A300 B2–1A, B2–1C, B2K–3C, and B2–203 airplanes that have accumulated less than 18,000 total flight cycles as of July 18, 2006: Prior to the accumulation of 18,000 total flight cycles, or within 700 flight cycles after July 18, 2006, whichever occurs later.

(3) For Model A300 B4–2C, B4–103, and B4–203 airplanes that have accumulated less than 18,000 total flight cycles as of July 18, 2006: Prior to the accumulation of 14,500 total flight cycles, or within 700 flight cycles after July 18, 2006, whichever occurs later.

(4) For Model A300 B4–601, B4–603, B4–620, B4–622, B4–605R, B4–622R, F4–605R, F4–622R, and C4–605R Variant F airplanes that have accumulated less than 18,000 total flight cycles as of July 18, 2006: Prior to the accumulation of 11,600 total flight cycles, or within 700 flight cycles after July 18, 2006, whichever occurs later.

Crack Repair

(k) If any crack is detected during any inspection required by paragraph (j) of this AD, prior to further flight, accomplish the requirements of paragraphs (k)(1) and (k)(2) of this AD, as applicable.

(1) If a crack is detected at only one hole, and the crack does not extend out of the

spotface of the hole, repair in accordance with Airbus Service Bulletin A300–57A0234, Revision 05, including Appendix 01, dated February 19, 2002 (for Model A300 B2–1A, B2–1C, B2K–3C, B2–203, B4–2C, B4–103, and B4–203 airplanes); or A300–57A6087, Revision 04, including Appendix 01, dated February 19, 2002 (for Model A300 B4–601, B4–603, B4–620, B4–622, B4–605R, B4–622R, F4–605R, F4–622R, and C4–605R airplanes); as applicable.

(2) If a crack is detected at more than one hole, or if any crack at any hole extends out of the spotface of the hole, repair in accordance with a method approved by the Manager, International Branch, ANM–116, or the EASA (or its delegated agent).

Terminating Modification for Repetitive Inspections Required by Paragraphs (g) and (j) of This AD for Certain Airplanes

(l) For airplanes on which the terminating modification in paragraph (i) of this AD has not been accomplished before July 18, 2006: At the earlier of the times specified in paragraphs (l)(1) and (l)(2) of this AD, modify Gear Rib 5 of the MLG attachment fittings at the lower flange. Except as provided by paragraph (m) of this AD, do the modification in accordance with the applicable service bulletin in Table 5 of this AD. This action terminates the repetitive inspections requirements of paragraphs (g) and (j) of this AD.

(1) Prior to the accumulation of 21,000 total flight cycles, or within 2 years after October 20, 1999, whichever is later.

(2) Within 16 months after July 18, 2006.

TABLE 5—SERVICE BULLETINS FOR TERMINATING MODIFICATION

Model—	Airbus Service Bulletin—	Revision level—	Dated—
A300 B4–601, B4–603, B4–620, B4–622, B4–605R, B4–622R, F4–605R, F4–622R, and C4–605R Variant F airplanes.	A300–57–6088	04	December 3, 2003.
A300 B2–1A, B2–1C, B2K–3C, B2–203, B4–2C, B4–103, and B4–203 airplanes.	A300–57–0235	04	March 13, 2003.
		05	December 3, 2003.

(m) Where the applicable service bulletin in paragraph (l) of this AD specifies to contact Airbus for modification instructions; or if there is a previously installed repair at any of the affected fastener holes; or if a crack is found when accomplishing the modification: Prior to further flight, modify in accordance with a method approved by the Manager, International Branch, ANM–116, or the EASA (or its delegated agent).

Actions Accomplished per Previous Issues of Service Bulletins

(n) Actions accomplished before July 18, 2006, in accordance with the service bulletins listed in Table 6 of this AD, are considered acceptable for compliance with the corresponding action specified in paragraphs (g) through (m) of this AD.

TABLE 6—PREVIOUS ISSUES OF SERVICE BULLETINS

Airbus Service Bulletin—	Revision level—	Dated—
A300–57–0235	02, including Appendix 01	September 27, 1999.
	03	September 5, 2002.
A300–57–6088	02	September 5, 2000.
	03	March 13, 2003.

No Reporting

(o) Although the service bulletins identified in Tables 1, 2, 3, 4, 5, and 6 of this AD specify to submit certain information to the manufacturer, this AD does not include such a requirement.

New Requirements of This AD

(p) Unless already done, do the following actions.

(1) At the applicable time specified in paragraph (p)(2) of this AD, perform a detailed inspection for cracking at the locations specified in paragraphs (p)(1)(i), (p)(1)(ii), and (p)(1)(iii) of this AD, in accordance with the Accomplishment Instructions of Airbus Mandatory Service Bulletin A300–57A0246, Revision 03, dated March 11, 2009; or Airbus Mandatory Service Bulletin A300–57A6101, Revision 03, dated March 11, 2009, as applicable.

(i) The bottom flange and vertical web in the area between the wing rear spar/gear rib 5 attachment and the forward reaction-rod pick-up lug.

(ii) On the inboard side, around the fastener holes at locations 43, 47 to 50, 52, and 54.

(iii) On the outboard side, the lower flange, the vertical web and around the fastener holes at locations 43, 47 to 50, 52 and 54.

(2) Do the inspection required by paragraph (p)(1) of this AD at the later of the times in paragraphs (p)(2)(i) and (p)(2)(ii) of this AD.

(i) Within 400 flight cycles after the accomplishment of the actions required by paragraph (i) or (l) of this AD, as applicable.

(ii) Within 400 flight cycles or 4 months after the effective date of this AD, whichever occurs first.

(3) If no cracking is detected during the inspection required by paragraph (p)(1) of this AD, before further flight, perform a fluorescent penetrant inspection (FPI) at holes location 47 and 54, in the right-hand and left-hand MLG rib 5 attachment fitting lower flange, in accordance with the Accomplishment Instructions of Airbus Mandatory Service Bulletin A300–57A0246, Revision 03, dated March 11, 2009; or Airbus Mandatory Service Bulletin A300–57A6101, Revision 03, dated March 11, 2009; as applicable.

(4) Thereafter, at intervals not to exceed 400 flight cycles, repeat the detailed and FPI inspections, in accordance with the Accomplishment Instructions of Airbus Mandatory Service Bulletin A300–57A0246, Revision 03, dated March 11, 2009; or Airbus Mandatory Service Bulletin A300–57A6101, Revision 03, dated March 11, 2009; as applicable.

(5) If any crack is detected during any of the inspections required by paragraphs (p)(1), (p)(3), and (p)(4) of this AD, before further flight, contact Airbus for a repair solution, and do the repair.

FAA AD Differences

Note 4: This AD differs from the MCAI and/or service information as follows: No differences.

Other FAA AD Provisions

(q) The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Dan Rodina, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, Washington 98057–3356; telephone (425) 227–2125; fax (425) 227–1149. Before using

any approved AMOC on any airplane to which the AMOC applies, notify your principal maintenance inspector (PMI) or principal avionics inspector (PAI), as appropriate, or lacking a principal inspector, your local Flight Standards District Office. The AMOC approval letter must specifically reference this AD.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

Related Information

(r) Refer to MCAI EASA Airworthiness Directive 2009–0081, dated April 6, 2009, and the service information in Table 7 of this AD.

TABLE 7—SERVICE INFORMATION

Airbus Service Information—	Revision level—	Dated—
Service Bulletin A300–57–0235	04	March 13, 2003.
	05	December 3, 2003.
Service Bulletin A300–57–6088	04	December 3, 2003.
Service Bulletin A300–57A0234	02	June 24, 1999.
	03, including Appendix 01	September 2, 1999.
	04, including Appendix 01	May 19, 2000.
	05, including Appendix 01	February 19, 2002.
Service Bulletin A300–57A6087	02, including Appendix 01	June 24, 1999.
	03, including Appendix 01	May 19, 2000.
	04, including Appendix 01	February 19, 2002.
Mandatory Service Bulletin A300–57A0246	03	March 11, 2009.
Mandatory Service Bulletin A300–57A6101	03	March 11, 2009

Issued in Renton, Washington, on November 6, 2009.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E9–27631 Filed 11–17–09; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2009–1066; Directorate Identifier 2009–NM–028–AD]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 747–100, 747–100B, 747–100B SUD, 747–200B, 747–300, 747SR, and 747SP Series Airplanes

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

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to supersede an existing airworthiness directive (AD) that applies to certain Boeing Model 747 series airplanes. The existing AD currently requires repetitive inspections to detect cracking in certain fuselage skin lap joints, and repair if necessary. This proposed AD would expand the inspection area in the existing AD, add a modification of certain lap joints, and add certain post-repair inspections of the lap joints. Accomplishing the modification would end the repetitive inspections required by the existing AD for the length of lap joint that is modified. This proposed AD results from a structural review of affected skin lap joints for widespread fatigue damage. We are proposing this AD to prevent fatigue cracking in certain lap joints, which could result in rapid depressurization of the airplane.

DATES: We must receive comments on this proposed AD by January 4, 2010.

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

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

For service information identified in this proposed AD, contact Boeing Commercial Airplanes, *Attention:* Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, Washington 98124–2207; telephone 206–544–5000, extension 1, fax 206–766–5680; e-mail *me.boecom@boeing.com;* Internet *https://www.myboeingfleet.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221 or 425–227–1152.

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: Ivan Li, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 917–6437; 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–2009–1066; Directorate Identifier 2009–NM–028–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

On May 31, 1994, we issued AD 94–12–04, Amendment 39–8932 (59 FR 30277, June 13, 1994), for certain Boeing Model 747 series airplanes. That AD requires repetitive inspections to detect cracking in certain fuselage skin lap joints, and repair, if necessary. That AD was prompted by the results of extensive pressure fatigue tests conducted by the manufacturer. We issued that AD to detect and repair fatigue cracking in certain lap joints, which will ensure safe operation of airplanes that have exceeded their economic design goal.

Actions Since Existing AD Was Issued

Since we issued AD 94–12–04, the manufacturer has conducted a structural review of affected skin lap joints for widespread fatigue damage, and has identified additional inspection and modification requirements. It was determined that it is necessary to inspect lap joints with an upper skin thickness of 0.09 inch in addition to the areas inspected in accordance with the existing AD. For Model 747SP airplanes, the skin lap joints in Section 44 are also included in those inspections. It was determined that lap joints in Sections 41 and 42 with an upper skin thickness of 0.071 inch or less should be modified; and post-repair inspections are necessary.

Revised Service Information

We have reviewed Boeing Alert Service Bulletin 747–53A2367, Revision 2, dated October 30, 2008 (''Revision 2 of the service bulletin''); and Boeing Service Bulletin 747–53A2367, Revision 3, dated January 15, 2009 (''Revision 3 of the service bulletin''). We referred to Boeing Service Bulletin 747–53–2367, dated December 18, 1991 (''the original issue of the service bulletin''); and Boeing Service Bulletin 747–53–2367, Revision 1, dated January 27, 1994 (''Revision 1 of the service bulletin''); as the appropriate sources of service information for accomplishing the actions required by AD 94–12–04.

Revisions 2 and 3 of the service bulletin retain the procedures described in the original issue of the service bulletin and Revision 1 of the service bulletin; however, those revisions add procedures for a new inspection area (Area 2) in Sections 41, 42, 44, and 46. Revisions 2 and 3 of the service bulletin also add procedures for a modification of the lap joints in Sections 41 and 42 for Groups 1, 2, 4, 5, and 7 through 10 airplanes. For airplanes on which any crack is found during the external surface high frequency eddy current (HFEC) inspection, the related investigative action is doing an open-hole HFEC inspection before further flight for further cracking; and for airplanes on which any crack is found, during that inspection, the corrective action is repairing the crack before further flight.

The compliance time for accomplishing the new Area 2 inspections is before the accumulation of 22,000 total flight cycles, or within 3,000 flight cycles after the last HFEC inspection of the area (as specified in the Boeing Model 747 Supplemental Structural Inspection Document), or within 1,000 flight cycles from the date on Revision 2 of the service bulletin, whichever occurs latest.

The compliance time for accomplishing the inspections in Section 41 at stringer 6 for Groups 2, 4, 8, and 9 airplanes not affected by Boeing Service Bulletin 747–53–2253 is within 10,000 flight cycles after doublers are installed per Boeing Service Bulletin 747–53–2272. These requirements are specified in AD 2008–10–15, Amendment 39–15522 (73 FR 29042, May 20, 2008).

For areas on which a lap joint repair was installed and the repair doubler is greater than or equal to 40 inches long, Revision 3 of the service bulletin describes procedures for repetitive internal surface HFEC inspections for cracks. The compliance time for accomplishing the initial inspection is within 15,000 flight cycles after the repair was installed.

Revision 3 of the service bulletin specifies repeating the applicable inspection at intervals not to exceed 3,000 flight cycles, or at intervals not to exceed 1,500 flight cycles for airplanes that have accumulated 30,000 total flight cycles or more. For Group 7, 8, and 9 airplanes, the inspections of the lap joints in Section 46 at stringer 4 left, between body stations 1720 and 1740, and between body stations 1960 and 1980, are repeated at intervals not to exceed 1,500 flight cycles.

For all airplanes, the compliance time for accomplishing the lap joint modification is before the accumulation of 30,000 total flight cycles, or within 3,000 flight cycles from the date of Revision 2 of the service bulletin, whichever is later. Accomplishing this modification eliminates the need for the repetitive inspections for the length of lap joint that is modified.

Revision 3 of the service bulletin also specifies that no lap joint modification instructions are included for Groups 3 and 6 airplanes and recommends contacting Boeing for modification instructions.

FAA's Determination and Requirements of the Proposed AD

We have evaluated all pertinent information and identified an unsafe condition that is likely to develop on other airplanes of the same type design. For this reason, we are proposing this AD, which would supersede AD 94–12–04 and would retain the requirements of the existing AD. This proposed AD would also require accomplishing the actions specified in the service information described previously, except as discussed under ''Differences Between the Proposed AD and Service Information.''

Differences Between the Proposed AD and Service Information

Revision 3 of the service bulletin specifies to contact the manufacturer for instructions on how to repair or modify certain conditions, but this proposed AD would require those conditions be done in one of the following ways:

- Using a method that we approve; or
- Using data that meet the certification basis of the airplane, and that have been approved by an Authorized Representative for the Boeing Commercial Airplanes Delegation Option Authorization Organization whom we have authorized to make those findings.

Revision 3 of the service bulletin recommends that the modification be done before the accumulation of 30,000 total flight cycles or within 3,000 flight cycles after the release date of Revision 2 of the service bulletin, ''whichever is earlier.'' However, the manufacturer has informed us that an error was made in that compliance time and it should specify ''whichever occurs later.'' The correct compliance time is specified in paragraph (j) of this AD.

Changes to Existing AD

This proposed AD would retain all requirements of AD 94–12–04. Since that AD was issued, the AD format has been revised, and certain paragraphs have been rearranged. As a result, the corresponding paragraph identifiers have changed in this proposed AD, as listed in the following table:

REVISED PARAGRAPH IDENTIFIERS

Requirement in AD 94–12–04	Corresponding requirement in this proposed AD
Paragraphs (a), (b), and (c)	Paragraph (g).

We have also revised paragraph (g)(2)(i) of this AD (paragraph (c)(1) of AD 94–12–04) to remove reference to Chapter 53–30–03 of the Boeing 747 Structural Repair Manual (SRM). Instead, that paragraph instructs operators to contact the FAA for repair instructions. We have also added a new Note 1 to specify that guidance on repairing any subject cracking can be found in Chapter 53–30–03 of the Boeing 747 SRM.

Costs of Compliance

There are about 209 airplanes of the affected design in the worldwide fleet. This proposed AD would affect about 69 airplanes of U.S. registry.

The actions that are required by AD 94–12–04 and retained in this proposed AD take about 14 work hours per airplane, at an average labor rate of $80 per work hour. Based on these figures, the estimated cost of the currently required actions is $1,120 per airplane, per inspection cycle.

The new proposed Area 2 inspections would take about 477 work hours per airplane, depending on airplane configuration, at an average labor rate of $80 per work hour. Based on these figures, the estimated cost of the new actions specified in this proposed AD for U.S. operators is between $38,160 and $2,633,040, or between $2,400 and $3,840 per airplane, per inspection cycle.

The new proposed modification would take about 171 work hours per airplane, at an average labor rate of $80 per work hour. Required parts cost per airplane would be minimal. Based on these figures, the estimated cost of the new actions specified in this proposed AD for U.S. operators is $943,920, or $13,680, per airplane.

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, Incorporation by reference, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. The FAA amends § 39.13 by removing Amendment 39–8932 (59 FR 30277, June 13, 1994) and adding the following new AD:

Boeing: Docket No. FAA–2009–1066; Directorate Identifier 2009–NM–028–AD.

Comments Due Date

(a) The FAA must receive comments on this AD action by January 4, 2010.

Affected ADs

(b) This AD supersedes AD 94–12–04, Amendment 39–8932.

Applicability

(c) This AD applies Boeing Model 747–100, 747–100B, 747–100B SUD, 747–200B, 747–300, 747SR, and 747SP series airplanes, certificated in any category, as identified in Boeing Service Bulletin 747–53A2367, Revision 3, dated January 15, 2009.

Subject

(d) Air Transport Association (ATA) of America Code 53: Fuselage.

Unsafe Condition

(e) This AD results from a structural review of affected skin lap joints for widespread fatigue damage. The Federal Aviation Administration is issuing this AD to prevent fatigue cracking in certain lap joints which could result in rapid depressurization of the airplane.

Compliance

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

Restatement of Requirements of AD 94–12–04, With Revised Service Information

Repetitive Inspections

(g) For airplanes identified in Boeing Service Bulletin 747–53–2367, dated December 18, 1991: Prior to the accumulation of 22,000 full pressure flight cycles (or, if the external skin panel of an affected lap joint has been replaced, prior to the accumulation of 22,000 full pressure flight cycles since skin replacement), or within 1,000 landings after July 13, 1994 (the effective date of AD 94–12–04), whichever occurs later, perform an external surface high frequency eddy current (HFEC) inspection of the skin around the upper row of fasteners, in accordance with the Accomplishment Instructions of Boeing Service Bulletin 747–53–2367, dated December 18, 1991; Revision 1, dated January 27, 1994; Boeing Alert Service Bulletin 747–53A2367, Revision 2, dated October 30, 2008; or Boeing Service Bulletin 747–53A2367, Revision 3, dated January 15, 2009. As of the effective date of this AD, only Revision 3 of the service bulletin may be used.

(1) If no crack is found, repeat the inspection thereafter at intervals not to exceed 3,000 full pressure flight cycles until the inspections required by paragraph (h) of this AD are done.

(2) If any crack is found, accomplish paragraphs (g)(2)(i) and (g)(2)(ii) of this AD.

(i) Prior to further flight, perform an open hole HFEC inspection to detect cracking in the upper row fastener holes between the adjacent frames, in accordance with the Accomplishment Instructions of Boeing Service Bulletin 747–53–2367, dated December 18, 1991; Revision 1, dated January 27, 1994; Boeing Alert Service Bulletin 747–53A2367, Revision 2, dated October 30, 2008; or Boeing Service Bulletin 747–53A2367, Revision 3, dated January 15, 2009. Prior to further flight, repair any crack found, in accordance with a method approved by the

Manager, Seattle Aircraft Certification Office (ACO), FAA.

Note 1: Guidance on repairing cracking can be found in Chapter 53–30–03 of the Boeing 747 Structural Repair Manual.

(ii) Repeat the inspection required by paragraph (g) of this AD thereafter at intervals not to exceed 3,000 full pressure flight cycles until the inspections required by paragraph (h) of this AD are done.

New Requirements of This AD

Repetitive Inspections/Investigative and Corrective Actions

(h) For all airplanes: Do initial and repetitive HFEC inspections for cracks of lap joints in Sections 41, 42, 44, and 46, by doing all the actions, including all applicable related investigative and corrective actions, specified in the Accomplishment Instructions of Boeing Service Bulletin 747–53A2367, Revision 3, dated January 15, 2009, except as provided by paragraph (l) of this AD. Do the inspections at the applicable times specified in paragraph 1.E. of Boeing Service Bulletin 747–53A2367, Revision 3, dated January 15, 2009, except as required by paragraph (k) of this AD. Do all applicable related investigative and corrective actions before further flight. Accomplishing the inspections required by this paragraph ends the repetitive inspections required by paragraph (g) of this AD. Do the actions required by paragraph (h) of this AD until the modification required by paragraph (j) of this AD is done.

(i) For areas on which a lap joint repair was installed and the repair doubler is greater than or equal to 40 inches long: Do initial and repetitive internal HFEC inspections for cracks, as required by paragraph (h) of this AD, by doing all the applicable actions, including applicable corrective actions, specified in the Accomplishment Instructions of Boeing Service Bulletin 747–53A2367, Revision 3, dated January 15, 2009, except as provided by paragraph (l) of this AD. Do the inspection and corrective actions at the times specified in paragraph 1.E. of Boeing Service Bulletin 747–53A2367, Revision 3, dated January 15, 2009, except as required by paragraph (k) of this AD.

Terminating Action

(j) Before the accumulation of 30,000 total flight cycles or within 3,000 flight cycles after the effective date of this AD, whichever occurs later: Modify the applicable lap joints in Sections 41 and 42 by doing all the actions specified in the Accomplishment Instructions of Boeing Service Bulletin 747–53A2367, Revision 3, dated January 15, 2009, except as required by paragraph (l) of this AD. Accomplishing this modification terminates the repetitive inspection requirements of this AD for the length of lap joint that is modified.

Exceptions to Boeing Service Bulletin 747–53A2367, Revision 3

(k) Where Boeing Service Bulletin 747–53A2367, Revision 3, dated January 15, 2009, specifies compliance times ''from the date on the original issue of this service bulletin [12/18/91],'' and ''from the date on Revision 2 of this service bulletin [10/30/08],'' this AD requires compliance within the specified compliance time after the effective date of this AD.

(l) Where Boeing Service Bulletin 747–53A2367, Revision 3, dated January 15, 2009, specifies to contact Boeing for repair or modification instructions: Before further flight, repair or modify using a method approved in accordance with the procedures specified in paragraph (m) of this AD.

Alternative Methods of Compliance (AMOCs)

(m)(1) The Manager, Seattle ACO, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Ivan Li, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle ACO, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 917–6437; fax (425) 917–6590. Or, e-mail information to *9-ANM-Seattle-ACO-AMOC-Requests@faa.gov*.

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

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

(4) AMOCs approved previously in accordance with AD 94–12–04 are approved as alternative methods of compliance with the corresponding requirements of this AD.

Issued in Renton, Washington, on November 6, 2009.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E9–27632 Filed 11–17–09; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2009–1030; Airspace Docket No. 09–AWP–8]

Proposed Establishment of Class E Airspace; Monterey, CA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to establish Class E airspace at Monterey Peninsula Airport, Monterey, CA. Additional controlled airspace is necessary to accommodate aircraft using a new Area Navigation (RNAV) Required Navigation Performance (RNP) Standard Instrument Approach Procedure (SIAP) at Monterey Peninsula Airport. The FAA is proposing this action to enhance the safety and management of aircraft operations at Monterey Peninsula Airport, Monterey, CA.

DATES: Comments must be received on or before January 4, 2010.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. Telephone (202) 366–9826. You must identify FAA Docket No. FAA–2009–1030; Airspace Docket No. 09–AWP–8, at the beginning of your comments. You may also submit comments through the Internet at *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Eldon Taylor, Federal Aviation Administration, Operations Support Group, Western Service Center, 1601 Lind Avenue, SW., Renton, WA 98057; telephone (425) 203–4537.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal.

Communications should identify both docket numbers (FAA Docket No. FAA 2009–1030 and Airspace Docket No. 09–AWP–8) and be submitted in triplicate to the Docket Management System (see **ADDRESSES** section for address and phone number). You may also submit comments through the Internet at *http://www.regulations.gov*.

Commenters wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed stamped postcard on which the following statement is made: ''Comments to FAA Docket No. FAA–2009–1030 and Airspace Docket No. 09–AWP–8''. The

postcard will be date/time stamped and returned to the commenter.

All communications received on or before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this action may be changed in light of comments received. All comments submitted will be available for examination in the public docket both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRMs

An electronic copy of this document may be downloaded through the Internet at *http://www.regulations.gov*. Recently published rulemaking documents can also be accessed through the FAA's Web page at *http://www.faa.gov/airports_airtraffic/air_traffic/publications/airspaceamendments/*.

You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office (see the **ADDRESSES** section for the address and phone number) between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. An informal docket may also be examined during normal business hours at the Northwest Mountain Regional Office of the Federal Aviation Administration, Air Traffic Organization, Western Service Center, Operations Support Group, 1601 Lind Avenue, SW., Renton, WA 98057.

Persons interested in being placed on a mailing list for future NPRM's should contact the FAA's Office of Rulemaking, (202) 267–9677, for a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

The Proposal

The FAA is proposing an amendment to Title 14 Code of Federal Regulations (14 CFR) part 71 by establishing Class E airspace designated as surface areas at Monterey Peninsula Airport, Monterey, CA. Controlled airspace is necessary to accommodate aircraft using the new RNAV (RNP) SIAP at Monterey Peninsula Airport. This action would enhance the safety and management of aircraft operations at Monterey Peninsula Airport, Monterey, CA.

Class E airspace designations are published in paragraph 6002, of FAA Order 7400.9T, signed August 27, 2009, and effective September 15, 2009, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document will be published subsequently in this Order.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this proposed regulation; (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this proposed rule, when promulgated, would not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the U.S. Code. Subtitle 1, Section 106, describes the authority for the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in subtitle VII, part A, subpart I, section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would establish additional controlled airspace at Monterey Peninsula Airport, Monterey, CA.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

1. The authority citation for 14 CFR part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of the FAA Order 7400.9T, Airspace Designations and Reporting Points, signed August 27, 2009, and effective September 15, 2009 is amended as follows:

Paragraph 6002 Class E Airspace Designated as Surface Areas

* * * * *

AWP CA, E2 Monterey, CA [New]

Monterey Peninsula Airport, CA
(Lat. 36°35′13″ N., long. 121°50′35″ W.)
ILS Localizer
(Lat. 36°34′58″ N., long. 121°49′55″ W.)

Within a 5-mile radius of the Monterey Peninsula Airport, and within 3 miles each side of the localizer east course extending from the 5-mile radius of Monterey Peninsula Airport to 10 miles east of the Runway 28R landing threshold, and within 3 miles each side of the localizer east course extending from the 10-mile arc to 15.2 miles east of the Runway 28R landing threshold. This Class E airspace area is effective during the specific dates and times established in advance by a Notice to Airmen. The effective dates and times will thereafter be continuously published in the Airport/Facility Directory.

* * * * *

Issued in Seattle, Washington, on November 5, 2009.

Robert E. Henry,

Acting Manager, Operations Support Group, Western Service Center.

[FR Doc. E9–27661 Filed 11–17–09; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2009–1011; Airspace Docket No. 09–ANM–19]

Proposed Establishment of Class E Airspace; Bryce Canyon, UT

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to establish Class E airspace at Bryce Canyon Airport, Bryce Canyon, UT. Controlled airspace is necessary to accommodate aircraft using a new Area Navigation (RNAV) Global Positioning System (GPS) Standard Instrument Approach Procedure (SIAP) at Bryce Canyon Airport, Bryce Canyon, UT. The FAA is proposing this action to enhance the safety and management of Instrument Flight Rules (IFR) aircraft operations at Bryce Canyon Airport.

DATES: Comments must be received on or before January 4, 2010.

ADDRESSES: Send comments on this proposal to the U.S. Department of

Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. Telephone (202) 366–9826. You must identify FAA Docket No. FAA–2009–1011; Airspace Docket No. 09–ANM–19, at the beginning of your comments. You may also submit comments through the Internet at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Eldon Taylor, Federal Aviation Administration, Operations Support Group, Western Service Center, 1601 Lind Avenue, SW., Renton, WA 98057; telephone (425) 203–4537.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal.

Communications should identify both docket numbers (FAA Docket No. FAA 2009–1011 and Airspace Docket No. 09–ANM–19) and be submitted in triplicate to the Docket Management System (*see* **ADDRESSES** section for address and phone number). You may also submit comments through the Internet at *http://www.regulations.gov.*

Commenters wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed stamped postcard on which the following statement is made: ''Comments to FAA Docket No. FAA–2009–1011 and Airspace Docket No. 09–ANM–19''. The postcard will be date/time stamped and returned to the commenter.

All communications received on or before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this action may be changed in light of comments received. All comments submitted will be available for examination in the public docket both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRMs

An electronic copy of this document may be downloaded through the Internet at *http://www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's web page at *http://www.faa.gov/airports_airtraffic/air_traffic/publications/airspace_amendments/.*

You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office (*see* the **ADDRESSES** section for the address and phone number) between 9 a.m. and 5 p.m., Monday through Friday, except federal holidays. An informal docket may also be examined during normal business hours at the Northwest Mountain Regional Office of the Federal Aviation Administration, Air Traffic Organization, Western Service Center, Operations Support Group, 1601 Lind Avenue, SW., Renton, WA 98057.

Persons interested in being placed on a mailing list for future NPRM's should contact the FAA's Office of Rulemaking, (202) 267–9677, for a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

The Proposal

The FAA is proposing an amendment to Title 14 Code of Federal Regulations (14 CFR) part 71 by establishing Class E airspace extending upward from 700 feet above the surface at Bryce Canyon Airport, Bryce Canyon, UT. Controlled airspace is necessary to accommodate aircraft using the new RNAV (GPS) SIAP at Bryce Canyon Airport. This action would enhance the safety and management of (IFR) operations at Bryce Canyon Airport, Bryce Canyon, UT.

Class E airspace designations are published in paragraph 6005 of FAA Order 7400.9T, signed August 27, 2009, and effective September 15, 2009, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document will be published subsequently in this Order.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this proposed regulation; (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this proposed rule, when promulgated, would not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the U.S. Code. Subtitle I, Section 106, describes the authority for the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would establish controlled airspace at Bryce Canyon Airport, Bryce Canyon, UT.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

1. The authority citation for 14 CFR part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of the FAA Order 7400.9T, Airspace Designations and Reporting Points, signed August 27, 2009, and effective September 15, 2009 is amended as follows:

Paragraph 6005 Class E airspace areas extending upward from 700 feet or more above the surface of the earth

* * * * *

ANM UT E5 Bryce Canyon, UT [New]

Bryce Canyon Airport, UT
(Lat. 37°42′23″ N., long. 112°08′45″ W.)

That airspace extending upward from 700 feet above the surface within 8 miles each side of the 047° and 227° bearing from the airport, extending 18 miles northeast and 15.9 miles southwest of the airport.

* * * * *

Issued in Seattle, Washington, on November 5, 2009.

Robert E. Henry,

Acting Manager, Operations Support Group, Western Service Center.

[FR Doc. E9–27663 Filed 11–17–09; 8:45 am]

BILLING CODE 4910–13–P

POSTAL SERVICE

39 CFR Part 111

Unpaid and Shortpaid Information-Based Indicia Postage Meters and PC Postage Products

AGENCY: Postal Service™.

ACTION: Proposed rule.

SUMMARY: The Postal Service is revising the *Mailing Standards of the United States Postal Service,* Domestic Mail Manual (DMM®), to implement revenue assurance procedures for information-based indicia (IBI) postage generated from postage evidencing systems. An automated process will be implemented to detect mailpieces with unpaid or shortpaid IBI postage. This automated process will supplement and enhance current procedures.

DATES: We must receive your comments on or before December 18, 2009.

ADDRESSES: Mail or deliver written comments to the Manager, Mailing Standards, U.S. Postal Service, 475 L'Enfant Plaza SW., Room 3436, Washington DC 20260–3436. You may inspect and photocopy all written comments at USPS Headquarters Library, 475 L'Enfant Plaza SW., 11th Floor N, Washington DC, between 9 a.m. and 4 p.m., Monday through Friday.

FOR FURTHER INFORMATION CONTACT: C. Scot Atkins, 703–280–7841 or Carol A. Lunkins, 202–268–7262.

SUPPLEMENTARY INFORMATION: This proposed rule includes mailing standards for postage printed using IBI postage meters and PC Postage® products including postage generated from Click-N-Ship® service. These technologies provide convenience and ease of use for printing and payment of postage. However, sufficient revenue assurance procedures and practices must be implemented to ensure all required postage is paid.

Postage meters and PC Postage products are collectively identified as ''postage evidencing systems.'' A postage evidencing system is a device or system of components a customer uses to print evidence that postage required for a mailing has been paid. Postage evidencing systems print indicia, such as meter imprints or IBI, to indicate postage payment. Mailers print indicia directly on a mailpiece or on a label that is affixed to a mailpiece.

Postage meters are devices that allow download, storage, and accounting of postage through the device. Meters print indicia that may be IBI or non-IBI, to indicate postage payment. IBI are digitally generated indicia that include a two-dimensional barcode. PC Postage products are software-based and Internet-based solutions for managing postage accounts and postage payment. Mailers purchase postage using a computer and print indicia using desktop or label printers. PC Postage products print IBI indicating postage payment and may print directly onto mailpieces, shipping labels, and USPS-approved customized labels. PC Postage products are offered by USPS and USPS-approved commercial providers.

IBI postage meters and PC Postage products, available from authorized providers, allow customers to set up and manage postage accounts via a secure host site, purchase postage via a credit card or automated clearing house (ACH) transaction, and print postage on envelopes, shipping labels, or customized labels for all mail classes except Periodicals and Bound Printed Matter.

The Postal Service will use mail processing equipment and ancillary information systems to detect and capture data for mailpieces with unpaid or shortpaid IBI postage from postage evidencing systems. The Postal Service will analyze this data to ensure its validity and confirm whether sufficient postage was paid. In cases where deficient postage is confirmed, the Postal Service will notify the respective PC Postage or postage meter provider to take corrective measures to recover the appropriate postage.

IBI printed either on a shipping label or directly on a mailpiece are to be used as originally printed and are not to be counterfeited, replicated, duplicated, falsified, or otherwise modified. In addition, the IBI postage affixed to a mailpiece must be equal to or greater than the amount due for the applicable price category and associated criteria such as weight, shape, and zone. Counterfeiting, replicating, duplicating, falsifying, or otherwise modifying IBI and not affixing the applicable amount of postage result in a loss of revenue for the Postal Service, because postage is not paid for the pieces mailed. This deficiency not only affects the Postal Service but our customers as well because rising costs may result in price adjustments.

USPS® may deny a customer use of a postage evidencing system in the event of failure to comply with rules and regulations contained in the DMM, submission of false or fictitious information, and entering a series of unpaid or shortpaid mailpieces and/or packages in the mailstream.

As part of the Postal Service's ongoing effort to increase effectiveness, enhance financial control, and reduce costs, an automated process will be implemented by using mail processing equipment and ancillary information systems to detect and capture unpaid and shortpaid IBI postage on mailpieces, including pieces with postage generated from Click-N-Ship service. This automated process will supplement and enhance our current manual process.

Unpaid IBI Postage

Mailpieces with unpaid IBI postage are those for which postage is not paid due to the use of counterfeited, replicated, duplicated, falsified, or otherwise modified IBI.

Shortpaid IBI Postage

Mailpieces with shortpaid postage are those for which the total of the postage affixed to a mailpiece is not equal to or greater than the amount due for the applicable price category and associated criteria such as weight, shape, and zone.

The Postal Service will analyze captured data to verify its validity and use this information to identify cases where unpaid or shortpaid IBI postage exist. Any mailpiece identified with an unpaid or shortpaid IBI may be subject to the following actions: Collection of the unpaid or shortpaid postage, debit from the customer's account, revocation of the customer's account privileges, and/or civil and criminal fines and penalties pursuant to existing federal law. Customers will work with their PC Postage or postage meter providers to address shortpaid and unpaid IBI postage disputes and appeals. The PC Postage or postage meter provider will work with the Postal Service to resolve such appeals.

Although we are exempt from the notice and comment requirements of the Administrative Procedure Act [5 U.S.C of 553(b), (c)] regarding proposed rulemaking by 39 U.S.C. 410 (a), we invite public comments on the following proposed revisions to *Mailing Standards of the United States Postal Service,* Domestic Mail Manual (DMM), incorporated by reference in the Code of Federal Regulations. See 39 CFR 111.1.

List of Subjects in 39 CFR Part 111

Administrative practice and procedure, Postal Service.

Accordingly, 39 CFR part 111 is proposed to be amended as follows:

PART 111—[AMENDED]

1. The authority citation for 39 CFR part 111 continues to read as follows:

Authority: 5 U.S.C. 552(a); 39 U.S.C. 101, 401, 403, 404, 414, 416, 3001–3011, 3201–3219, 3403–3406, 3621, 3622, 3626, 3632, 3633, and 5001.

2. Revise the following sections of *Mailing Standards of the United States Postal Service,* Domestic Mail Manual (DMM) as follows:

* * * * *

600 Basic Standards for All Mailing Services

* * * * *

604 Postage Payment Methods

* * * * *

4.0 Postage Meters and PC Postage Products (''Postage Evidencing Systems'')

4.1 Basic Information

* * * * *

4.1.2 Product Categories

* * * The primary characteristics of postage meters and PC Postage products are described below.

* * * * *

[Revise item ''b'' of 4.1.2 as follows:]

b. PC Postage products are software-based and Internet-based solutions for managing postage accounts and postage payment. Mailers purchase postage using a computer and print indicia using desktop or label printers. PC Postage products print information-based indicia (IBI) indicating postage payment and may print directly onto mailpieces, shipping labels, and USPS-approved customized labels. PC Postage products are offered by the USPS and USPS-approved commercial providers. PC Postage products are typically offered by providers through subscription service agreements. Some components of PC Postage systems may be purchased as authorized by the USPS.

[Delete item ''c'' of 4.1.2 in its entirety.]

* * * * *

4.2 Authorization To Use Postage Evidencing Systems

* * * * *

[Revise title and text of 4.2.4 as follows:]

4.2.4 Denial of Authorization To Use

USPS may deny use of a postage evidencing system in the event of failure to comply with rules and regulations contained in the DMM, submission of false or fictitious information, and for entering a series of unpaid or shortpaid mailpieces and/or packages in the mailstream. The customer must make the postage evidencing system and transaction records available and surrender the system to the provider, the USPS, or the USPS agent when notified to do so.

* * * * *

4.3 Postage Payment

4.3.1 Paying for Postage

[Revise the first sentence of 4.3.1 as follows:]

The value of the postage indicia on each mailpiece must be equal to or greater than the amount due for the applicable price category and associated criteria such as weight, shape, and zone or another amount permitted by mailing standards to qualify for existing prices.

* * *

* * * * *

[Add new 4.3.6, Shortpaid Information-based Indicia as follows:]

4.3.6 Shortpaid Information-Based Indicia

Mailpieces bearing shortpaid information-based indicia (IBI) postage are those for which the postage indicated in the IBI is not equal to or greater than the postage for the applicable price category and associated criteria such as weight, shape, and zone. Mailpieces bearing shortpaid IBI postage are treated as having insufficient postage (see 8.1.8). Customers who repeatedly deposit mail with shortpaid postage will be subject to revocation of the privilege to use a postage evidencing system.

[Add new 4.3.7, Unpaid Information-based Indicia as follows:]

4.3.7 Unpaid Information-Based Indicia

Mailpieces bearing unpaid information-based indicia (IBI) are those for which postage is not paid due to the use of counterfeited, replicated, duplicated, falsified, or otherwise modified IBI. Counterfeited, replicated, duplicated, falsified, or otherwise modified IBI are not acceptable as payment of postage and are treated as omitted postage (see 8.2.3). Customers who repeatedly deposit mail with forms of nonpayment will be subject to revocation of the privilege to use a postage evidencing system.

* * * * *

8.0 Insufficient or Omitted Postage

8.1 Insufficient Postage

8.1.1 Definition

[Revise the first sentence of 8.1.1 by adding a reference to information-based indicia as follows:]

Except Express Mail, Registered Mail, nonmachinable First-Class Mail, and mail paid with information-based indicia (IBI), all other mail that is received at either the office of mailing or office of address without enough postage is marked to show the total (rounded off) deficiency of postage and fees due.* * *

* * * * *

[Add new 8.1.8, Information-based Indicia Mailpieces With Insufficient Postage as follows:]

8.1.8 Information-Based Indicia Mailpieces With Insufficient Postage

The total of the postage affixed to a mailpiece must be equal to or greater than the amount due for the applicable price category and associated criteria such as weight, shape, and zone. When USPS determines during any phase of processing that mailpieces bearing an information-based indicia (IBI) are shortpaid mailpieces, the Postal Service will notify the respective PC Postage or postage meter provider to take necessary actions to recover revenue loss for the total amount of postage due from the customer's PC Postage or postage meter account. The customer may appeal the decision through the PC Postage or postage meter provider. If the customer repeatedly deposits mailings with shortpaid postage, the PC Postage or postage meter account privileges may be revoked and/or the customer may be subject to the applicable civil and criminal fines and penalties pursuant to existing Federal law.

8.2 Omitted Postage

8.2.1 Handling Mail With Omitted Postage

[Revise the first sentence of 8.2.1 by adding a reference to information-based indicia as follows:]

Except mail paid with information-based indicia, mail of any class and/or indicating extra services that is received at either the office of mailing or office of address without postage is endorsed ''Returned for Postage'' and is returned to the sender without an attempt at delivery. * * *

* * * * *

[Add new 8.2.3, Handling Mail With Unpaid Information-based Indicia as follows:]

8.2.3 Handling Mail With Unpaid Information-Based Indicia

The total of the postage affixed to a mailpiece must be equal to or greater than the amount due for the applicable price category and associated criteria such as weight, shape, and zone. When the USPS determines during any phase of processing that mailpieces bearing an information-based indicia (IBI) are unpaid due to the use of counterfeited, replicated, duplicated, falsified, or otherwise modified IBI, the USPS will notify the PC Postage or postage meter provider to take necessary actions to reclaim revenue loss for the total amount of omitted postage. The customer may appeal the decision through their PC Postage or postage meter provider. The PC Postage or postage meter account may be revoked and/or the customer may be subject to applicable civil and criminal fines and penalties pursuant to existing Federal law.

* * * * *

We will publish an appropriate amendment to 39 CFR part 111 to reflect these changes if our proposal is adopted.

Stanley F. Mires,

Chief Counsel, Legislative.

[FR Doc. E9–27628 Filed 11–17–09; 8:45 am]

BILLING CODE 7710–12–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2009–0470; FRL–8978–2]

Approval and Promulgation of Air Quality Implementation Plans; California; Motor Vehicle Inspection and Maintenance Program; Proposed Rule—Notice of Data Availability and Request for Comment

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of data availability (NODA) and request for comment.

SUMMARY: The EPA is providing notice that it has placed in the docket for the proposed rulemaking concerning California's June 5, 2009 Motor Vehicle Inspection and Maintenance (I/M) program submittal additional modeling data relevant to the proposed rulemaking, published on August 19, 2009. The August 19, 2009 notice established a 30-day comment period on EPA's proposal, which ended on September 18, 2009. EPA is reopening the comment period to end on December 2, 2009. The purpose of this notice is to provide the public an opportunity to review and comment on the additional modeling data, which were described in the proposed rulemaking notice and are further described below.

Readers should note that only comments about the new modeling data discussed in this document and related issues will be considered during the comment period. Issues related to the August 19, 2009 proposed rule that are not directly affected by the data referenced in this Notice of Data Availability are not open for further comment.

DATES: EPA will accept comments on the modeling data and related issues until December 2, 2009.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R09–OAR–2009–0470, by one of the following methods:

1. *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the on-line instructions.

2. *E-mail: buss.jeffrey@epa.gov*.

3. *Mail or deliver:* Jeffrey Buss (Air-2), U.S. Environmental Protection Agency Region IX, 75 Hawthorne Street, San Francisco, CA 94105–3901.

Instructions: All comments will be included in the public docket without change and may be made available online at *http://www.regulations.gov*, including any personal information provided, unless the comment includes Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Information that you consider CBI or otherwise protected should be clearly identified as such and should not be submitted through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* portal 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 e-mail directly to EPA without going through *http://www.regulations.gov*, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disc 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 *http://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 *http://www.regulations.gov* or in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Jeffrey Buss, EPA Region IX, (415) 947–4152, *buss.jeffrey@epa.gov*.

SUPPLEMENTARY INFORMATION: Throughout this document, the terms ''we'', ''us'', and ''our'' refer to EPA.

On August 19, 2009 (74 FR 41818), EPA proposed to approve state implementation plan (SIP) revisions submitted by the California Air Resources Board (CARB) on June 5, 2009 relating to the State's basic and enhanced vehicle I/M program (''2009 I/M Revision'') contingent upon California's submittal of revisions to the enhanced program performance standard evaluations to address a different attainment year for the Western Mojave Desert 8-hour ozone nonattainment area and to address California's base-year program performance.

As explained in the August 19, 2009 proposal, these revisions to California's enhanced program performance standard evaluation were necessary for two reasons. First, the submitted performance modeling evaluation for the Western Mojave Desert 8-hour ozone nonattainment area was based on the State's choice of 2020 as the horizon year, based on the attainment deadline for 8-hour ozone nonattainment areas classified as ''severe-17.'' [1] Because EPA interprets CAA section 181(b)(3) as disallowing state requests to reclassify ozone nonattainment areas to ''severe-17,'' we noted that the State must submit a revised modeling evaluation

[1] By letter dated February 14, 2008, CARB requested reclassification of the Western Mojave Desert 8-hour ozone nonattainment area to ''severe-17.'' Western Mojave Desert is currently classified as a ''moderate'' nonattainment area for the 8-hour ozone standard. 40 CFR 81.305.

based on a more appropriate horizon year for this area. 74 FR 41818–41823.

Second, CARB did not provide base year modeling evaluations for the six areas in the State that are subject to the enhanced I/M requirements in 40 CFR part 51, subpart S. The six areas are the South Coast Air Basin, San Joaquin Valley, Western Mojave Desert, Sacramento Metro, Coachella Valley, and Ventura County. We noted that a base year modeling run is required to allow for a more definitive conclusion that the California enhanced I/M program obtained the same or lower emission levels as the EPA model program by January 1, 2002, and that the program will maintain this level of emission reduction (or better) through the applicable 8-hour ozone attainment deadlines, as required by 40 CFR 51.351(f). Based on our preliminary modeling analyses and evaluation of the data provided in CARB's submittal, however, we noted that we expect these revised modeling evaluations will satisfy the regulatory requirements. 74 FR 41818–41823. In our proposed rule, we indicated that we would notify the public of any additional information that is provided to address these issues. Publication of this NODA is intended to serve this purpose.

On October 28, 2009, CARB submitted the revised enhanced I/M performance modeling analyses described above. We placed the analyses in the docket on October 29, 2009. Specifically, CARB submitted (1) revised enhanced program performance standard evaluations for the Western Mojave Desert area based on a horizon year of 2018, and (2) 2002 base year performance modeling evaluations for the six areas in the State that are subject to the enhanced I/M requirements in 40 CFR part 51, subpart S (the South Coast Air Basin, San Joaquin Valley, Western Mojave Desert, Sacramento Metro, Coachella Valley, and Ventura County). We find that selection of year 2018 by California as the ''year before the attainment year'' for Western Mojave Desert for enhanced performance modeling purposes is acceptable on the presumption that CARB will amend its voluntary reclassification request from ''severe-17'' to ''severe-15.'' We interpret section 181(b)(3) to allow for voluntary reclassification by a state to the latter, but not the former.

We have also reviewed the submitted modeling data and find that the inputs to the MOBILE6.2 model accurately reflect the California I/M program. Based on the modeling results for Western Mojave Desert submitted on October 28, 2009, together with the performance standard modeling results contained in the 2009 I/M Revision, we believe that California has now demonstrated that the California I/M program would achieve greater percent emissions reductions (relative to the no I/M scenario) for VOC and NO_X in each of the six areas in the year before the attainment year than would the EPA model enhanced I/M program in 2002.

Moreover, the modeling results for the California I/M program in 2002 show that the California program achieved greater percent emissions reductions (relative to the no I/M scenario) for VOC and NO_X in each of the six areas than the EPA model enhanced I/M program in 2002. Thus, in view of the results of both the base year and horizon year modeling results, we believe that the analyses submitted by CARB on October 28, 2009 support the conclusion that the California I/M program will maintain a greater percent emissions reduction in all six subject areas (relative to the no I/M scenario) than would the Federal I/M program in the base year, thereby meeting the enhanced I/M performance standard in 40 CFR 51.351(f) and supporting full approval of the 2009 I/M Revision. EPA is today providing notice and opportunity to comment on these revised modeling evaluations, which are available in the docket for the proposed action.

Dated: October 30, 2009.

Enrique Manzanilla,

Acting Regional Administrator, Region IX.

[FR Doc. E9–27669 Filed 11–17–09; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 271

[EPA–R–10–RCRA–2009–0766; FRL–8977–2]

Oregon: Proposed Authorization of State Hazardous Waste Management Program Revision

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: Oregon has applied to EPA for final authorization of certain changes to its hazardous waste program under the Resource Conservation and Recovery Act, as amended (RCRA). EPA has reviewed Oregon's application and has preliminarily determined that these changes satisfy all requirements needed to qualify for final authorization, and is proposing to authorize the State's changes.

DATES: Comments on this proposed rule must be received by December 18, 2009.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R10–RCRA–2009–0766, by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail: Kocourek.Nina@epa.gov.*
- *Mail:* Nina Kocourek, U.S. Environmental Protection Agency, Region 10, Office of Air, Waste & Toxics (AWT–122), 1200 Sixth Avenue, Suite 900, Seattle, Washington 98101.

Instructions: Direct your comments to Docket ID No. EPA–R10–RCRA–2009–0766. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov*, or e-mail. The *http://www.regulations.gov* 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 *http://www.regulations.gov*, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters or any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket, visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

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

copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy during normal business hours at the U.S. Environmental Protection Agency, Region 10, Office of Air, Waste & Toxics, Mailstop AWT–122, 1200 Sixth Avenue, Suite 900, Seattle, Washington 98101, contact: Nina Kocourek, phone number: (206) 553–6502; or the Oregon Department of Environmental Quality, 811 SW Sixth Avenue, Portland, Oregon, 97204, contact: Scott Latham, phone number: (503) 229–5953.

FOR FURTHER INFORMATION CONTACT: Nina Kocourek, U.S. Environmental Protection Agency, Region 10, Office of Air, Waste & Toxics (AWT–122), 1200 Sixth Avenue, Suite 900, Seattle, Washington 98101, phone number: (206) 553–6502, e-mail: *kocourek.nina@epa.gov.*

SUPPLEMENTARY INFORMATION:

A. Why Are Revisions to State Programs Necessary?

States which have received final authorization from EPA under RCRA section 3006(b), 42 U.S.C. 6926(b), must maintain a hazardous waste program that is equivalent to, consistent with, and no less stringent than the Federal program. As the Federal program changes, States must change their programs and ask EPA to authorize the changes. Changes to State programs may be necessary when Federal or State statutory or regulatory authority is modified or when certain other changes occur. Most commonly, States must change their programs because of changes to EPA's regulations codified in Title 40 of the Code of Federal Regulations (CFR) parts 124, 260 through 268, 270, 273, and 279.

B. What Decisions Have We Made in This Proposed Rule?

EPA has preliminarily determined that Oregon's application to revise its authorized program meets all of the statutory and regulatory requirements established by RCRA. Therefore, we are proposing to grant Oregon final authorization to operate its hazardous waste program with the changes described in the authorization application. Oregon will have responsibility for permitting Treatment, Storage, and Disposal Facilities (TSDFs) within its borders, except in Indian country (18 U.S.C. 1151), and for carrying out the aspects of the RCRA program described in its revised program application, subject to the limitations of the Hazardous and Solid Waste Amendments of 1984 (HSWA). New Federal requirements and prohibitions imposed by Federal regulations that EPA promulgates under the authority of HSWA, and which are not less stringent than existing requirements, take effect in authorized States before the States are authorized for the requirements. Thus, EPA will implement those requirements and prohibitions in Oregon, including issuing permits, until the State is granted authorization to do so.

C. What Will Be the Effect if Oregon Is Authorized for These Changes?

If Oregon is authorized for these changes, a facility in Oregon subject to RCRA will have to comply with the authorized State requirements in lieu of the corresponding Federal requirements in order to comply with RCRA. Additionally, such persons will have to comply with any applicable Federal requirements, such as, for example, HSWA regulations issued by EPA for which the State has not received authorization, and RCRA requirements that are not supplanted by authorized State-issued requirements. Oregon continues to have enforcement responsibilities under its State hazardous waste management program for violations of this program, but EPA retains its authority under RCRA sections 3007, 3008, 3013, and 7003, which includes, among others, the authority to:

- Conduct inspections; require monitoring, tests, analyses, or reports;
- Enforce RCRA requirements; suspend, terminate, modify or revoke permits; and
- Take enforcement actions regardless of whether the State has taken its own actions.

The action to approve these revisions would not impose additional requirements on the regulated community because the regulations for which Oregon will be authorized are already effective under State law and are not changed by the act of authorization.

D. What Happens if EPA Receives Comments on This Action?

If EPA receives comments on this action, we will address those comments in a later final rule. You may not have another opportunity to comment. If you want to comment on this authorization, you must do so at this time.

E. What Has Oregon Previously Been Authorized for?

Oregon initially received final authorization on January 30, 1986, effective January 31, 1986 (51 FR 3779), to implement the RCRA hazardous waste management program. EPA granted authorization for changes to Oregon's program on March 30, 1990, effective on May 29, 1990 (55 FR 11909); August 5, 1994, effective October 4, 1994 (59 FR 39967); June 16, 1995, effective August 15, 1995 (60 FR 31642); October 10, 1995, effective December 7, 1995 (60 FR 52629); September 10, 2002, effective September 10, 2002 (67 FR 57337); and June 26, 2006 effective June 26, 2006 (71 FR 36216) .

F. What Changes Are We Proposing?

EPA is proposing to authorize revisions to Oregon's authorized program described in Oregon's official program revision application, submitted to EPA on October 21, 2009 and deemed complete by EPA on October 26, 2009. EPA has made a preliminary determination that Oregon's hazardous waste program revisions, as described in this proposed rule, satisfy the requirements necessary to qualify for final authorization. The following table identifies equivalent and more stringent State regulatory analogues to the Federal regulations for those regulatory revisions for which Oregon is seeking authorization. The referenced analogous State authorities were legally adopted and effective as of June 25, 2009.

Description of Federal requirements CL [1]	**Federal Register** reference	Analogous state authority (Oregon Administrative Rules (OAR 340–* * *)
Land Disposal Restrictions: Treatment Variance for Radioactively Contaminated Batteries, CL 201.	67 FR 62618, 11/21/2002 ..	–100–0002.
NESHAP: Standards for Hazardous Air Pollutants for Hazardous Waste Combustors—Corrections, CL 202.	67 FR 77687, 12/19/2002 ..	–100–0002.
Hazardous Waste Management System; Identification and Listing of Hazardous Waste; Used Oil Management Standards, CL 203.	68 FR 44659, 7/30/2003	–100–0002.
NESHAP: Surface Coating of Automobiles and Light-Duty Trucks, CL 205	69 FR 22601, 4/26/2004	–100–0002.

Description of federal requirements CL [1]	Federal Register reference	Analogous state authority (Oregon Administrative Rules (OAR 340–* * *)
Non-wastewaters from Dyes and Pigments, CL 206	70 FR 9138, 2/24/2005	–100–0002.
Non-wastewaters from Dyes and Pigments Correction, CL 206.1	70 FR 35032, 6/13/2005	–100–0002.
Uniform Hazardous Waste Manifest, CL 207 [2]	70 FR 10776, 3/4/2005	–100–0002.
Uniform Hazardous Waste Manifest Correction, CL 207.1 [3]	70 FR 35034, 6/16/2005	–100–0002.
Methods Innovation; SW–846, CL 208	70 FR 34538, 6/14/2005	–100–0002.
Methods Innovation; SW–846 Correction, CL 208.1	70 FR 44150, 8/1/2005	–100–0002.
Mercury Containing Equipment, CL 209	70 FR 45508, 8/5/2005	–100–0002.
Headworks Exemption, CL 211	70 FR 57769, 10/4/2005	–100–0002.
NESHAP: Phase I Final Replacement Standards, CL 212	70 FR 59402, 10/12/2005	–100–0002.
Burden Reduction Rule, CL 213 [3]	71 FR 16862, 4/4/2006	–100–0002; –104–0021(1), (2) and (3); –105–0140(1), (2), (3), (4) and (5).
CFR Corrections Rule 1, CL 214	71 FR 40254, 7/14/2006	–100–0002.
CRT Exclusion, CL 215	71 FR 42928, 7/28/2006	–100–0002.

[1] CL (Checklist) is a document that addresses the specific changes made to the Federal regulations by one or more related final rules published in the **Federal Register**. EPA develops these checklists as tools to assist States in developing their authorization application and in documenting specific State regulations analogous to the Federal regulations. For more information see EPA's RCRA State Authorization Web page at *http://www.epa.gov/epawaste/osw/laws-regs/state/index.htm*.

[2] Concurrent with the incorporation by reference of this rule package on June 18, 2009, the Environmental Quality Commission repealed a State-only hazardous waste manifest rule (OAR 340–102–0060) that had previously been authorized by EPA. The State took this action to avoid any potential conflict with the Federal Uniform Hazardous Waste Manifest Rules (CL 207 and 207.1) which are incorporated by reference into Oregon's hazardous waste rules and effective State law as of June 25, 2009.

[3] State rule contains some more stringent provisions. For identification of the more stringent State provisions refer to the authorization revision application and the Attorney General's statement for this proposed rule, as well as see discussion below in Section G of this rule.

G. Where Are the Revised State Rules Different From the Federal Rules?

This section discusses differences between the revisions Oregon proposed to its authorized program and the Federal regulations. EPA's preliminary determination is that the State does have more stringent requirements related to the Federal Burden Reduction Rule (70 FR 16862, April 4, 2006).

In 1999, EPA initiated a new Federal program, National Environmental Performance Track. This was a voluntary program designed to recognize facilities that had a sustained record of compliance and implemented high quality environmental management systems. EPA provided exclusive regulatory and administrative benefits to the Performance Track member facilities. The State of Oregon did not participate in the Federal National Environmental Performance Track Program. In May 2009, EPA terminated the Federal National Performance Track Program (74 FR 22742, May 14, 2009); therefore there are no current Federal Performance Track member facilities. However, EPA did not remove the Federal rules applicable to the Performance Track member facilities from its regulations, and if EPA's Performance Track Program were reinstated these Federal rules would continue to be applicable to future member facilities.

The State incorporated by reference the Federal Burden Reduction Rule (70 FR 16862, April 4, 2006), which included special allowances to lower priorities on routine inspections for Performance Track member facilities. The State also adopted rules which deleted those portions of the rule that referenced Federal Performance Track member facilities. The effect of deleting those references is that the State's rules do not allow any special or administrative benefits for Performance Track member facilities. Therefore, the State's rules found at OAR 340–104–0021(1), (2) and (3); OAR 340–105–0140(1), (2), (3), (4) and (5) are more stringent than those corresponding Federal counterparts found at 40 CFR 264.15(b)(4) and (5); 40 CFR 264.174; 40 CFR 264.195(e)(1); 40 CFR 265.15(b)(4) and (5); 40 CFR 265.174; 40 CFR 265.195(d); and 40 CFR 265.201(e).

H. Who Handles Permits After the Authorization Takes Effect?

Oregon will continue to issue permits for all the provisions for which it is authorized and administer the permits it issues. If EPA issued permits prior to authorizing Oregon for these revisions, these permits would continue in force until the effective date of the State's issuance or denial of a State hazardous waste permit, at which time EPA would modify the existing EPA permit to expire at an earlier date, terminate the existing EPA permit for cause, or allow the existing EPA permit to otherwise expire by its terms, except for those facilities located in Indian Country. EPA will not issue new permits or new portions of permits for provisions for which Oregon is authorized after the effective date of this authorization. EPA will continue to implement and issue permits for HSWA requirements for which Oregon is not yet authorized.

I. What Is Codification and Is EPA Codifying Oregon's Hazardous Waste Program as Authorized in This Proposed Rule?

Codification is the process of placing the State's statutes and regulations that comprise the State's authorized hazardous waste program into the Code of Federal Regulations. This is done by referencing the authorized State rules in 40 CFR part 272. EPA is reserving the amendment of 40 CFR part 272, Subpart MM for codification to a later date.

J. How Would Authorizing Oregon for These Revisions Affect Indian Country (18 U.S.C. 1151) in Oregon?

Oregon is not authorized to carry out its hazardous waste program in Indian country, as defined in 18 U.S.C. 1151. Indian country includes: (1) All lands within the exterior boundaries of Indian reservations within or abutting the State of Oregon; (2) Any land held in trust by the U.S. for an Indian tribe; and (3) Any other land, whether on or off an Indian reservation, that qualifies as Indian country. Therefore, this action has no effect on Indian country. EPA will continue to implement and administer the RCRA program on these lands.

K. Statutory and Executive Order Reviews

This proposed rule seeks to revise the State of Oregon's authorized hazardous waste program pursuant to section 3006

of RCRA and imposes no requirements other than those currently imposed by State law. This proposed rule complies with applicable executive orders and statutory provisions as follows:

1. Executive Order 12866

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the Agency must determine whether the regulatory action is ''significant'', and therefore subject to OMB review and the requirements of the Executive Order. The Executive Order defines ''significant regulatory action'' as one that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more, or adversely affect in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. EPA has determined that this proposed rule is not a ''significant regulatory action'' under the terms of Executive Order 12866 and is therefore not subject to OMB review.

2. Paperwork Reduction Act

This proposed action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, because this proposed rule does not establish or modify any information or recordkeeping requirements for the regulated community and only seeks to authorize the pre-existing requirements under State law and imposes no additional requirements beyond those imposed by State law.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing, and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in Title 40 of the CFR are listed in 40 CFR part 9.

3. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires Federal agencies to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions. For purposes of assessing the impacts of today's proposed rule on small entities, small entity is defined as: (1) A small business defined by the Small Business Administration's size regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field. As part of the State's rule development process, the State of Oregon prepared a ''Department of Environmental Quality (DEQ) Chapter 340, Proposed Rulemaking Statement of Need and Fiscal and Economic Impact'' which included an analysis on impacts to small businesses. The State concluded that there are no economic or fiscal impacts resulting from DEQ's proposed rulemaking. See the Oregon Environmental Quality Commission Agenda, dated June 19, 2009, Action Item N—Hazardous Waste Omnibus Rulemaking, Attachment E, for the DEQ ''Impact to Small Business Analysis'' *http://www.deq.state.or.us/about/eqc/agendas/2009/2009juneEQCagenda.htm*. I certify that this proposed rule will not have a significant economic impact on a substantial number of small entities because the proposed rule will only have the effect of authorizing pre-existing requirements under State law and imposes no additional requirements beyond those imposed by State law. EPA continues to be interested in the potential impacts of the proposed rule on small entities and welcomes comments on issues related to such impacts.

4. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act (UMRA) of 1995 (Pub. L. 104–4) establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures and final rules with ''Federal mandates'' that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective, or least burdensome alternative if the Administrator publishes with the rule an explanation why the alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements. Today's proposed rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local, or tribal governments or the private sector. It imposes no new enforceable duty on any State, local or tribal governments or the private sector. Similarly, EPA has also determined that this proposed rule contains no regulatory requirements that might significantly or uniquely affect small government entities. Thus, today's proposed rule is not subject to the

requirements of sections 202 and 203 of the UMRA.

5. Executive Order 13132: Federalism

This proposed rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This rule proposes to authorize pre-existing State rules. Thus, Executive Order 13132 does not apply to this proposed rule. In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and State and local governments, EPA specifically solicits comment on this proposed rule from State and local officials.

6. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (59 FR 22951, November 9, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' This proposed rule does not have tribal implications, as specified in Executive Order 13175 because EPA retains its authority over Indian Country. Thus, Executive Order 13175 does not apply to this proposed rule. EPA specifically solicits additional comment on this proposed rule from tribal officials.

7. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

EPA interprets EO 13045 (62 F.R. 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the EO has the potential to influence the regulation. This action is not subject to EO 13045 because it approves a State program.

8. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This proposed rule is not subject to Executive Order 13211, ''Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) because it is not a ''significant regulatory action'' as defined under Executive Order 12866.

9. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law 104–113, 12(d) (15 U.S.C. 272), directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. This proposed rulemaking does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

10. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low Income Populations

Executive Order (EO) 12898 (59 FR 7629, February 16, 1994) establishes Federal executive policy on environmental justice. Its main provision directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States. EPA has determined that this proposed rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations. This proposed rule does not affect the level of protection provided to human health or the environment because this rule proposes to authorize pre-existing State rules which are equivalent to, and no less stringent than existing Federal requirements.

List of Subjects in 40 CFR Part 271

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

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

Dated: October 27, 2009.

Michelle L. Pirzadeh,

Acting Regional Administrator, Region 10.

[FR Doc. E9–27615 Filed 11–17–09; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

42 CFR Part 84

[Docket Number NIOSH–0137]

RIN 0920–AA33

Total Inward Leakage Requirements for Respirators

AGENCY: National Institute for Occupational Safety and Health (NIOSH) of the Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice of proposed rulemaking; notice of public meeting.

SUMMARY: The National Institute for Occupational Safety and Health (NIOSH) of the Centers for Disease Control and Prevention (CDC), will hold a public meeting concerning the proposed rule that was published in the **Federal Register** on Friday, October 30, 2009. The proposed rule proposes to establish total inward leakage (TIL) requirements for half-mask air-purifying particulate respirators approved by NIOSH. The proposed new requirements specify TIL minimum performance requirements and testing to be conducted by NIOSH and respirator manufacturers to demonstrate that these respirators, when selected and used correctly, provide effective respiratory protection to intended users against toxic dusts, mists, fumes, fibers, and biological and infectious aerosols (e.g. influenza A(H5N1), severe acute respiratory syndrome (SARS) coronavirus, and Mycobacterium tuberculosis).

DATES: *Meeting:* A public meeting on the proposed rule will be held on December 3, 2009. Details concerning those meetings are in the **SUPPLEMENTARY INFORMATION** section below.

Comments: As established in the proposed rule of October 30, 2009 (74 FR 56141), all written comments must be received on or before December 29, 2009.

ADDRESSES: You may submit comments, identified by RIN: 0920–AA33, by any of the following methods:

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

• *E-mail: niocindocket@cdc.gov*. Include ''RIN: 0920–AA33'' and ''42 CFR Part 84'' in the subject line of the message.

• *Mail:* NIOSH Docket Office, Robert A. Taft Laboratories, MS–C34, 4676 Columbia Parkway, Cincinnati, OH 45226.

Instructions: All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this rulemaking, RIN: 0920–AA33. All comments received will be posted without change to *http://www.cdc.gov/niosh/docket,* including any personal information provided.

Docket: For access to the docket to read background documents or comments received, go to *http://www.cdc.gov/niosh/docket.*

FOR FURTHER INFORMATION CONTACT: Jonathan V. Szalajda, NIOSH, National Personal Protective Technology Laboratory (NPPTL), Post Office Box 18070, 626 Cochrans Mill Road, Pittsburgh, Pennsylvania 15236, telephone (412) 386–5200, facsimile (412) 386–4089, e-mail *zfx1@cdc.gov*.

SUPPLEMENTARY INFORMATION: The Department of Health and Human Services published a proposed rule on the Total Inward Leakage Requirements for Respirators on Friday, October 30, 2009 (74 FR 56141).

NIOSH will hold a public meeting on the proposed rule at the following time and location: December 3, 2009, beginning at 8:30 a.m. EST and ending at 4 p.m. EST, or after the last public commenter has spoken, whichever is earlier, at the Marriot Inn and Conference Center UMUC, 3501 University Boulevard E., Adelphi, MD 20783.

Requests to make presentations at the public meeting should be mailed to the NIOSH Docket Office, Robert A. Taft Laboratories, MS–C34, 4676 Columbia Parkway, Cincinnati, OH 45226. Requests may also be submitted by telephone (513) 533–8611, facsimile (513) 533–8285, or e-mailed to *niocindocket@cdc.gov*.

All requests to present should contain the name, address, telephone number and relevant business affiliations of the presenter, and the approximate time requested for the presentation. Oral presentations should be limited to 15 minutes.

After reviewing the requests for presentations, NIOSH will notify the presenter that his/her presentation is scheduled. If a participant is not present when his/her presentation is scheduled to begin, the remaining participants will be heard in order. After the last scheduled speaker is heard, participants who missed their assigned times may be allowed to speak limited by time available. Attendees who wish to speak but did not submit a request for the opportunity to make a presentation may be given this opportunity after the scheduled speakers are heard, at the discretion of the presiding officer and limited by time available.

This meeting will also be using Audio/LiveMeeting Conferencing, remote access capabilities where interested parties may listen in and review the presentations over the internet simultaneously. Parties remotely accessing the meeting will have the opportunity to comment during the open comment period. To register to use this capability, please contact the National Personal Protective Technology Laboratory (NPPTL), Policy and Standards Development Branch, Post Office Box 18070, 626 Cochrans Mill Road, Pittsburgh, PA 15236, telephone (412) 386–5200, facsimile (412) 386–4089. This option will be available to participants on a first come, first serve basis and is limited to the first 50 participants.

Dated: November 6, 2009.

James Stephens,

Associate Director of Science, Centers for Disease Control and Prevention.

[FR Doc. E9–27388 Filed 11–17–09; 8:45 am]

BILLING CODE 4163–19–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

46 CFR Parts 10, 11, 12, and 15

[Docket No. USCG–2004–17914]

RIN 1625–AA16

Implementation of the 1995 Amendments to the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978

AGENCY: Coast Guard, DHS.

ACTION: Notice of public meetings; request for comments.

SUMMARY: The Coast Guard announces a series of public meetings to receive comments on a notice of proposed rulemaking (NPRM) entitled ''Implementation of the 1995 Amendments to the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978'' that published in the **Federal Register** on November 17, 2009. As stated in that document, the proposed amendments seek to more fully incorporate the requirements of the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978, as amended (STCW Convention), as well as the Seafarer's Training, Certification and Watchkeeping Code (STCW Code) in the requirements for the credentialing of United States merchant mariners.

DATES: Public meetings will be held on the following dates:

• Tuesday, December 1, 2009, in Miami, FL from 9 a.m. until noon;

• Wednesday, December 2, 2009, in NY from 9 a.m. until noon;

• Wednesday, December 9, 2009, in New Orleans, LA from 9 a.m. until noon;

• Friday, December 11, 2009, in Seattle, WA from 9 a.m. until noon;

• Wednesday, January 20, 2010, in Washington, DC from 10 a.m. until 1 p.m.

Written comments and related material may also be submitted to Coast Guard personnel specified at those meetings for inclusion in the official docket for this rulemaking. The comment period for the NPRM closes on February 16, 2010. All comments and related material submitted after the meeting must either be submitted to our online docket via *http://www.regulations.gov* on or before February 16, 2010 or reach the Docket Management Facility by that date.

ADDRESSES: The public meetings will be held at the following locations:

• Tuesday, December 1, 2009, at the Marriott Miami Airport Hotel, 1201 NW LeJeune Road, Miami, FL 33126 from 9 a.m. until noon;

• Wednesday, December 2, 2009, at the Marriott New York LaGuardia Airport Hotel, 102–05 Ditmars Blvd, East Elmhurst, NY 11369 from 9 a.m. until noon;

• Wednesday, December 9, 2009, at the Renaissance Arts Hotel, 700 Tchoupitoulas Street, New Orleans, LA 70130 from 9 a.m. until noon;

• Friday, December 11, 2009, at the Marriott Seattle Airport Hotel, 3201 South 176th Street, Seattle, WA 98188 from 9 a.m. until noon;

• Wednesday, January 20, 2010, at United States Coast Guard Headquarters Building, Room 2415, 2100 Second Street, SW., Washington, DC 20593 from 10 a.m. until 1 p.m. **Note:** A government-issued photo identification (for example, a driver's license) will be required for entrance to the building.

Live Webcasts (audio and video) of the four public meetings to be held in

Miami, FL, New York, NY, New Orleans, LA, and Seattle, WA, will also be broadcast online. The Web site for viewing those Webcasts can be found at *http://www.stcwregs.us.* The Webcasts will enable those using this feature only to view the proceedings and not to make remarks to those participating in the meetings in person. However, a verbatim record of these public meetings will be provided in the docket.

You may submit written comments identified by docket number USCG–2004–17914 before or after the meetings using any one of the following methods:

(1) *Federal eRulemaking Portal: http://www.regulations.gov.*

(2) *Fax:* 202–493–2251.

(3) *Mail:* Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.

(4) *Hand delivery:* Same as mail address above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

To avoid duplication, please use only one of these four methods. Our online docket for this rulemaking is available on the Internet at *http://www.regulations.gov* under docket number USCG–2004–17914.

FOR FURTHER INFORMATION CONTACT: If you have questions on this proposed rulemaking, call or e-mail Mr. Mark Gould, Maritime Personnel Qualifications Division, U.S. Coast Guard, telephone 202–372–1409, e-mail: *Mark.C.Gould@uscg.mil.* If you have questions on viewing or submitting material to the docket, call Ms. Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Background and Purpose

The Coast Guard published a notice of proposed rulemaking (NPRM) in the **Federal Register** on November 17, 2009, entitled ''Implementation of the 1995 Amendments to the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978.'' In the NPRM, we stated our intention to hold public meetings and to publish a notice announcing the location and date. This document is the notice of those meetings.

In the NPRM, we seek to more fully incorporate the requirements of the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978, as amended (STCW Convention), as well as the Seafarer's Training, Certification and Watchkeeping Code (STCW Code) in the requirements for the credentialing of United States merchant mariners.

You may view the NPRM in our online docket, in addition to supporting documents prepared by the Coast Guard, and comments submitted thus far by going to *http://www.regulations.gov.* Once there, click on the ''Read Comments'' box. In the ''Enter Keyword or ID'' box, insert ''USCG–2004–17914'' and click search. Click the ''Open Docket Folder'' button in the ''Actions'' column. If you do not have access to the internet, you may view the docket online by visiting the Docket Management Facility in Room W12–40 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. We have an agreement with the Department of Transportation to use the Docket Management Facility.

We encourage you to participate in this rulemaking by submitting comments either orally at the meetings or in writing. If you bring written comments to the meetings, you may submit them to Coast Guard personnel specified at the meeting to receive written comments. These comments will be submitted to our online public docket. All comments received will be posted without change to *http://www.regulations.gov* and will include any personal information you have provided.

Anyone can search the electronic form of comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review a Privacy Act notice regarding our public dockets in the January 17, 2008, issue of the **Federal Register** (73 FR 3316).

Information on Service for Individuals With Disabilities

For information on facilities or services for individuals with disabilities or to request special assistance at the public meetings, contact Mr. Mark Gould at the telephone number or e-mail address indicated under the **FOR FURTHER INFORMATION CONTACT** section of this notice.

Dated: November 12, 2009.

J.G. Lantz,

Director of Commercial Regulations and Standards, U.S. Coast Guard.

[FR Doc. E9–27639 Filed 11–17–09; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 580

[Docket No. NHTSA–2009–0174; Notice 1]

Petition for Approval of Alternate Odometer Disclosure Requirements

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT.

ACTION: Notice of initial determination.

SUMMARY: The State of Texas has petitioned for approval of alternate requirements to certain requirements under Federal odometer law. NHTSA has initially determined that Texas's alternate requirements satisfy Federal odometer law, with limited exceptions. Accordingly, NHTSA has preliminarily decided to grant Texas's petition, on the condition that before NHTSA makes a final determination, Texas amends its program to meet all the requirements of Federal odometer law or demonstrates that it meets the requirements of Federal law. This notice is not a final agency action.

DATES: Comments are due no later than December 18, 2009.

ADDRESSES: You may submit comments [identified by DOT Docket ID Number NHTSA–2008–0116] by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online 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., between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.
- *Fax:* 202–493–2251.

Instructions: For detailed instructions on submitting comments and additional information on the rulemaking process, see the Public Participation heading of the **SUPPLEMENTARY INFORMATION** section of this document. Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. *Please see* the Privacy Act heading below.

Privacy Act: Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if

submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78) or you may visit *http://DocketInfo.dot.gov.*

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* or the street address listed above. Follow the online instructions for accessing the dockets.

FOR FURTHER INFORMATION CONTACT: Andrew DiMarsico, Office of the Chief Counsel, National Highway Traffic Safety Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590 (*Telephone:* 202–366–5263) (Fax: 202–366–3820).

SUPPLEMENTARY INFORMATION:

I. Introduction

Federal odometer law, which is largely based on the Motor Vehicle Information and Cost Savings Act (Cost Savings Act) [1] and Truth in Mileage Act of 1986 (TIMA),[2] contains a number of provisions to limit odometer fraud and assure that the purchaser of a motor vehicle knows the true mileage of the vehicle. Under regulations promulgated pursuant to provisions in the Cost Savings Act, the transferor (seller) of a motor vehicle must provide a written statement of the vehicle's mileage, signed and dated by the transferor, to the transferee (buyer) at the time of sale. This written statement is generally referred to as the odometer disclosure statement. Further, under TIMA, vehicle titles themselves must have a space for the odometer disclosure statement and States are prohibited from licensing vehicles if the odometer disclosure statement on the title is not signed and dated by the transferor. In addition, titles must be printed by a secure printing process or other secure process. TIMA also contains specific disclosure provisions on transfers of leased vehicles. Federal law also contains document retention requirements.

TIMA's requirements respecting the disclosure of motor vehicle mileage when vehicles are transferred or leased apply in a State unless the State has in effect alternative requirements approved by NHTSA. A State may petition NHTSA for the approval of alternate odometer disclosure requirements that apply in lieu of the Federal odometer requirements.

Seeking to implement an electronic vehicle title transfer system, the State of Texas has petitioned for approval of alternate odometer disclosure requirements under TIMA. The Texas Department of Transportation proposes a paperless electronic title transfer scheme. Texas' program is similar to the Commonwealth of Virginia's alternate odometer disclosure program, which, after notice and comment, NHTSA approved on January 2, 2009. 74 FR 643, 650 (January 7, 2009). Similar to Virginia's, Texas's proposal does not implicate the provisions of federal odometer law related to leased vehicles, disclosures by power of attorney where the title is held by a lien holder, or transactions involving at least one out-of-State party.

As discussed below, NHTSA's initial assessment is that the Texas program satisfies the requirements for approval under Federal odometer law, if Texas amends its program to or shows that its program provides for a transferee to obtain a paper title that complies with the requirements of TIMA,[3] incorporates the ''brand'' requirement in its electronic titling process (the brand states whether the odometer reflects the actual mileage, reflects the mileage in excess of the designated odometer limit or differs from the actual mileage and should not be relied upon) [4] and requires dealers to satisfy their obligation under Federal law to retain copies of odometer disclosure statements that they issue or receive.[5] This notice proposes that NHTSA conditionally grant the Texas petition, subject to its resolution of these three concerns to NHTSA's satisfaction.

II. Statutory Background

NHTSA recently reviewed the statutory background of Federal odometer law in its consideration and approval of Virginia's petition for alternate odometer disclosure requirements. *See* 73 FR 35617 (June 24, 2008) and 74 FR 643 (January 7, 2009). The statutory background of the Cost Savings Act and TIMA, and the purposes behind TIMA, are discussed at length in NHTSA's Final Determination granting Virginia's petition. 74 FR 643, 647–48. A brief summary of the statutory background of Federal odometer law and the purposes of TIMA follows.

In 1972, Congress enacted the Cost Savings Act, among other things, to prohibit tampering of odometers on motor vehicles and to establish certain safeguards for the protection of purchasers with respect to the sale of motor vehicles having altered or reset odometers. *See* Public Law 92–513, section 401, 86 Stat. 947, 961–63 (1972). The Cost Savings Act required that the transferor of a motor vehicle provide a written vehicle mileage disclosure to the transferee, included several provisions relating to tampering with odometers and provided for enforcement. *See* Public Law 92–513, section 408, 86 Stat. 947 (1972).[6] In general, the purpose for the disclosure was to assist purchasers to know the true mileage of a motor vehicle.

A major shortcoming of the odometer provisions of the Cost Savings Act was that they did not require that the odometer disclosure statement be on the title. In a number of States, they were on separate documents that could be altered easily or discarded and did not travel with the title. *See* 74 FR 644. Consequently, the disclosure statements did not deter odometer fraud employing altered documents, discarded titles, and title washing. *Id.*

Congress enacted TIMA in 1986 to address the Cost Savings Act's shortcomings. It amended the Cost Savings Act to prohibit States from licensing vehicles after transfers of ownership unless the new owner (transferee) submitted a title from the seller (transferor) containing the seller's signed and dated statement of the vehicle's mileage, as previously required by the Cost Savings Act. *See* Public Law 99–579, 100 Stat. 3309 (1986); 74 FR 644 (Jan. 7, 2009). TIMA also prohibits the licensing of vehicles, for use in any State, unless the title issued to the transferee is printed using a secure printing process or other secure process, indicates the vehicle mileage at the time of transfer and contains additional space for a subsequent mileage disclosure by the transferee when it is sold again. *Id.* Other provisions created similar safeguards for leased vehicles.

[1] Public Law 92–513, 86 Stat. 947, 961 (1972).

[2] Public Law 99–579, 100 Stat. 3309 (1986).

[3] *See* Section 408(d)(2)(A)(i) of the Cost Savings Act, as added by TIMA, recodified at 49 U.S.C. 32705(b)(3)(A)(i) and 49 CFR 580.4.

[4] *See* Section 408 of the Cost Savings Act, recodified at 49 U.S.C. 32705, and 49 CFR 580.5(e).

[5] *See* Section 408 of the Cost Savings Act, recodified at 49 U.S.C. 32705, and 49 CFR 580.8.

[6] Section 408 stated:

(a) Not later than 90 days after the date of enactment of this Act, the Secretary shall prescribe rules requiring any transferor to give the following written disclosure to the transferee in connection with the transfer of ownership of a motor vehicle:

(1) Disclosure of the cumulative mileage registered on the odometer.

(2) Disclosure that the actual mileage is unknown, if the odometer reading is known to the transferor to be different from the number of miles the vehicle has actually traveled.

Such rules shall prescribe the manner in which information shall be disclosed under this section and in which such information shall be retained.

(b) It shall be a violation of this section for any transferor to violate any rules under this section or to knowingly give a false statement to a transferee in making any disclosure required by such rules.

TIMA added a provision to the Cost Savings Act, allowing States to have alternate requirements to those required under TIMA respecting the disclosure of mileage, with the approval of the Secretary of Transportation. It amended Section 408 of the Cost Savings Act as follows:

(f)(1) The requirements of subsections (d) and (e)(1) respecting the disclosure of motor vehicle mileage when motor vehicles are transferred or leased shall apply in a State unless the State has in effect alternate motor vehicle mileage disclosure requirements approved by the Secretary. The Secretary may promulgate regulations establishing procedures for the consideration and approval of such alternate requirements.

(2) The Secretary shall approve alternate motor vehicle mileage disclosure requirements submitted by a State unless the Secretary determines that such requirements are not consistent with the purpose of the disclosure required by subsection (d) or (e), as the case may be.

In 1988, Congress amended section 408(d) of the Cost Savings Act to permit the use of a secure power of attorney in circumstances where the title was held by a lienholder. The Secretary was required to publish a rule to implement the provision. *See* Public Law 100–561 section 40, 102 Stat. 2805, 2817 (1988), which added Section 408(d)(2)(C). In 1990, Congress amended section 408(d)(2)(C) of the Cost Savings Act. The amendment addressed retention of powers of attorneys by States and provided that the rule adopted by the Secretary not require that a vehicle be titled in the State in which the power of attorney was issued. *See* Public Law 101–641 section 7(a), 104 Stat. 4654, 4657 (1990).

In 1994, in the course of the recodification of various laws pertaining to the Department of Transportation, the Cost Savings Act, as amended, was repealed, reenacted and recodified without substantive change. *See* Public Law 103–272, 108 Stat. 745, 1048–1056, 1379, 1387 (1994). The odometer statute is now codified at 49 U.S.C. 32701 *et seq.* In particular, Section 408(a) of the Cost Savings Act was recodified at 49 U.S.C. 32705(a). Sections 408(d) and (e), which were added by TIMA (and later amended), were recodified at 49 U.S.C. 32705(b) and (c). The provisions pertaining to approval of State alternate motor vehicle mileage disclosure requirements were recodified at 49 U.S.C. 32705(d).

III. Statutory Purposes

As discussed above, the Cost Savings Act, as amended by TIMA in 1986, contains a specific provision on approval of State alternate odometer disclosure programs. Subsection 408(f)(2) of the Cost Savings Act (recodified in 1994 to 49 U.S.C. 32705(d)) provides that NHTSA ''shall approve alternate motor vehicle mileage disclosure requirements submitted by a State unless [NHTSA] determines that such requirements are not consistent with the purpose of the disclosure required by subsection (d) or (e) as the case may be.'' (Subsections 408(d), (e) of the Cost Savings Act were recodified to 49 U.S.C. 32705(b) and (c)). In light of this provision, we now turn to our interpretation of the purposes of these subsections, as germane to Texas's petition.[7]

Our Final Determination granting Virginia's petition for alternate odometer disclosure requirements, after notice and comment, identified the purposes of TIMA germane to petitions for approval of certain alternate odometer disclosure requirements.[8] 74 FR 643, 647–48 (January 7, 2009). These purposes are summarized below.

One purpose of TIMA was to assure that the form of the odometer disclosure precluded odometer fraud. 74 FR 647. To prevent odometer fraud facilitated by disclosure statements that were separate from titles, TIMA required mileage disclosures to be on a secure vehicle title instead of a separate document. These titles also had to contain space for the seller's attested mileage disclosure and a new disclosure by the purchaser when the vehicle was sold again. This discouraged mileage alterations on titles and limited opportunities for obtaining new titles with lower mileage than the actual mileage. *Id.*

A second purpose of TIMA was to prevent odometer fraud by processes and mechanisms making the disclosure of an odometer's mileage on the title a condition of the application for a title, and a requirement for the title issued by the State. 74 FR 647. This provision was intended to eliminate or significantly reduce abuses associated with lack of control of the titling process. *Id.*

Third, TIMA sought to prevent alterations of disclosures on titles and to preclude counterfeit titles through secure processes. 74 FR 648. In furtherance of these purposes, in the context of paper titles, under TIMA, the title must be set forth by means of a secure printing process or protected by ''other secure process.''[9] *Id.*

Another purpose was to create a record of the mileage on vehicles and a paper trail. 74 FR 648. The underlying purposes of this record and paper trail were to enable consumers to be better informed and provide a mechanism through which odometer tampering can be traced and violators prosecuted. TIMA's requirement that new applications for titles include the prior owner's signed mileage disclosure statement on his or her title creates a permanent record that is easily checked by subsequent owners or law enforcement officials. This record provides critical snapshots of the vehicle's mileage at every transfer, which are the fundamental links of this paper trail.

Finally, the general purpose of TIMA was to protect consumers by assuring that they received valid representations of the vehicle's actual mileage at the time of transfer based on odometer disclosures. *Id.*

IV. The Texas Petition

Because it seeks to implement an electronic title transfer system, Texas petitions for approval of alternate odometer disclosure requirements. The scope of its petition is limited; Texas does not request alternate disclosure requirements for leased vehicles, disclosures of odometer statements by power of attorney, such as for vehicles subject to a lien, or transactions involving at least one out-of-State party.

Texas proposes maintaining electronic records of titles in the Texas Department of Transportation (TxDOT), Division of Vehicle Title and Registration (VTR) computer system. According to Texas's petition, the ''title'' will reside as an electronic record with the TxDOT, but that ''hard'' copies of the title can be generated if needed.

The petition also states that the proposed system would require sellers to accurately disclose vehicle mileage and allow buyers to record, view and acknowledge receipt of the disclosure through a secure on-line transaction

[7] Texas's petition does not address disclosures in leases or disclosures by power of attorney. In view of the scope of Texas's petition, Texas will continue to be subject to current federal requirements as to leases and disclosures by power of attorney, and we do not address the purposes of the related provisions.

[8] Since Virginia's program did not cover disclosures in leases or disclosures by power of attorney, the purposes of Sections 408(d)(2)(C) and 408(e) of the Cost Savings Act, as amended, were not germane and were not addressed in the notice approving the Virginia program. *See* 74 FR 647 n. 12.

[9] Congress intended to encourage new technologies by including the language ''other secure process.'' The House Report accompanying TIMA noted that '''other secure process' is intended to describe means other than printing which could securely provide for the storage and transmittal of title and mileage information.'' H.R. Rep. No. 99–833, at 33 (1986). ''In adopting this language, the Committee intends to encourage new technologies which will provide increased levels of security for titles.'' *Id. See also* Cost Savings Act, as amended by TIMA, § 408(d), recodified at 49 U.S.C. 32705(b).

with TxDOT using the TexasOnline Authentication Service (TOAS). TOAS is described as a secure identity verification service that establishes electronic signatures by authenticating individuals against a database. TOAS allows TexasOnline to collect user data, which it matches four personal data elements and two forms of identification submitted by the user against the TexasOnline Authentication Database (TOAD) [10] to authenticate and verify the identity of the user. TOAD data elements include: A Texas driver license or identification card number; current driver license or identification card audit number; date of birth; and the last four digits of the individual's social security number.

A purchaser or seller cannot access the proposed electronic title system unless the purchaser's or seller's identity, and status as a Texas resident, holding a valid Texas driver's license or identification card, is authenticated by TOAS. Therefore, the Texas petition asserts that out-of-state parties would be unable to initiate an electronic title transfer in an on-line transaction with TxDOT.

Under Texas's proposal, completing a motor vehicle sale would require that the seller (transferor) and the purchaser (transferee) perform several steps. First, the seller's identity must be authenticated using TOAS. Once authenticated, the seller can access the TxDOT VTR Registration and Titles System (VTR system). The seller then selects a ''transfer of ownership'' transaction and enters the Vehicle Identification Number (VIN). The vehicle's information is automatically populated on the screen. The transferor is prompted to enter the vehicle sales price and odometer reading.[11] After entering this data, the VTR system will provide the transferor with a unique transaction number. The transferor must provide the unique transaction number to the transferee to complete the transaction.

The transaction would remain in ''pending'' status until the transferee logs on to complete the transfer of ownership transaction. Meanwhile, the VTR system would automatically check the odometer reading entered by the transferor against VTR odometer records. If the odometer reading entered by the transferor is lower than in the State's records, the transaction will be immediately rejected.

Once transferees log on to TexasOnline and are authenticated, TOAS will transfer them to the TxDOT VTR system where they can select ''vehicle transfer of ownership'' and enter the unique transaction number obtained from the transferor. The transferee must enter the correct transaction number to continue. Once access is obtained, the transferee would verify the sales price and odometer reading entered by the transferor. If all the data entered by the transferor is verified and acknowledged as correct by the transferee, ownership of the vehicle would pass to the transferee and an electronic title record would be established by the VTR system. The VTR system would then contact the transferor and request that the transferor's original paper title be mailed to the VTR for destruction.[12]

If the transferee does not agree with the information entered by the transferor, then the VTR system will reject the transaction. The transferor will have the opportunity to correct the sales price and odometer reading for the rejected transaction. The transferee would then re-verify the information to ensure the accuracy. A second discrepancy would result in cancellation of the electronic transaction.

Texas's petition states that the same process, along with additional safeguards, will be used in dealer assignments and reassignments of vehicle ownership. According to Texas, such safeguards include requiring the dealership to notify VTR of the employees authorized to do titling activities for the dealership.[13] This authorization will be stored in the TxDOT VTR system. To complete a transaction, the authorized employee will be required to enter his or her authorization number and the dealer number.

Texas's petition asserts that its proposed alternate odometer disclosure is consistent with Federal odometer law. As advanced by TxDOT, Texas's alternative ensures that a fraudulent odometer disclosure can readily be detected and reliably traced to a particular individual by providing a means for TxDOT to validate and authenticate the individuals through the electronic signatures of both parties. As described above, the parties' electronic signatures are established and their identities authenticated through the four TOAD data elements, Texas driver's license, driver's license audit number, date of birth and last four digits of social security number. TOAS then verifies the identity of the transferor and transferee through the submission of the required information. To conduct any transaction, both the transferor and transferee will have to authenticate their identity by submitting the correct data elements.

Texas also asserts that its proposal provides a level of security equivalent to that of a disclosure on a secure title document and provides an on-line authentication for identity management solution in lieu of an actual signature on the title. Furthermore, Texas states that the electronic odometer disclosure provided by the transferor will be available to the transferee at the time ownership of the vehicle is transferred.

The Texas petition maintains that the electronic record and signature components of the proposal comport with the Electronic Signatures in Global and National Commerce Act (E-Sign), 15 U.S.C. 7001 *et seq.* Current State law permits the creation of electronic certificates of title, but requires a paper certificate of title for all transfers of vehicle ownership. Tex. Transp. Code Ann. § 501.117. If its proposal were approved, Texas could pass pending legislation that would implement an electronic title system.

V. Analysis

Under TIMA, NHTSA ''shall approve alternate motor vehicle mileage disclosure requirements submitted by a State unless [NHTSA] determines that such requirements are not consistent with the purpose of the disclosure required by subsection (d) or (e) as the case may be.'' The purposes are discussed above, as is the Texas alternative. We now provide our initial assessment whether Texas's proposal

[10] Currently, TexasOnline permits users to perform several services online, such as renewal of driver licenses, voter registration address changes, and ordering driving records. The term ''electronic signature'' means an electronic sound, symbol or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record. 15 U.S.C. 7006(5) (2004).

[11] Texas does not address the brand requirement. Under the Cost Savings Act, a person transferring ownership must provide written disclosure that the actual mileage is unknown, if the transferor knows that the odometer reading is different from the number of miles the vehicle has actually traveled. *See* 49 CFR 590.5(e).

[12] According to the Texas petition, the previous title, regardless if it were electronic or paper, would be superseded by the ''new'' electronic title. The ''old'' title is invalidated in the VTR system and would be unable to transfer title in Texas.

[13] Texas does not address the dealer retention requirements as set forth in 49 CFR 580.8(a), which requires dealers and distributors to retain a copy of odometer disclosure statements that they issue and receive for five years. It is unclear whether Texas's program includes a mechanism for the dealer or distributor to retain a copy of any odometer disclosure statement involved in a transaction.

satisfies TIMA's purposes as relevant to its petition.[14]

One purpose is to assure that the form of the odometer disclosure precludes odometer fraud. In this regard, NHTSA has initially determined that Texas's proposed alternate disclosure requirements satisfy this purpose. Under Texas's proposal, it appears that the ''title'' will reside as an electronic record with the TxDOT, but a hard copy of the title will be generated upon request. Texas's proposed system will, therefore, continue to have the odometer disclosure on the virtual ''title'' itself, as required by TIMA, and not as a separate document. As to TIMA's requirement that the title contain a space for the transferor to disclose the vehicle's mileage, NHTSA does not believe the proposed Texas electronic title is inconsistent with the space requirement. The agency, however, expects that hard copies of these electronic titles will provide a separate space for owners to execute a proper odometer disclosure in keeping with TIMA and current practice.

Another purpose of TIMA is to prevent odometer fraud by processes and mechanisms making the disclosure of an odometer's mileage on the title a condition of the application for a title and a requirement for the title issued by the State. NHTSA has initially determined that Texas's proposed process satisfies this purpose. The proposed on-line title transfer process requires disclosure of odometer information before the transaction can be completed. If the transaction is successful, the VTR system will retain an electronic title, which includes a record of the transaction and the odometer disclosure information. Once the transaction is complete, transferors are instructed to mail the existing title to the VTR for destruction.[15]

Another purpose of TIMA is to prevent alterations of disclosures on titles and to preclude counterfeit titles through secure processes. The agency has initially determined that VTR's alternate disclosure requirements appear to be as secure as current paper titles. Electronic recording of odometer readings and disclosures decreases the likelihood of any subsequent odometer disclosure being altered by erasures or other methods. As we understand Texas's proposal, once the transaction is completed, the VTR system stores an electronic version of the title until the transferee requests it.

Under the VTR system, all subsequent transfers may be performed through the on-line process. Each time an on-line transfer occurs, the VTR system stores the electronic version of the title, and issues a paper title only upon request. Since the title remains in electronic form under State care and custody, the likelihood of an individual altering, tampering or counterfeiting the title is significantly decreased. These electronic records are maintained in a secure environment and any attempted alteration would be detected by the system. Finally, if a transferee requests a paper title, the VTR will issue a paper title, but the Texas submission does not state that the paper title will comply with TIMA requirements, which it must.

Another purpose of TIMA is to create a record of the mileage on vehicles and a paper trail. The underlying purposes of this record trail are to enable consumers to be better informed and provide a mechanism through which odometer tampering can be traced and violators prosecuted. In NHTSA's preliminary view, the proposed electronic title transfer system will create a scheme of records equivalent to the current ''paper trail'' now assisting law enforcement in identifying and prosecuting odometer fraud. Under the Texas proposal, creation of a paper trail starts with the establishment of the electronic signatures of the parties. Due to the system's procedures for validating and authenticating the electronic signature of each individual through TOAS and TOAD, the electronic signatures of the transferor and transferee are reliable, readily detectable and can easily be linked to particular individuals.[16] Because the electronic signature consists of data elements such as the Texas driver license or identification card number, driver license or identification card audit number, date of birth and last four digits of the individual's social security number, the VTR system can validate and authenticate individual electronic signatures. This authentication process also allows the VTR system to trace the individuals involved in the transaction. This capacity maintains the purposes of creating a paper trail since the VTR system will have histories of odometer disclosures for each title transfer. These electronic records will create the electronic equivalent to a paper based system that will be readily available to law enforcement. The one exception is that the program does not require dealers to retain a copy of all odometer disclosures that they issue and receive.

Finally, TIMA's overall purpose is to protect consumers by assuring that they receive valid representations of the vehicle's actual mileage at the time of transfer based on odometer disclosures. Here, Texas's proposed alternate disclosure requirements include several characteristics that would assure that representations of a vehicle's actual mileage would be as valid as those found in current paper title transfers, with one exception. These characteristics include identity and residency authentication, an automatic system check of the reported mileage against previously reported mileage, and transferee verification of the data reported by the transferor.[17] In addition, by providing rapid access to records of past transfers, the scheme proposed by Texas could potentially provide superior deterrence to odometer fraud when compared to the current paper title system. The one exception is that Texas's alternate disclosure requirements do not require the transferor to state whether the odometer reflects the actual mileage or if the actual mileage is unknown. *See* 49 CFR 580.5(e). This statement is referred to as the ''brand.''

VI. NHTSA's Initial Determination

For the foregoing reasons, NHTSA preliminarily grants Texas's proposed alternate disclosure requirements on the condition that Texas amends its program to enable transferees to obtain a paper copy of the title that meets the requirements of TIMA, requires dealers to retain a copy of all odometer disclosures that they issue and receive, and requires disclosure of the brand, or demonstrates that these requirements are met. This is not a final agency action. NHTSA invites public comments within the scope of this notice. Should NHTSA decide to issue a final grant of Texas' petition, it would likely reserve the right to rescind that grant in the event that information acquired after

[14] Texas would continue to be subject to all federal requirements that are not based on Section 408(d) of the Cost Savings Act as amended, recodified at 49 U.S.C. 32705(b).

[15] If the transferor does not return the existing title to VTR, the existing title will be invalid once the vehicle transfers to the transferee.

[16] Electronic signatures are generally valid under applicable law. Congress recognized the growing importance of electronic signatures in interstate commerce when it enacted the Electronic Signatures in Global and National Commerce Act (E-Sign). *See* Public Law 106–229, 114 Stat. 464 (2000). E-Sign established a general rule of validity for electronic records and electronic signatures. 15 U.S.C. 7001. It also encourages the use of electronic signatures in commerce, both in private transactions and transactions involving the Federal government. 15 U.S.C. 7031(a).

[17] Further protection is provided by the VTR system itself. The system automatically cross references the odometer reading entered by the transferor against the odometer reading on the VTR system. If the odometer reading entered by the transferor is lower than the mileage recorded in the VTR system, the VTR system will immediately reject the transaction.

that grant were to indicate that, in operation, Texas alternate requirements do not satisfy applicable standards.

Request for Comments

How Do I Prepare and Submit Comments?

Your comments must be written and in English. To ensure that your comments are filed correctly in the Docket, please include the docket number of this document in your comments.

Your comments must not be more than 15 pages long (*see* 49 CFR 553.21). We established this limit to encourage you to write your primary comments in a concise fashion. However, you may attach necessary additional documents to your comments. There is no limit on the length of the attachments.

Please submit two copies of your comments, including the attachments, to Docket Management at the address given under **ADDRESSES**.

You may also submit your comments to the docket electronically by logging onto the Dockets Management System Web site at *http://dms.dot.gov*. Click on ''Help & Information,'' or ''Help/Info'' to obtain instructions for filing the document electronically.

How Can I Be Sure That My Comments Were Received?

If you wish Docket Management to notify you upon its receipt of your comments, enclose a self-addressed, stamped postcard in the envelope containing your comments. Upon receiving your comments, Docket Management will return the postcard by mail.

How Do I Submit Confidential Business Information?

If you wish to submit any information under a claim of confidentiality, you should submit three copies of your complete submission, including the information you claim to be confidential business information, to the Chief Counsel, NHTSA, at the address given above under **FOR FURTHER INFORMATION CONTACT**. In addition, you should submit two copies, from which you have deleted the claimed confidential business information, to Docket Management at the address given above under **ADDRESSES**. When you send a comment containing information claimed to be confidential business information, you should include a cover letter setting forth the information specified in our confidential business information regulation (49 CFR Part 512).

Will The Agency Consider Late Comments?

We will consider all comments that Docket Management receives before the close of business on the comment closing date indicated above under **DATES**. To the extent possible, we also will consider comments that Docket Management receives after that date. If Docket Management receives a comment too late for us to consider it in developing the final rule, we will consider that comment as an informal suggestion for future rulemaking action.

How Can I Read the Comments Submitted by Other People?

You may read the comments received by Docket Management at the address given under **ADDRESSES**. The hours of the Docket are indicated above in the same location.

You also may see the comments on the Internet. To read the comments on the Internet, go to *http://www.regulations.gov*, and follow the instructions for accessing the Docket.

Please note that even after the comment closing date, we will continue to file relevant information in the Docket as it becomes available. Further, some people may submit late comments. Accordingly, we recommend that you periodically check the Docket for new material.

Issued on: November 6, 2009.

O. Kevin Vincent,

Chief Counsel.

[FR Doc. E9–27157 Filed 11–17–09; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 222

[Docket No. 0906181067–91356–01]

RIN 0648–XP96

2010 Annual Determination for Sea Turtle Observer Requirement

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

ACTION: Proposed rule.

SUMMARY: The National Marine Fisheries Service (NMFS) publishes its proposed Annual Determination (AD) for 2010, pursuant to its authority under the Endangered Species Act (ESA). Through this proposed AD, NMFS would identify commercial fisheries operating in state and Federal waters in the Atlantic Ocean, Gulf of Mexico, and Pacific Ocean that would be required to take observers upon NMFS' request. The purpose of observing identified fisheries is to learn more about sea turtle interactions in a given fishery, evaluate existing measures to reduce or prevent sea turtle takes, and to determine whether additional measures to address prohibited sea turtle takes may be necessary. Fisheries identified through this process would remain on the AD, and therefore required to carry observers upon NMFS' request, for 5 years.

DATES: Comments must be received by December 18, 2009.

ADDRESSES: Send comments on the proposed rule by any one of the following methods.

(1) Electronic Submissions: Submit all electronic comments through the Federal eRulemaking portal: *http://www.regulations.gov* (follow instructions for submitting comments).

(2) Facsimile: (301) 713–0376, Attention: 2010 Sea Turtle Annual Determination.

(3) Mail: Chief, Marine Mammal and Sea Turtle Conservation Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Silver Spring, MD 20910.

Instructions: All comments received are a part of the public record and will generally be posted to *http://www.regulations.gov* without change. All personal identifying information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information. NMFS will accept anonymous comments (enter ''N/A'' in the required fields, if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

Send comments on the information collection requirements or any other aspects of the collection of information to the Chief of the Marine Mammal and Sea Turtle Conservation Division, Office of Protected Resources, at the **ADDRESSES** above, and e-mail to *David_Rostker@omb.eop.gov*, or fax to (202) 395–7285.

See **SUPPLEMENTARY INFORMATION** for a listing of all Regional Offices.

FOR FURTHER INFORMATION CONTACT: Kristy Long, Office of Protected Resources, 301–713–2322; Ellen Keane, Northeast Region, 978–282–8476; Dennis Klemm, Southeast Region, 727–824–5312; Elizabeth Petras, Southwest

Region, 562–980–3238; Kim Maison, Pacific Islands Region, 808–944–2257. Individuals who use a telecommunications device for the hearing impaired may call the Federal Information Relay Service at 1–800–877–8339 between 8 a.m. and 4 p.m. Eastern time, Monday through Friday, excluding Federal holidays.

SUPPLEMENTARY INFORMATION:

Availability of Published Materials

Information regarding the Marine Mammal Protection Act (MMPA) List of Fisheries (LOF) may be obtained at *http://www.nmfs.noaa.gov/pr/interactions/lof/* and information regarding Marine Mammal Stock Assessment Reports may be obtained at *http://www.nmfs.noaa.gov/pr/sars/* or from any NMFS Regional Office at the addresses listed below:

NMFS, Northeast Region, 55 Great Republic Drive, Gloucester, MA 01930–2298;

NMFS, Southeast Region, 263 13th Avenue South, St. Petersburg, FL 33701;

NMFS, Southwest Region, 501 W. Ocean Blvd., Suite 4200, Long Beach, CA 90802–4213; or

NMFS, Pacific Islands Region, Protected Resources, 1601 Kapiolani Boulevard, Suite 1100, Honolulu, HI 96814–4700.

Purpose of the Sea Turtle Observer Requirement

Under the ESA, 16 U.S.C. 1531 *et seq.*, NMFS has the responsibility to implement programs to conserve marine life listed as endangered or threatened. All sea turtles found in U.S. waters are listed as either endangered or threatened under the ESA. Kemp's ridley (*Lepidochelys kempii*), leatherback (*Dermochelys coriacea*), and hawksbill (*Eretmochelys imbricata*) sea turtles are listed as endangered. Loggerhead (*Caretta caretta*), green (*Chelonia mydas*), and olive ridley (Lepidochelys olivacea) sea turtles are listed as threatened, except for breeding colony populations of green turtles in Florida and on the Pacific coast of Mexico and breeding colony populations of olive ridleys on the Pacific coast of Mexico, which are listed as endangered. Due to the inability to distinguish between populations of green turtles away from the nesting beach, NMFS considers green turtles endangered wherever they occur in U.S. waters. While some sea turtle populations have shown signs of recovery, many populations continue to decline.

Incidental take, or bycatch, in fishing gear is one of the main sources of sea turtle injury and mortality nationwide. Section 9 of the ESA prohibits the take (including harassing, harming, pursuing, hunting, shooting, wounding, killing, trapping, capturing, or collecting or attempting to engage in any such conduct), including incidental take, of endangered sea turtles. Pursuant to section 4(d) of the ESA, NMFS has issued regulations extending the prohibition of take, with exceptions, to threatened sea turtles (50 CFR 223.205 and 223.206). Section 11 of the ESA authorizes the issuance of regulations to enforce the take prohibitions. NMFS may grant exceptions to the take prohibitions with an incidental take statement or an incidental take permit issued pursuant to ESA section 7 or 10, respectively. To do so, NMFS must determine that the activity that will result in incidental take is not likely to jeopardize the continued existence of the affected listed species. In some cases, NMFS has been able to make this determination because the fishery is conducted with modified gear or modified fishing practices that NMFS has been able to evaluate. However, for some Federal fisheries and most state fisheries, NMFS has not granted an exception primarily because we lack information about fishery-turtle interactions. Therefore, any incidental take of sea turtles in those fisheries is unlawful as it has not been exempted from the ESA prohibition on take.

The most effective way for NMFS to learn more about sea turtle-fishery interactions in order to minimize or prevent take is to place observers aboard fishing vessels. In 2007, NMFS issued a regulation (50 CFR 222.402) to establish procedures through which each year NMFS will identify, pursuant to specified criteria and after notice and opportunity for comment, those fisheries in which the agency intends to place observers (72 FR 43176, August 3, 2007). These regulations specify that NMFS may place observers on U.S. fishing vessels, either recreational or commercial, operating in U.S. territorial waters, the U.S. exclusive economic zone (EEZ), or on the high seas, or on vessels that are otherwise subject to the jurisdiction of the U.S.

NMFS and/or interested cooperating entities will pay the direct costs for vessels to carry observers. These include observer salary and insurance costs. NMFS may also evaluate other potential direct costs, should they arise. Once selected, a fishery will be eligible to be observed for five years without further action by NMFS. This will enable NMFS to develop an appropriate sampling protocol to investigate whether, how, when, where, and under what conditions incidental takes are occurring; to evaluate whether existing measures are minimizing or preventing takes; and to determine whether additional measures are needed to implement ESA take prohibitions and conserve turtles.

Process for Developing an Annual Determination

Pursuant to 50 CFR 222.402, the Assistant Administrator for Fisheries, NOAA (AA), in consultation with Regional Administrators and Fisheries Science Center Directors, develops a proposed annual determination identifying which fisheries are required to carry observers, if requested, to monitor potential interactions with sea turtles. NMFS provides an opportunity for public comment on any proposed determination. The determination is based on the best available scientific, commercial, or other information regarding sea turtle-fishery interactions; sea turtle distribution; sea turtle strandings; fishing techniques, gears used, target species, seasons and areas fished; or qualitative data from logbooks or fisher reports. Specifically, this determination is based on the extent to which:

(1) The fishery operates in the same waters and at the same time as sea turtles are present;

(2) The fishery operates at the same time or prior to elevated sea turtle strandings; or

(3) The fishery uses a gear or technique that is known or likely to result in incidental take of sea turtles based on documented or reported takes in the same or similar fisheries; and

(4) NMFS intends to monitor the fishery and anticipates that it will have the funds to do so.

The AA uses the most recent version of the annually published MMPA List of Fisheries (LOF) as the comprehensive list of commercial fisheries for consideration. The LOF includes all known state and Federal commercial fisheries that occur in U.S. waters. The classification scheme used for fisheries on the LOF would not be relevant to this process. Unlike the LOF process, an annual determination may also include recreational fisheries likely to interact with sea turtles on the basis of the best available information.

NMFS consulted with appropriate state and Federal fisheries officials and other entities to identify which fisheries, both commercial and recreational, should be considered in the annual determination. Although the comments and recommendations provided to NMFS by states were based upon the best available information on their fisheries, NMFS received more

recommendations for fisheries to include on the 2010 AD than is feasible to propose at this time based on the four previously noted criteria (50 CFR 222.402(a)).

The AD is not an exhaustive or comprehensive list of all fisheries with documented or suspected takes of sea turtles; there are additional fisheries that NMFS remains concerned about. For these additional fisheries, NMFS may already be addressing incidental take through another mechanism (e.g., rulemaking to implement modifications to fishing gear and/or practices) or will consider adding them to future annual determinations based on the four previously noted criteria (50 CFR 222.402(a)).

Notice of the final determination will be published in the **Federal Register** and made in writing to individuals permitted for each fishery identified for monitoring. NMFS will also notify state agencies and provide notification through publication in local newspapers, radio broadcasts, and other means, as appropriate. Once included in the final determination, a fishery will remain eligible for observer coverage for five years to enable the design of an appropriate sampling program and to ensure collection of sufficient scientific data for analysis. If NMFS determines that more than five years are needed to obtain sufficient scientific data, NMFS will include the fishery in the proposed AD again prior to the end of the fifth year. As part of the 2010 AD, NMFS has included, to the extent practicable, information on the fisheries or gear types to be sampled, geographic and seasonal scope of coverage, and any other relevant information. After publication of a final AD, a 30–day delay in effective date for implementing observer coverage will follow, except for those fisheries where the AA has determined that there is good cause pursuant to the Administrative Procedure Act to make the rule effective without a 30–day delay.

Implementation of Observer Coverage in a Fishery Listed on the 2010 Annual Determination

The design of any observer program for fisheries identified through the AD process, including how observers would be allocated to individual vessels, would vary among fisheries, fishing sectors, gear types, and geographic regions and would ultimately be determined by the individual NMFS Regional Office, Science Center, and/or observer program. During the program design, NMFS would be guided by the following standards for distributing and placing observers among fisheries identified in the AD and vessels in those particular fisheries:

(1) The requirements to obtain the best available scientific information;

(2) The requirement that observers be assigned fairly and equitably among fisheries and among vessels in a fishery;

(3) The requirement that no individual person or vessel, or group of persons or vessels, be subject to inappropriate, excessive observer coverage; and

(4) The need to minimize costs and avoid duplication, where practicable.

Vessels where the facilities for accommodating an observer or carrying out observer functions are so inadequate or unsafe (due to size or quality of equipment, for example) that the health or safety of the observer or the safe operation of the vessel would be jeopardized, would not be required to take observers under this proposed rule. Nonetheless, per Magnuson-Stevens Fishery Conservation and Management Act (MSA) regulations for observers (50 CFR 600.746), a vessel that would otherwise be required to carry an observer, but is inadequate or unsafe for purposes of carrying an observer and for allowing operation of normal observer functions, is prohibited from fishing without observer coverage. However, observation techniques using alternative platforms apart from the fishing vessel, but still requiring the cooperation of fishermen, may be employed in such instances as appropriate. Failure to comply with the requirements under this rule may result in civil or criminal penalties under the ESA.

Observer programs designed or carried out in accordance with 50 CFR 222.404 would be required to be consistent with existing observer-related NOAA policies and regulations, such as those under the Fair Labor and Standards Act (29 U.S.C. 201 *et seq.*), the Service Contract Act (41 U.S.C. 351 *et seq.*), Observer Health and Safety regulations (50 CFR 600), and other relevant policies.

Fisheries not included on the 2010 AD may still be observed under a different authority than the ESA (e.g., MMPA, MSA).

Additional information on observer programs in commercial fisheries can be found on the NMFS National Observer Program's website: *http://www.st.nmfs.gov/st4/nop/*; links to individual regional observer programs may also be found on this website.

Sea Turtle Distribution

Atlantic Ocean and Gulf of Mexico

Sea turtle species found in waters of the Atlantic Ocean and Gulf of Mexico include green, hawksbill, Kemp's ridley, leatherback, and loggerhead turtles. The waters off the U.S. East Coast represent important residential, migrating, and foraging habitat for several of these species. Further, the Southeastern U.S. is a major sea turtle nesting area for loggerheads and, to a lesser extent, green and leatherback turtles.

Four species, green, Kemp's ridley, leatherback, and loggerhead turtles, occur seasonally in southern New England and mid-Atlantic continental shelf waters north of Cape Hatteras, North Carolina. The occurrence of these species in these waters is temperature dependent. In general, turtles move up the coast from southern wintering areas as water temperatures warm in the spring. The trend is reversed in the fall as water temperatures decrease. By December, turtles have passed Cape Hatteras, returning to more southern waters for the winter. Hard-shelled species are typically observed as far north as Cape Cod, Massachusetts, whereas more cold-tolerant leatherbacks are observed farther north in northern Gulf of Maine waters in the summer and fall.

Green turtles are found in inshore and nearshore waters from Texas to Massachusetts, the U.S. Virgin Islands, and Puerto Rico. While foraging and developmental habitats also occur in the wider Caribbean, important feeding areas in Florida include the Indian River Lagoon, the Florida Keys, Florida Bay, Homosassa, Crystal River, Cedar Key, and St. Joseph Bay. The bays and sounds of North Carolina also provide important foraging habitat for green turtles, which can occur in those areas in relatively high densities.

In the Atlantic, hawksbills are most common in Puerto Rico and its associated islands and in the U.S. Virgin Islands. In the continental U.S., the species is recorded from all the Gulf States and along the east coast as far north as Massachusetts, but sightings north of Florida are rare. Hawksbills are observed in Florida on the reefs off Palm Beach, Broward, Miami-Dade, and Monroe Counties. Texas is the only other U.S. state where hawksbills are sighted with any regularity.

Kemp's ridleys are distributed throughout waters of the Gulf of Mexico and U.S. Atlantic coast, from Florida to New England. The major nesting area for Kemp's ridleys is in Tamaulipas, Mexico, but some nesting also occurs along the Texas coast.

The second largest nesting aggregation of loggerheads in the world occurs in the southeastern U.S. Loggerheads occur throughout the Atlantic and Gulf of

Mexico, spending significant time in coastal areas.

Adult leatherbacks are capable of tolerating a wide range of water temperatures, and have been sighted along the entire continental coast of the United States as far north as the Gulf of Maine and south to Puerto Rico, the U.S. Virgin Islands, and into the Gulf of Mexico. The central east coast of Florida represents a small, but growing, nesting area for leatherbacks in the western North Atlantic.

U.S. Pacific Ocean

Leatherback sea turtles are found consistently off the U.S. west coast, usually north of Point Conception, California. Green turtles, loggerhead, and olive ridley sea turtles are rarely observed in the west coast EEZ, but records show that all species have stranded in California and the Pacific Northwest. Leatherbacks are known to migrate to central and northern California from their natal beaches in the Western Pacific to feed on jellyfish. During aerial surveys conducted since the early 1990s, leatherbacks were most often spotted off Point Reyes, south of Point Arena, in the Gulf of the Farallons, and in Monterey Bay. Leatherback turtles usually appear in Monterey Bay and California coastal waters during August and September and move offshore in October and November. Other observed areas of summer leatherback concentration include northern California and the waters off Washington through northern Oregon, offshore from the Columbia River plume.

Green, loggerhead, and olive ridley sea turtles are generally found in waters temperatures above 18 C, which is warmer than the waters off most of California, Oregon, and Washington. Two small populations of green turtles occur in the southern California Bight utilizing the warm water outflows from power plants in San Diego Bay and Alamitos Bay in Long Beach, California. In the eastern Pacific, loggerheads have been reported as far north as Alaska, and as far south as Chile. Occasional sightings are reported from the coasts of Washington and Oregon, but most records are of juveniles off the coast of California. Based upon limited observer records, loggerheads travel into the southern California Bight during El Nino events (or warm water conditions similar to an El Nino). The majority of fishery interactions with loggerheads during El Nino conditions have occurred during the summer. Olive ridleys have been recorded stranded all along the U.S. west coast. Olive ridleys are believed to use warm water currents along the west coast for foraging. The general distribution of olive ridleys along the U.S. west coast is unknown at this time.

Sea turtles occur throughout the Pacific Islands Region including the State of Hawaii and the U.S. territories of Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands (CNMI). Green and hawksbill turtles are most common in nearshore waters while leatherbacks, loggerheads, and olive ridleys occur in offshore pelagic waters. Stock structure and population dynamics for some species in this region are poorly understood.

Sea Turtle Strandings

NMFS reviewed data collected by the Sea Turtle Stranding and Salvage Network (STSSN) between 2003 and 2007 to identify stranding trends and inform development of this proposed rule. Cold stunned, captive-reared, and post-hatchling turtles were not included in the data reviewed.

Between 2003 and 2007, the STSSN along the U.S. Atlantic and Gulf coasts collectively documented strandings of six species: loggerhead, Kemp's ridley, green, leatherback, hawksbill, and olive ridley turtles, with loggerheads consistently representing the highest number of strandings. For the purposes of this review, the U.S. Atlantic and Gulf of Mexico coastline is divided into three regions: (1) Gulf, including all Gulf of Mexico waters from TX through the FL gulf coast, (2) Southeast Atlantic, including U.S. Atlantic waters from FL east coast through NC, and (3) Northeast Atlantic, including all U.S. Atlantic waters from VA through ME. Of the three regions, the Southeast Atlantic consistently records the highest level of strandings during any given month, each year. In each region, as well as collectively, loggerhead sea turtles represent the highest number of annual strandings, followed by Kemp's ridley and leatherback turtles in the Atlantic and green turtles in the Gulf.

Based on the data reviewed, strandings have occurred in each month of the year, in all three regions; however, distinct trends are notable within each region. In the Gulf and Southeast Atlantic regions, strandings consistently occur in every month of the year. In the Gulf region, the highest concentration of strandings occurs from March to August, with a notable peak in April and May. In the Southeast Atlantic region, the highest concentration of strandings occurs from March to November, with a notable peak in May and June. In the Northeast Atlantic region, strandings predominately occur between May and November of each year, with the highest concentration of strandings between June and September; strandings are not regularly observed in the winter and early spring.

On the U.S. West Coast, strandings are infrequent compared to the Atlantic and Gulf of Mexico coasts predominantly due to oceanographic features (e.g., currents) and species abundance and distribution. Between 2003 and 2007, the STSSN in California documented strandings of three species: green, leatherback, and olive ridley turtles. Green turtles represent the highest number of strandings. Strandings were documented in all months except April; data indicate a peak in strandings between July and October.

In Oregon and Washington, very few strandings were recorded between 2003 and 2007. Green, loggerhead, and olive ridley turtle strandings were recorded from December to March, with no strandings documented from April through November. Prior to 2003, stranded leatherback turtles were recorded in Oregon and Washington.

In the Pacific Islands region, strandings occur throughout the year, primarily green turtles and secondarily hawksbills in Hawaii, Guam, American Samoa, and CNMI.

Addition of Fisheries on the 2010 Annual Determination

NMFS is proposing to include 19 fisheries (17 in the Atlantic Ocean and Gulf of Mexico and 2 in the Pacific Ocean) on the 2010 AD. These 19 fisheries, described below and listed in Table 1, represent several gear types, including trawl, gillnet, trap/pot, and pound net/weir/seine.

As described above, the most recent LOF is used as the universe of commercial fisheries included on the AD. The fishery name, definition, and number of vessels/persons specified on the AD are taken from the most recent final LOF. Additionally, the fishery descriptions below include a particular fishery's current classification on the MMPA LOF (i.e., Category I, II, or III); Category I and II fisheries are required to carry observers if requested by NMFS. As noted previously, NMFS also has authority to observe fisheries in Federal waters under the MSA, under which NMFS has collected sea turtle bycatch information.

Trawl Fisheries

Interactions with trawl fisheries are of a particular concern for sea turtles, since forced submergence in any type of restrictive gear could lead to lack of oxygen and subsequent death by drowning. Metabolic changes that can

impair a sea turtle's ability to function can occur within minutes of a forced submergence (Lutcavage et al., 1997).

Trawls that are not outfitted with turtle excluder devices (TEDs) may result in forced submergence. Currently, only trawl fisheries capable of catching shrimp and operating south of Cape Charles, VA, and in the Gulf of Mexico as well as trawl fisheries targeting summer flounder south of Cape Charles, VA, are required to use TEDs.

NMFS' Strategy for Sea Turtle Conservation and Recovery in Relation to Atlantic Ocean and Gulf of Mexico Fisheries (''Strategy''), a gear-based approach to addressing sea turtle bycatch, has identified trawl gear as a priority given our knowledge of the level of bycatch in this gear and the availability of technology that allows sea turtles to escape the trawl net, minimizing injury and mortality. The Strategy is currently evaluating mitigation measures for trawl fisheries that overlap with sea turtles. Several fisheries that NMFS proposes to include on the 2010 AD may be considered for sea turtle conservation measures under the Strategy in a future rulemaking to implement the prohibition of take and to help conserve and recover sea turtles.

Several states included trawl fisheries in their responses to NMFS' request for information and recommendations for the 2010 AD. Massachusetts noted that summer flounder trawlers are known to interact with sea turtles. New York recommended considering bottom otter trawl fisheries given that this is one of the top gear types in terms of pounds landed in Long Island Sound, Peconic Bay, and along the South Shore. New Jersey suggested focusing observer coverage in areas where trawl gear overlaps with sea turtle observations. Maryland reported that interactions between bottom otter trawl gear as well as beam trawl gear and sea turtles are possible in the Atlantic Ocean (0–3 miles (0–4.8 km)) and there have been reports of sea turtles captured in trawl gear. North Carolina ranked trawls operating in ocean waters as their top priority based on NMFS' four criteria. South Carolina noted that both trynets and whelk trawls are of concern. Georgia, Florida, and Alabama all noted trawl fisheries as well. Mississippi highlighted skimmer trawls in their response to NMFS' request for recommendations. Therefore, based on the information provided by states and the best available scientific information, NMFS proposes to include the following trawl fisheries on the 2010 AD.

Atlantic Shellfish Bottom Trawl Fishery

The Atlantic shellfish bottom trawl fishery (estimated 972 vessels/persons) encompasses the calico scallop trawl, crab trawl, Georgia/South Carolina/Maryland whelk trawl, Gulf of Maine/Mid-Atlantic sea scallop trawl, and Gulf of Maine northern shrimp trawl (71 FR 2006, January 4, 2006). This fishery extends from Maine through Florida. The fishery is managed through Federal and interstate fishery management plans (FMPs).

This fishery is classified as Category III on the MMPA LOF; however, portions of the fishery have been observed at low levels under MSA authority and by the Georgia Department of Natural Resources (GA DNR).

Since 2004, 16 sea turtle takes were reported by NMFS trained observers in the Atlantic sea scallop trawl fishery. Takes of sea turtles in scallop trawl gear have been observed during the months from June through October. One of the 16 sea turtles captured in scallop trawl gear was decomposed indicating it was not killed as a result of the scallop trawl gear in which it was observed. Fourteen of the non-decomposed turtles were loggerhead sea turtles, while one was not identified to species.

In addition, loggerhead sea turtle bycatch in the mid-Atlantic sea scallop trawl fishery, one component of the Atlantic shellfish bottom trawl fishery, was estimated for 2004 and 2005. The average annual bycatch estimates of loggerhead sea turtles in 2004 and 2005 in mid-Atlantic sea scallop trawl gear ranged from 81 to 191 turtles, depending on the estimation methodology used (Murray 2007). GA DNR conducted a limited observer program in the trawl fishery targeting whelk in the late 1990s; 7 turtles (3 Kemp's ridleys, 2 greens, and 2 loggerheads) were taken in 28 observed tows. NMFS is particularly interested in observing this fishery in waters off of Massachusetts and south as sea turtles more commonly occur in this area.

NMFS proposes to include this fishery on the 2010 AD based on documented interactions with sea turtles in this and other bottom trawl fisheries and the need to obtain more information on the interactions in this fishery.

Mid-Atlantic Bottom Trawl Fishery

Bottom otter trawl nets include a variety of net types, including flynets, which are high profile trawls. The ''Mid-Atlantic bottom trawl fishery'' as described in this proposed AD includes both the mid-Atlantic bottom trawl fishery and the mid-Atlantic flynet fishery as defined on the LOF.

The Mid-Atlantic bottom trawl fishery (estimated ≤1,000 vessels/persons), as defined on the LOF, uses bottom trawl gear to target species including, but not limited to, bluefish, croaker, monkfish, summer flounder (fluke), winter flounder, silver hake (whiting), spiny dogfish, smooth dogfish, scup, and black sea bass. The fishery occurs year-round from Cape Cod, MA, to Cape Hatteras, NC, in waters west of 72 30' W. long. and north of a line extending due east from the North Carolina/South Carolina border. The gear is managed by several state and Federal FMPs.

The Mid-Atlantic flynet fishery (estimated 21 vessels/persons), as defined on the LOF, is a multi-species fishery composed of nearshore and offshore components that operate along the east coast of the mid-Atlantic United States. Flynets typically range from 80–120 ft (24–36.6 m) in headrope length, with wing mesh sizes of 16–64 in (41–163 cm), following a slow 3:1 taper to smaller mesh sizes in the body, extension, and codend sections of the net. The nearshore fishery operates from October to April inside of 30 fathoms (180 ft; 55 m) from New Jersey to North Carolina. This nearshore fishery targets Atlantic croaker, weakfish, butterfish, harvestfish, bluefish, menhaden, striped bass, kingfish species, and other finfish species. Flynet fishing is no longer permitted in Federal waters south of Cape Hatteras to a line extending from the NC/SC border in order to protect weakfish stocks. The offshore component operates from November to April outside of 30 fathoms (180 ft; 55 m) from the Hudson Canyon off New York, south to Hatteras Canyon off North Carolina. These deeper water fisheries target bluefish, Atlantic mackerel, *Loligo* squid, black sea bass, and scup (72 FR 7382, February 15, 2007). Illex squid are also targeted offshore (70–200 fathoms [420–1,200 ft; 128–366 m]) during summer months from May to September.

The Mid-Atlantic bottom trawl fishery and the Mid-Atlantic flynet fishery are currently classified as Category II on the MMPA LOF, which authorizes NMFS to observe these fisheries for marine mammal interactions, and to collect information on sea turtles should a take occur on an observed trip. Between 2003 and 2007, observer coverage as reported in the Marine Mammal Stock Assessment Report (SAR) ranged from a low of 1% to a high of 18.61% depending on target species; see Appendix III of the draft 2009 SAR for additional details (NMFS, 2009). It should be noted that the mid-Atlantic

bottom trawl fishery is defined slightly differently in the SARs (which use 70° W as a boundary) than it is defined here and in the LOF. NMFS will consider changing this definition in a future LOF.

Since 2003, NMFS has documented 50 sea turtle takes (excluding severely decomposed animals) in bottom otter trawl gear in the mid-Atlantic. These takes occurred primarily between October and February, but takes were also reported May through September. In 2007, the observer program created new codes to document the different net types used, including flynets. Seven of the takes were recorded on trips where flynets were indicated as the specific net type used. Loggerhead turtles were the predominant species observed taken, but leatherback turtles were also documented. An estimate of the average annual bycatch of loggerhead sea turtles in mid-Atlantic bottom otter trawl gear during 1996–2004 was completed in 2006. The analysis defined the mid-Atlantic as the region from the shoreline below 41° 30' N./66° W. to the southern extent of the NEFSC observer data collection, around 35° 00' N. lat. and 75° 30' W. long. Estimated average annual bycatch of loggerhead turtles in mid-Atlantic bottom otter trawl gear during 1996–2004 was 616 animals (Murray, 2008).

NMFS proposes to include this fishery on the 2010 AD to more adequately observe this gear type where and when it overlaps with sea turtle distribution.

Mid-Atlantic Mid-water Trawl (including pair trawl) Fishery

The Mid-Atlantic mid-water trawl fishery (estimated 620 vessels/persons) primarily targets Atlantic mackerel, chub mackerel, and miscellaneous other pelagic species. This fishery consists of both single and pair trawls, which are designed, capable, or used to fish for pelagic species with no portion of the gear designed to be operated in contact with the bottom. The fishery for Atlantic mackerel occurs primarily from southern New England through the mid-Atlantic from January to March and in the Gulf of Maine during the summer and fall (May to December).

The Mid-Atlantic mid-water trawl fishery is currently classified as Category II on the MMPA LOF, which authorizes NMFS to observe this fishery for marine mammal interactions, and to collect information on sea turtles should a take occur on an observed trip. During 2003–2007, estimated observer coverage year-round in this fishery was 3.5%, 12.16%, 8.4%, 8.9%, and 3.85%, respectively (NMFS 2009); no sea turtle takes were observed.

NMFS proposes to include this fishery on the 2010 AD to more adequately observe this gear type in areas and during times where it overlaps with sea turtle distribution.

Southeastern U.S. Atlantic, Gulf of Mexico Shrimp Trawl Fishery

The Southeastern U.S. Atlantic, Gulf of Mexico shrimp trawl fishery (estimated ≤18,000 vessels/persons) targets shrimp using various types of trawls; NMFS would focus on the component of the fishery that uses skimmer trawls for the 2010 AD. Skimmer trawls are used primarily in inshore/inland shallow waters (typically less than 20 ft (6.1 m)) to target shrimp. The skimmer trawl has a rigid ''L''-shaped or triangular metal frame with the inboard portion of the frame attached to the vessel and the outboard portion attached to a skid that runs along the seabed.

Skimmer trawl use increased in response to TED requirements for shrimp bottom otter trawls. Skimmer trawls currently have no TED requirement but are subject to tow time limits of 55 minutes from April 1 to October 31 and 75 minutes from November 1 to March 31. Skimmer trawls are used in North Carolina, Florida (Gulf Coast), Mississippi, and Louisiana. There are documented takes of sea turtles in skimmer trawls in North Carolina, and anecdotal reports elsewhere. In North Carolina, there were 150–200+ active vessels per year from 2000–2002 and in Louisiana, skimmer trawls accounted for 37% of the shrimp catch and 63% of the total shrimp trawling effort from 1999–2004. Louisiana skimmer trawl effort averaged about 60,750 trips per year over that period, ranging from about 81,700 trips in year 2000 to 49,000 trips in year 2004. No effort information is available for Mississippi and Florida.

Skimmer trawl effort overlaps with sea turtle distribution, and as noted above, takes have been reported. Although subject to tow times, the magnitude and impact of turtle takes in this fishery are not understood, and no observer program currently exists for this portion of the shrimp fishery. Given the extent this gear is used, NMFS thinks it is important to better understand these interactions.

NMFS is considering including skimmer trawls under the Atlantic Ocean and Gulf of Mexico Sea Turtle Strategy, which may result in a regulation to require TEDs or other protections for sea turtles for all trawl gears as appropriate. Observer coverage to understand the scope and impact of turtle takes by this gear will also be needed to make well informed management decision on what actions may be necessary to manage this fishery to minimize and prevent sea turtle takes and further sea turtle conservation and recovery.

The Southeastern U.S. Atlantic, Gulf of Mexico shrimp trawl fishery is classified as Category III on the MMPA LOF, but mandatory observer coverage under MSA authority began in 2007. The fishery is currently observed at approximately 1% of total fishery effort. NMFS is proposing to include the Southeastern U.S. Atlantic, Gulf of Mexico shrimp trawl fishery, to focus observer coverage in the component of the fishery that uses skimmer trawls, on the 2010 AD.

Gillnet Fisheries

Sea turtles are vulnerable to entanglement and drowning in gillnets, especially when the gear is left untended. The main risk to sea turtles from capture in gillnet is forced submergence. Entanglement in gillnets can also result in severe abrasions on entangled turtles. Large mesh gillnets (e.g., 10–12 in. (25.4–30.5 cm) stretched mesh) have been documented as effective at capturing sea turtles. Additionally, sea turtles have been documented as entangled in smaller mesh gillnets.

Several states (i.e., CA, NY, NJ, DE, MD, VA, NC, AL) recommended including gillnet fisheries on the 2010 AD. California recommended two small mesh gillnet fisheries. New York recommended considering sink gillnets and runaround gillnets, particularly those operating off the South Shore and Peconic Bay. During the time sea turtles are present in New York waters, gillnets are one of the top gear types in terms of pounds landed along the South Shore. New Jersey recommended observing gillnet fisheries operating in areas that overlap with sea turtle sightings. Delaware identified gillnet gear as a concern based on the potential for interactions. Maryland noted that potential for sea turtle takes exists in gillnet fisheries operating within coastal bays and tidal tributaries, but no takes have been documented. Virginia noted that there are state regulations for gillnets in an effort to conserve and protect sea turtles in their waters. North Carolina ranked large mesh commercial gillnets operating in estuarine waters as a top concern. Alabama noted gillnets in their response to NMFS' request for recommendations. In addition, NMFS' Strategy for Sea Turtle Conservation and Recovery in Relation to Atlantic Ocean and Gulf of Mexico Fisheries has identified gillnet gear as a high priority.

Therefore, based on the information provided by states and the best available scientific information, NMFS proposes to include the following gillnet fisheries on the 2010 AD.

CA Halibut, White Seabass and Other Species Set Gillnet Fishery (>3.5 in mesh)

The CA halibut, white seabass, and other species set gillnet fishery (estimated 58 vessels/persons) targets halibut, white seabass, and other species from the U.S.-Mexico border north to Monterey Bay using 200 fathom (1,200 ft; 366 m) gillnet with a stretch mesh size of 8.5 in (31.6 cm). Net soak duration is typically 8–10, 19–24, or 44–49 hours at a depth ranging from 15–50 fathoms (90–300 ft; 27–91 m) with most sets from 15–35 fathoms (90–210 ft; 27–64 m). No more than 1500 fathoms (9,000 ft; 2,743 m) of gill or trammel net may be fished in combination for CA halibut and angel shark. Fishing occurs year-round, with effort generally increasing during summer months and declining during last the 3 months of the year. The central CA portion of the fishery from Point Arguello to Point Reyes has been closed since September, 2002, following a ban on gillnets inshore of 60 fathoms (360 ft; 110 m). Set gill nets have been prohibited in state waters south of Point Arguello and within 70 fathoms (420 ft; 128 m) or one mile (1.6 km), whichever is less, around the Channel Islands since 1990. The California Department of Fish and Game (CDFG) manages the fishery as a limited entry fishery with gear restrictions and area closures.

This fishery is classified as Category II on the MMPA LOF, which authorizes NMFS to observe this fishery in state waters for marine mammal interactions, and to collect information on sea turtles should a take occur on an observed trip. This fishery was observed at about 17.8% in 2007 and 5% in 2008. No sea turtle takes were observed during 2007 or 2008. NMFS proposes to include this fishery on the 2010 AD because it operates in the same waters that turtles are known to occur and this gear type is known to result in the incidental take of sea turtles based on documented takes in similar fisheries.

CA Yellowtail, Barracuda, and White Seabass Drift Gillnet Fishery (mesh size >3.5 in. and <14 in.)

The CA yellowtail, barracuda, and white seabass drift gillnet fishery (24 vessels/persons) targets primarily yellowtail and white seabass, and secondarily barracuda, with target species typically determined by market demand on a short-term basis. Drift gillnets are up to 6,000 ft (1,829 m) long and are set at the surface. The mesh size depends on target species and is typically 6.0–6.5 in (15–16.5 cm). When targeting yellowtail and barracuda, the mesh size must be ≥3.5 in (9 cm); when targeting white seabass, the mesh size must be ≥6 in (15.2 cm). From June 16 to March 14 not more than 20 percent, by number, of a load of fish may be white seabass with a total length of 28 in (71 cm). A maximum of ten white seabass per load may be taken, if taken in gillnet or trammel nets with meshes from 3.5–6.0 in (9–15 cm) in length. The fishery operates year-round, primarily south of Point Conception with some effort around San Clemente Island and San Nicolas Island. This fishery is a limited entry fishery with various gear restrictions and area closures managed by the California Department of Fish and Game (CDFG).

This fishery is classified as Category II on the MMPA LOF, which authorizes NMFS to observe this fishery for marine mammal interactions, and to collect information on sea turtles should a take occur on an observed trip. This fishery was observed in 2003 and 2004, with 10.4% and 11.0% coverage, respectively. No sea turtle takes were observed during 2003 or 2004. NMFS proposes to include this fishery on the 2010 AD because it operates in the same waters that turtles are known to occur and this gear type is known to result in the incidental take of sea turtles based on documented takes in similar fisheries.

Chesapeake Bay Inshore Gillnet Fishery

The Chesapeake Bay inshore gillnet fishery (estimated 45 vessels/persons) targets menhaden and croaker using gillnet gear with mesh sizes ranging from 2.75–5 in (7–12.7 cm), depending on the target species. The fishery operates between the Chesapeake Bay/Bridge Tunnel and the mainland. The fishery is managed under the Interstate FMPs for Atlantic Menhaden and Atlantic Croaker.

This fishery is classified as Category II on the MMPA LOF, which authorizes NMFS to observe this fishery in state waters for marine mammal interactions, and to collect information on sea turtles should a take occur on an observed trip. NMFS has previously observed this fishery at extremely low levels. NMFS proposes to include this fishery on the 2010 AD because sea turtles are known to occur in the same areas where the fishery operates, takes have been previously documented in similar gear, and the fishery operates during a period of high sea turtle strandings.

Long Island Inshore Gillnet Fishery

The Long Island Sound inshore gillnet fishery (estimated 20 vessels/persons) includes all gillnet fisheries setting nets west of a line from the north fork of the eastern end of Long Island, NY (Orient Point to Plum Island to Fishers Island) to Watch Hill, RI (59 FR 43703, August 25, 1994). Target species include, but are not limited to bluefish, striped bass, weakfish, and summer flounder.

This fishery is classified as Category III on the MMPA LOF and NMFS has not previously required vessels operating in this fishery to carry an observer. NMFS has previously observed this fishery at extremely low levels; no sea turtle takes were observed. NMFS proposes to include this fishery in the 2010 AD because sea turtles are known to occur in the same areas where the fishery operates and takes have been documented in similar gear types.

Mid-Atlantic Gillnet Fishery

The Mid-Atlantic gillnet fishery (estimated 7,596 vessels/persons) targets monkfish, spiny dogfish, smooth dogfish, bluefish, weakfish, menhaden, spot, croaker, striped bass, large and small coastal sharks, Spanish mackerel, king mackerel, American shad, black drum, skate spp., yellow perch, white perch, herring, scup, kingfish, spotted seatrout, and butterfish. The fishery uses drift and sink gillnets, including nets set in a sink, stab, set, strike, or drift fashion, with some unanchored drift or sink nets used to target specific species. The dominant material is monofilament twine with stretched mesh sizes from 2.5–12 in (6.4–30.5 cm), and string lengths from 150–8,400 ft. (46–2,560 m). This fishery operates year-round west of a line drawn at 72° 30' W. long. south to 36° 33.03' N. lat. and east to the eastern edge of the EEZ and north of the North Carolina/South Carolina border, not including waters where inshore gillnet fisheries (i.e., Chesapeake Bay, North Carolina, Long Island Sound inshore gillnet fisheries) operate in bays, estuaries, and rivers. This fishery includes any residual large pelagic driftnet effort in the mid-Atlantic and any shark and dogfish gillnet effort in the mid-Atlantic zone described. The fishing effort is prosecuted right off the beach (6 ft [1.8 m]) or in nearshore coastal waters to offshore waters (250 ft [76 m]).

Gear in this fishery is managed by several Federal FMPs and Interstate FMPs managed by the Atlantic States Marine Fisheries Commission (ASMFC). Fisheries are primarily managed by TACs; individual trip limits (quotas); effort caps (limited number of days at

sea per vessel); time and area closures; and gear restrictions and modifications.

This fishery is classified as Category I on the MMPA LOF, which authorizes NMFS to observe this fishery in state and federal waters for marine mammal interactions, and to collect information on sea turtles should a take occur on an observed trip. During 2003–2007, estimated observer coverage year-round in this fishery was 1%, 2%, 3%, 4%, and 6%, respectively (NMFS, 2009). Since 2003, 12 takes (excluding severely decomposed animals) of loggerhead, leatherback, green, and Kemp's ridley turtles were documented by observers between May and December. From 1995–2006, the average annual bycatch estimate of loggerheads in U.S. mid-Atlantic sink gillnet gear was 350 turtles (Murray 2009). The mid-Atlantic was defined in this analysis as west of 70° W. long. from the shoreline of Cape Cod southward to the southern limit of the observer data collection program (approximately 33° N. lat.), extending westward to the coastline (Murray, 2009). NMFS proposes to include this fishery on the 2010 AD to focus observer coverage during times and in areas where sea turtles are known to occur.

Northeast Sink Gillnet Fishery

The Northeast sink gillnet fishery (estimated ≤6,455 vessels/persons) targets Atlantic cod, haddock, pollock, yellowtail flounder, winter flounder, witch flounder, American plaice, windowpane flounder, spiny dogfish, monkfish, silver hake, red hake, white hake, ocean pout, skate spp, mackerel, redfish, and shad. This fishery uses sink gillnet gear, which is anchored gillnet (bottom-tending net) gear fished in the lower one-third of the water column. The dominant material is monofilament twine with stretched mesh sizes from 6–12 in (15–30.5 cm) and string lengths from 600–10,500 ft (183–3,200 m), depending on the target species. Large mesh (10–14 in [25–35.6 cm]) sink gillnets, either tied down or set upright without floats using a polyfoam core floatline, are used when targeting monkfish. The fishery operates from the U.S.-Canada border to Long Island, NY, at 72° 30' W. long. south to 36° 33.03' N. lat. (corresponding with the Virginia/North Carolina border) and east to the eastern edge of the EEZ, including the Gulf of Maine, Georges Bank, and Southern New England, and excluding Long Island Sound or other waters where gillnet fisheries are classified as Category III on the MMPA LOF. Fishing effort occurs year-round, peaking from May to July primarily on continental shelf regions in depths from 30–750 ft (9–228.6 m), with some nets deeper than 800 ft (244 m).

This fishery is managed by the Northeast Multispecies (Groundfish) FMP. This fishery is also managed by the Atlantic Large Whale Take Reduction Plan (ALWTRP) and the Harbor Porpoise Take Reduction Plan (HPTRP) to reduce the risk of entanglement of right, humpback, and fin whales, and harbor porpoises, respectively. The fishery is primarily managed through TAC limits; individual trip limits (quotas); effort caps (limited number of days at sea per vessel); time and area closures; and gear restrictions.

This fishery is classified as Category I on the MMPA LOF, which authorizes NMFS to observe this fishery in state and Federal waters for marine mammal interactions and to collect information on sea turtles should a take occur on an observed trip. During 2003–2007, estimated observer coverage year-round in this fishery was 3%, 6%, 7%, 4%, 7%, respectively (NMFS, 2009). Five sea turtle takes were observed during this time. NMFS proposes to include this fishery on the 2010 AD to focus observer coverage during times and in areas where sea turtles are known to occur, particularly in waters off Massachusetts and waters south of this area.

North Carolina Inshore Gillnet Fishery

The NC inshore gillnet fishery (94 vessels/persons) targets species including, but not limited to, southern flounder, weakfish, bluefish, Atlantic croaker, striped mullet, spotted seatrout, Spanish mackerel, striped bass, spot, red drum, black drum, and shad. This fishery includes any fishing effort using any type of gillnet gear, including set (float and sink), drift, and runaround gillnet for any target species inshore of the COLREGS lines in North Carolina. This fishery is managed under state and ASMFC interstate FMPs, applying net and mesh size regulations, and seasonal area closures in the Pamlico Sound Gillnet Restricted Area (PSGNRA).

Gillnet fisheries operating in inshore and inland waters of North Carolina are currently not observed except in a limited area. An ESA section 10(a)(1)(B) permit requires monitoring the Pamlico Sound summer flounder gillnet fishery. However, extensive gillnet activity occurs throughout the inshore and inland waters of North Carolina (e.g., Core Sound/Cape Fear area, Roanoke and Albemarle Sounds); effort in some areas has never been observed, but other areas have had limited coverage, which was authorized under the MMPA (this fishery is listed as Category II on the MMPA LOF). Gillnet activity overlaps spatially with areas utilized by sea turtles, often at relatively high densities. Additionally, the likelihood of significant injury or mortality to sea turtles when taken by this gear is high. NMFS recently conducted a limited observer program in the southern flounder gillnet fishery in Core Sound, which was previously unobserved. Several sea turtles (green, Kemp's ridley, and loggerhead) were observed taken in the fishery. Take levels were highly variable, but generally high, with many observed trips taking no sea turtles, and other trips having as many as five takes. A more extensive, longer-term observer program is needed to adequately assess the extent and impact of the all components of the inshore North Carolina gillnet fishery on sea turtles. Therefore, NMFS is proposing to include this fishery on the 2010 AD.

Southeast Atlantic Gillnet Fishery

The Southeast Atlantic gillnet fishery (779 estimated vessels/persons) targets finfish including, but not limited to, king mackerel, Spanish mackerel, whiting, bluefish, pompano, spot, croaker, little tunny, bonita, jack crevalle, cobia, and striped mullet. This fishery does not include gillnet effort targeting sharks as part of the Southeastern U.S. Atlantic shark gillnet fishery. This fishery uses gillnets set in sink, stab, set, or strike fashion. The fishery operates in waters south of a line extending due east from the North Carolina-South Carolina border and south and east of the fishery management council demarcation line between the Atlantic Ocean and the Gulf of Mexico. The majority of fishing effort occurs in Federal waters since South Carolina, Georgia, and Florida prohibit the use of gillnets, with limited exceptions, in state waters.

Fishing for king mackerel, Spanish mackerel, cobia, cero, and little tunny in Federal waters is managed under the Coastal Migratory Pelagic Resources FMP. None of the other target species are Federally-managed under the MSA. In state waters, state and ASMFC Interstate FMPs apply.

This fishery is classified as Category II on the MMPA LOF, which authorizes NMFS to observe this fishery in state and federal waters for marine mammal interactions, and to collect information on sea turtles should a take occur on an observed trip. NMFS has previously observed this fishery at moderate levels, primarily focused on target catch and bycatch species other than sea turtles. NMFS proposes to include this fishery on the 2010 to focus observer coverage during times and in areas where sea turtles are known to occur.

Trap/Pot Fisheries

Turtles are known to become entangled in the end lines (also called vertical lines) of trap/pot gear and there have been anecdotal reports that sea turtles may interact with the trap/pot itself. Turtles entangled in trap/pot gear may drown or suffer injuries (and potential subsequent mortality) due to constriction by the rope or line. Takes of both leatherback and hard-shelled sea turtles have been documented in this gear type. NMFS Northeast Region established the Northeast Atlantic Sea Turtle Disentanglement Network (STDN) in 2002 to respond to entanglements in vertical lines associated with trap/pot gear.

Several states included trap/pot fisheries in their responses to NMFS' request for information and recommendations for the 2010 AD. Massachusetts listed pots (lobster, fish, whelk) as a gear type known to interact with sea turtles. New York recommended that fish, lobster, and crab pots be considered. Maryland ranked the commercial crab pot fishery that operates April through December as having a high possibility for interacting with sea turtles and a greater possibility for injury compared to other gear types in Maryland state waters. Maryland also ranked several other commercial pot fisheries (e.g., conch and fish) with a lower potential to interact with sea turtles. Maryland noted reports of sea turtles getting their heads caught in the gear while eating bait out of the trap/pot. Delaware included conch and blue crab trap/pot fisheries as having potential interactions with sea turtles where effort overlaps with sea turtle distribution. Both South Carolina and Florida included trap/pot fisheries in their recommendations and noted the potential for using an alternative platform program to observe this gear type.

Therefore, NMFS proposes to include the following four trap/pot fisheries, focusing on those fisheries or components of fisheries operating south of Massachusetts, as sea turtles more commonly occur in this area, on the 2010 AD.

Atlantic Blue Crab Trap/Pot Fishery

The Atlantic blue crab trap/pot fishery (estimated ≤16,000 vessels/persons) targets blue crab using pots baited with fish or poultry typically set in rows in shallow water. The pot position is marked by either a floating or sinking buoy line attached to a surface buoy. The fishery occurs year-round from the south shore of Long Island at 72 30' W. long. in the Atlantic and east of the fishery management demarcation line between the Atlantic Ocean and the Gulf of Mexico (50 CFR 600.105), including state waters. The fishery is managed under state FMPs.

This fishery is classified as Category II on the MMPA LOF, which authorizes NMFS to observe this fishery for marine mammal interactions, and to collect information on sea turtles should a take occur on an observed trip. NMFS has not observed this fishery, but has documented 3 sea turtle takes in blue crab trap/pot gear in Virginia during the months of May and June. One of the events involved a leatherback and two involved loggerheads (STDN, unpublished data). NMFS proposes to include this fishery on the 2010 AD to target observer coverage more specifically to obtain information on sea turtle bycatch and how sea turtles may be interacting with trap/pot gear.

Atlantic Mixed Species Trap/Pot Fishery

The Atlantic mixed species trap/pot fishery (unknown number of vessels/persons) targets species including, but not limited to, hagfish, shrimp, conch/whelk, red crab, Jonah crab, rock crab, black sea bass, scup, tautog, cod, haddock, pollock, redfish (ocean perch), white hake, spot, skate, catfish, and stone crab. This fishery as defined on the MMPA LOF also includes American eel as a target species; however, there is also a Category III American eel trap/pot fishery listed on the LOF. Therefore, NMFS does not consider American eel to be a target species in the Atlantic mixed species trap/pot fishery and will correct this oversight in a future LOF. The fishery includes all trap/pot operations from the Maine-Canada border south through the waters east of the fishery management demarcation line between the Atlantic Ocean and the Gulf of Mexico (50 CFR 600.105), but does not include the following trap/pot fisheries (as defined on the MMPA LOF): Northeast/Mid-Atlantic American lobster trap/pot; Atlantic blue crab trap/pot; Florida spiny lobster trap/pot; Southeastern U.S. Atlantic, Gulf of Mexico stone crab trap/pot; U.S. Mid-Atlantic eel trap/pot fisheries; and the Southeastern U.S. Atlantic, Gulf of Mexico golden crab fishery (68 FR 1421, January 10, 2003). The fishery is managed under various Interstate and Federal FMPs.

This fishery is classified as Category II on the MMPA LOF, which authorizes NMFS to observe this fishery in state and Federal waters for marine mammal interactions, and to collect information on sea turtles should a take occur on an observed trip. NMFS has previously observed this fishery at extremely low levels; no sea turtle takes have been documented by fishery observers. However, the NMFS STDN has documented 9 leatherback entanglements in trap/pot gear targeting sea bass in Massachusetts during the month of August from 2003 to 2008 (STDN, unpublished data). From 2003–2008, the STDN documented 1 green, 4 loggerhead, and 8 leatherback turtle takes in trap/pot gear targeting whelk in MA, VA, and NJ during May, June, July, August, and October.

NMFS is proposing to include this fishery in the 2010 AD to target observer coverage more specifically to obtain information on sea turtle interactions and how sea turtles may be interacting with trap/pot gear, particularly in waters off of Massachusetts and waters south of this area, as sea turtles more commonly occur in these areas.

Northeast/Mid-Atlantic American Lobster Trap/Pot Fishery

The Northeast/Mid-Atlantic American lobster trap/pot fishery (estimated 13,000 vessels/persons) targets American lobster primarily with traps, while 2–3 percent of the target species is taken by mobile gear (trawls and dredges). The fishery operates in inshore and offshore waters from Maine to New Jersey and may extend as far south as Cape Hatteras, NC. Approximately 80 percent of American lobster is harvested from state waters; therefore, the ASMFC has the primary regulatory role. The fishery is managed in state waters under the ASMFC Interstate FMP and in Federal waters under the Atlantic Coastal Fisheries Cooperative Management Act.

This fishery is classified as Category I on the MMPA LOF, which authorizes NMFS to observe this fishery in state and Federal waters for marine mammal interactions, and to collect information on sea turtles should a take occur on an observed trip. NMFS has previously observed this fishery at extremely low levels; no sea turtle takes have been observed. However, NMFS STDN has documented 27 leatherback turtle entanglements in this fishery operating in ME, MA, and RI. These entanglements have occurred between June and October (STDN, unpublished data).

NMFS is proposing to include this fishery in the 2010 AD to target observer coverage more specifically to obtain information on sea turtle bycatch and how sea turtles may be interacting with trap/pot gear, particularly in waters off of Massachusetts and waters south of this area, as sea turtles more commonly occur in these areas.

Pound Net/Weir/Seine Fisheries

Pound net, weir, and seine fisheries may use mesh similar to that used in gillnets, but the gear is prosecuted differently from traditional gillnets. For example, pound net leaders have a mesh component similar to a gillnet; sea turtles have been documented entangled in pound net leaders. Pound net leaders in the Virginia portion of the Chesapeake Bay are subject to requirements designed to reduce sea turtle bycatch. Purse seines and weirs also have the potential to entangle and drown sea turtles.

Several states included pound net/weir/seine fisheries in their responses to NMFS' request for information and recommendations for the 2010 AD. Massachusetts listed pound nets/weirs as a gear type known to interact with sea turtles. Maryland noted that sea turtles have been documented alive and uninjured in the pounds, but none have been documented in pound net leaders. Virginia recognized both historical observations of interactions in this fishery as well as current regulations in the fishery (69 FR 24997, May 5, 2004; 71 FR 36024, June 23, 2006). North Carolina noted pound nets operating in estuarine waters in their recommendations.

Therefore, based on the information provided by states and the best available scientific information, NMFS proposes to include the following four pound net/weir/seine fisheries on the 2010 AD.

Mid-Atlantic Haul/Beach Seine Fishery

The Mid-Atlantic haul/beach seine fishery (estimated ≤221 vessels/persons) targets striped bass, mullet, spot, weakfish, sea trout, bluefish, kingfish, and harvest fish using seines with one end secured (e.g., swipe nets and long seines) and seines secured at both ends or those anchored to the beach and hauled up on the beach. The beach seine system also uses a bunt and a wash net that are attached to the beach and extend into the surf. The beach seines soak for less than 2 hours. The fishery occurs in waters west of 72° 30' W. long. and north of a line extending due east from the North Carolina-South Carolina border. Fishing on the Outer Banks, NC, occurs primarily in the spring (April to June) and fall (October to December). In the Chesapeake Bay, this gear has been historically fished in the southwest portion of the Bay with some effort in the northwest portion. Effort begins to increase in early May, peaks in early/mid-June, and continues into July. During this time, based on historical data from Virginia, approximately 100 haul seine trips occur.

The fishery is managed under the Interstate FMPs for Bluefish and for Atlantic Striped Bass of the Atlantic Coast from Maine through North Carolina, and is subject to Bottlenose Dolphin Take Reduction Plan implementing regulations.

This fishery is classified as Category II on the MMPA LOF, which authorizes NMFS to observe this fishery for marine mammal interactions, and to collect information on sea turtles should a take occur on an observed trip. NMFS has previously observed this fishery at low levels; no sea turtle takes have been observed. NMFS proposes to include this fishery on the 2010 AD based on suspected interactions with sea turtles given the nature of the gear and fishing methodology in addition to effort overlapping with sea turtle distribution. In the Chesapeake Bay, the fishery operates at the same time as historically elevated sea turtle strandings.

Mid-Atlantic Menhaden Purse Seine Fishery

The Mid-Atlantic menhaden purse seine fishery (22 estimated vessels/persons) targets menhaden and thread herring using purse seine gear. Most sets occur within 3 mi (4.8 km) of shore with the majority of the effort occurring off North Carolina from November to January, and moving northward during warmer months to southern New England. The fishery is managed under the Interstate FMP for Atlantic Menhaden. In the Chesapeake Bay, this fishery operates to a limited extent during a period of high sea turtle strandings (May and June).

This fishery is classified as Category II on the MMPA LOF, which authorizes NMFS to observe this fishery for marine mammal interactions, and to collect information on sea turtles should a take occur on an observed trip. NMFS recently began observing the fishery at low levels. NMFS proposes to include this fishery on the 2010 AD to focus observer coverage in times and areas of sea turtle distribution and learn more about the interactions between this fishery and sea turtles.

Virginia Pound Net Fishery

The Virginia pound net fishery (estimated 41 vessels/persons) targets species including, but not limited to, croaker, menhaden, mackerel, weakfish, and spot, using stationary gear in nearshore Virginia waters, primarily in the Chesapeake Bay and its tributaries. Pound net gear includes a leader posted perpendicular to the shoreline and extending outward to the ''heart,'' which funnels the fish into the pound, where the catch accumulates. This fishery includes all pound net effort in Virginia State waters, including waters inside the Chesapeake Bay. The fishery is managed under Interstate FMPs for Atlantic Croaker and Spot.

The Virginia pound net fishery is currently classified as Category II on the MMPA LOF, which authorizes NMFS to observe this fishery for marine mammal interactions, and to collect information on sea turtles should a take occur on an observed trip. Loggerhead, Kemp's ridley, leatherback, and green turtles have been observed taken in this fishery. Between 2002 and 2004, approximately 2,650 surveys of leaders were completed in the Virginia pound net fishery; 27 takes of sea turtles were recorded during the survey.

NMFS currently requires the use of a modified pound net leader in certain areas of the VA Chesapeake Bay to reduce entanglements of sea turtles in this gear type (71 FR 36024, June 23, 2006). This fishery operates at the same time as historically elevated sea turtle strandings. NMFS proposes to include this fishery on the 2010 AD to assess interactions between pound net gear and sea turtles and to evaluate the effectiveness of the modified gear. Because some vessels in this fishery may be too small to carry observers, NMFS would consider observing the fishery using both traditional methods as well as an alternative platform.

U.S. Mid-Atlantic Mixed Species Stop Seine/Weir/Pound Net (except the NC roe mullet stop net) Fishery

The Mid-Atlantic mixed species stop seine/weir/pound net fishery (estimated 751 vessels/persons) targets several species, including, but not limited to, weakfish, striped bass, shark, catfish, menhaden, flounder, gizzard shad, and white perch. The fishery uses fixed or staked net gear (pound net, weir, staked trap) from Nantucket Sound to Chesapeake Bay (60 FR 31681, June 16, 1995); the Virginia pound net and the NC roe mullet stop net fisheries are not included as part of this fishery.

This fishery is classified as Category III on the MMPA LOF and has never been observed. However, sea turtle takes have been documented in pound net gear in NY, MD, VA, and NC by NMFS, STSSN, and other researchers. NMFS proposes to include this fishery on the 2010 to better understand the nature

and extent of these interactions in the mid-Atlantic.

Table 1 – State and Federal Commercial Fisheries included on the 2010 Annual Determination

Fishery	Years Eligible to Carry Observers
Trawl Fisheries	
Atlantic shellfish bottom trawl	2010–2014
Mid-Atlantic bottom trawl	2010–2014
Mid-Atlantic mid-water trawl (including pair trawl)	2010–2014
Southeastern U.S. Atlantic, Gulf of Mexico shrimp trawl	2010–2014
Gillnet Fisheries	
CA halibut, white seabass and other species set gillnet (>3.5 in mesh)	2010–2014
CA yellowtail, barracuda, and white seabass drift gillnet (mesh size >3.5 in. and <14 in.)	2010–2014
Chesapeake Bay inshore gillnet	2010–2014
Long Island inshore gillnet	2010–2014
Mid-Atlantic gillnet	2010–2014
North Carolina inshore gillnet	2010–2014
Northeast sink gillnet	2010–2014
Southeast Atlantic gillnet	2010–2014
Trap/pot Fisheries	
Atlantic blue crab trap/pot	2010–2014
Atlantic mixed species trap/pot	2010–2014
Northeast/mid-Atlantic American lobster trap/pot	2010–2014
Pound Net/Weir/Seine Fisheries	
Mid-Atlantic haul/beach seine	2010–2014
Mid-Atlantic menhaden purse seine	2010–2014
U.S. mid-Atlantic mixed species stop seine/weir/pound net (except the NC roe mullet stop net)	2010–2014
Virginia pound net	2010–2014

Classification

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this rule would not have a significant economic impact on a substantial number of small entities. The factual basis leading to the certification is set forth below.

NMFS has estimated that approximately 65,940 vessels participating in 19 fisheries listed in Table 1 would be eligible to carry an observer if requested. However, NMFS would only request a fraction of the total number of participants to carry an observer based on the sampling protocol identified for each fishery by regional observer programs. As noted throughout this proposed rule, NMFS would select vessels and focus coverage in times and areas where fishing effort overlaps with sea turtle distribution. Due to the unpredictability of fishing effort, NMFS cannot determine the specific number of vessels that would be requested to carry an observer.

If a vessel is requested to carry an observer, fishers will not incur any direct economic costs associated with carrying that observer. Potential indirect costs to individual fishers required to take observers may include: lost space on deck for catch, lost bunk space, and lost fishing time due to time needed to process bycatch data. For effective monitoring, however, observers will rotate among a limited number of vessels in a fishery at any given time and each vessel within an observed fishery has an equal probability of being requested to accommodate an observer. Therefore, the potential indirect costs to individual fishers are expected to be minimal because observer coverage would only be required for a small percentage of an individual's total annual fishing time. In addition, 50 CFR 222.404(b) states that an observer will not be placed on a vessel if the facilities for quartering an observer or performing observer functions are inadequate or unsafe, thereby exempting vessels too small to accommodate an observer from this requirement. As a result of this certification, an initial regulatory flexibility analysis is not required and was not prepared.

This proposed rule would amend an existing collection-of-information that was approved by the Office of Management and Budget (OMB) under OMB control number 0648–0593. This requirement will be submitted to OMB for approval. This proposed rule would add an estimated 853 participants and an estimated maximum 60 burden hours to the associated information collection.

Public comment is sought regarding: whether this proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the burden estimate; 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, including through the use of automated collection techniques or other forms of information technology. Send comments on these or any other aspects of the collection of information to (enter office name) at the **ADDRESSES** above, and e-mail to *David_Rostker@omb.eop.gov*, or fax to (202) 395–7285.

Notwithstanding any other provision of the law, no person is required to respond to, 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 OMB Control Number.

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

An environmental assessment (EA) was prepared under the National Environmental Policy Act (NEPA) for regulations to implement this observer requirement in 50 CFR part 222, subpart D. The EA concluded that implementing these regulations would not have a significant impact on the human environment. This proposed rule would not make any significant change in the management of fisheries included on the AD, and therefore, this proposed rule would not change the analysis or conclusion of the EA. If NMFS takes a management action, for example, requiring fishing gear modifications such as TEDs, NMFS would first prepare an environmental document as

required under NEPA and specific to that action.

This proposed rule would not affect species listed as threatened or endangered under the Endangered Species Act (ESA) or their associated critical habitat. The impacts of numerous fisheries have been analyzed in various biological opinions, and this proposed rule would not affect the conclusions of those opinions. The inclusion of fisheries on the AD is not considered to be a management action that would adversely affect threatened or endangered species. If NMFS takes a management action, for example, requiring modifications to fishing gear and/or practices, NMFS would review the action for potential adverse affects to listed species under the ESA.

This proposed rule would have no adverse impacts on sea turtles and may have a positive impact on sea turtles by improving knowledge of sea turtles and the fisheries interacting with sea turtles through information collected from observer programs.

This proposed rule would not affect the land or water uses or natural resources of the coastal zone, as specified under section 307 of the Coastal Zone Management Act.

Literature Cited

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Murray, K.T. 2009. Characteristics and magnitude of sea turtle bycatch in US mid-Atlantic gillnet gear. Endangered Species Research 8:211–224.

National Marine Fisheries Service. 2009. Draft 2009 Marine Mammal Stock Assessment Reports for the Atlantic Ocean and Gulf of Mexico. *http://www.nmfs.noaa.gov/pr/pdfs/sars/ao2009_draft_appendices.pdf*

Dated: November 13, 2009.

Janes W. Balsiger,

Acting Assistant Administrator for Fisheries, National Marine Fisheries Service.

[FR Doc. E9–27674 Filed 11–16–09; 8:45 am]

BILLING CODE 3510–22–S

Notices

Federal Register
Vol. 74, No. 221
Wednesday, November 18, 2009

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

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

Agency Information Collection Activities: Proposed Collection; Comment Request—Senior Farmers' Market Nutrition Program (SFMNP)

AGENCY: Food and Nutrition Service (FNS), USDA.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice invites the general public and other public agencies to comment on this proposed information collection. This is a revision of a currently approved collection for the Senior Farmers' Market Nutrition Program (SFMNP).

DATES: Written comments must be received on or before January 19, 2010.

ADDRESSES: Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions that were used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments may be sent to: Sandra Clark, Chief, Policy and Program Development Branch, Food and Nutrition Service, U.S. Department of Agriculture, 3101 Park Center Drive, Room 528, Alexandria, VA 22302. Comments may also be submitted via fax to the attention of Margarita Ray at 703–305–2746 or via e-mail to *wichq-web@fns.usda.gov.* Comments will also be accepted through the Federal eRulemaking Portal. Go to *http://www.regulations.gov*, and follow the online instructions for submitting comments electronically.

All written comments will be open for public inspection at the office of the Food and Nutrition Service during regular business hours (8:30 a.m. to 5 p.m. Monday through Friday) at 3101 Park Center Drive, Room 522, Alexandria, Virginia 22302.

All responses to this notice will be summarized and included in the request for Office of Management and Budget approval. All comments will be a matter of public record.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of this information collection should be directed to Sandra Clark, Chief, Policy and Program Development Branch at 703–305–2746.

SUPPLEMENTARY INFORMATION:

Title: Senior Farmers' Market Nutrition Program.

Form Number: FNS 683A.

OMB Number: 0584–0541.

Expiration Date: 1/31/2010.

Type of Request: Revision of a currently approved collection.

Abstract: Section 4231 of the Food, Conservation and Energy Act of 2008 (Pub. L. 110–246, also known as the Farm Bill) reauthorized the SFMNP through FY 2012; a prior law (the Farm Security and Rural Investment Act of 2002 (Pub. L. 107–171)) gave the Department of Agriculture the authority to promulgate regulations for the operation and administration of the Senior Farmers' Market Nutrition Program (SFMNP). These regulations are published at 7 CFR part 249. The purposes of the SFMNP are to provide resources in the form of fresh, nutritious, unprepared, locally grown fruits, vegetables, honey and herbs from farmers' markets, roadside stands, and community supported agriculture (CSA) programs to low income seniors; to increase the domestic consumption of agricultural commodities by expanding or aiding in the domestic farmers' markets, roadside stands, and CSA programs; and to develop or aid in the development of new and additional farmers' markets, roadside stands, and CSA programs.

USDA published a final rulemaking on the SFMNP on December 6, 2006 (71 FR 74618), that contained an estimated information collection burden based on the rule's requirements for program operation and administration. The initial SFMNP information collection burden was approved by the Office of Management and Budget (OMB) for 3 years, effective January, 2007, under RIN 0584–0541. The Department is now soliciting comments on the accuracy and reasonableness of this estimated burden since the original SFMNP rulemaking.

Burden Estimate

1. Reporting

Affected Public: Respondents include State agencies, local agencies, individuals/households (participants), and authorized SFMNP farms (farmers, farmers' markets, roadside stands, and CSA programs).

Estimated Number of Respondents: The total estimated number of respondents is 970,906. This includes: State agencies, local agencies, individuals/households (participants), and authorized SFMNP farms (farmers, farmers' markets, roadside stands, and CSA programs).

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Responses: 1,934,836.

Estimated Time per Response: .17.

The estimated time of response varies from 15 minutes to 40 hours depending on respondent group.

Estimated Total Annual Burden on Respondents: 15,273,240 minutes (254,554 hours). See the table below for estimated total annual burden for each type of respondent.

2. Recordkeeping

Estimated Number of Recordkeepings: 963,930.

Respondents include: State and local agencies.

Estimated Average Number of Recordkeepings per Respondent: 1.

Estimated Time per Recordkeeping: 8 hours.

Estimated Total Annual Burden on Respondents: 243,224.

The estimated time of response varies from 15 minutes to 40 hours depending on respondent group.

Estimated Total Annual Reporting/Recordkeeping Requirements: 497,778

hours. See the table below for estimated total annual burden for each type of respondent.

Regulation section	Title	Forms	Estimated number of respondents	Reports filed annually	Total annual response	Estimated hrs/ response	Annual burden hrs
Affected Public: STATE & LOCAL AGENCIES (Including Indian Tribal Organizations and U.S. Territories)							
Reporting							
249.3(e)	Local Agency Applications		490	1	490	2	980
249.4	State Plan		49	1	49	40	1,960
249.10(e)	Monitoring/review of outlets		587	1	587	1.5	881
249.10(f)	Coupon/CSA management system		49	1	49	5	245
249.10(h)	Coupon reconciliation		49	1	49	3	147
249.11	Financial management system		49	1	49	10	490
249.12	Prior Approval for costs per 7 CFR 3016.22		5	1	5	160	800
249.17(b)(2)	State agency corrective action plans		12	1	12	10	120
249.18(b)	Audit responses		12	1	12	15	180
249.23(b)	Financial/recipient reports		49	1	49	40	1,960
Subtotal	(Reporting Requirements)		1,351		1,351	.17	7,763
Affected Public: INDIVIDUALS/HOUSEHOLDS (Applicants for Program Benefits)							
Reporting							
249.6(a)(3)	Certification data for seniors		963,685	1	963,685	0.25	240,921
Subtotal	(Reporting Requirements)		963,685		963,685		240,921
Affected Public: Farms (Farmers/Markets/Roadside stands/CSAs)							
Reporting							
249.10(b)	Farmer applications & agreements		5,870	1	5,870	1	5,870
Subtotal	(Reporting Requirements)		5,870		5,870		5,870
GRAND SUBTOTAL			970,906		970,906		254,554
Affected Public: STATE & LOCAL AGENCIES (Including Indian Tribal Organizations and U.S. Territories)							
Recordkeeping							
249.9	Nutrition education		963,685	1	963,685	0.25	240,921
249.10(b)	Authorized outlet agreements		49	1	49	2	98
249.10(e)	Summary of authorized outlet monitoring		49	1	49	2	98
249.11	Record of financial expenditures		49	1	49	2	98
249.16(a)	Fair hearings		49	1	49	1	49
249.23(a)	Record of program operations		49	1	49	40	1,960
Subtotal	(Recordkeeping Requirements)		963,930		963,930		243,224
TOTAL BURDEN	(Reporting & Recordkeeping)		1,934,836		1,934,836		497,778

Dated: November 10, 2009.

Julia Paradis,

Administrator, Food and Nutrition Service.

[FR Doc. E9–27600 Filed 11–17–09; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF COMMERCE

International Trade Administration

A–428–602

Brass Sheet and Strip from Germany: Notice of Extension of Time Limit for Preliminary Results of Administrative Review

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

EFFECTIVE DATE: November 18, 2009.

FOR FURTHER INFORMATION CONTACT: Dennis McClure or George McMahon at (202) 482–5973 and (202) 482–1167, respectively; AD/CVD Operations, Office 3, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

Background

On April 27, 2009, the Department of Commerce (the ''Department'') initiated an administrative review of the antidumping duty order on brass sheet and strip from Germany with respect to Wieland–Werke AG (Wieland). *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 74 FR 19042 (April 27, 2009).

The period of review (POR) is March 1, 2008, through February 28, 2009. The preliminary results of this review are currently due no later than December 1, 2009.

Extension of Time Limits for Preliminary Results

Section 751(a)(3)(A) of the Tariff Act of 1930, as amended (the Act), requires the Department to make a preliminary determination within 245 days after the last day of the anniversary month of an order or finding for which a review is requested. Section 751(a)(3)(A) of the Act further states that if it is not practicable to complete the review within the time period specified, the administering authority may extend the 245–day period to issue its preliminary results by up to 120 days.

We determine that completion of the preliminary results of this review within the 245–day period is not practicable for the following reasons. This review requires the Department to gather and analyze a significant amount of information pertaining to the company's sales practices, manufacturing costs and corporate relationships, which is complicated due to the manner in which the inputs for making brass sheet and strip are purchased and the processes by which brass sheet and strip are sold. Furthermore, the respondent, Wieland, has proposed that the Department use an alternative cost methodology to account for the volatility in the material costs that affects our analysis and requires an examination of a significant amount of data. Given the number and complexity of issues in this case, and in accordance with section 751(a)(3)(A) of the Act, we are extending the time period for issuing the preliminary results of review by 120 days. Therefore, the preliminary results are now due no later than March 31, 2010. The final results continue to be due 120 days after the date of publication of the preliminary results.

We are issuing and publishing this notice in accordance with sections 751(a)(3)(A) and 777(i)(1) of the Act.

Dated: November 10, 2009.

John M. Andersen,

Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. E9–27670 Filed 11–17–09; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Docket 49–2009]

Foreign-Trade Zone 119—Minneapolis, MN; Application for Subzone SICK, Inc. (Photo-Electronic Industrial Sensors); Bloomington, MN

An application has been submitted to the Foreign-Trade Zones Board (the Board) by the Greater Metropolitan Area Foreign Trade Zone Commission (Minneapolis, Minnesota), grantee of FTZ 119, requesting special-purpose subzone status for the photo-electronic industrial sensor manufacturing facility of SICK, Inc. (SICK), located in Bloomington, Minnesota. The application was submitted pursuant to the provisions of the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a–81u), and the regulations of the Board (15 CFR part 400). It was formally filed on November 10, 2009.

The SICK facility (300 employees/55,207 sq.ft./3.2 acres) is located at 6900 West 110th Street, Bloomington (Hennepin County), Minnesota. The facility is used to manufacture and distribute photo-electronic industrial automation sensors, safety systems, and automatic identification products (classified under HTSUS 8541.40) for the U.S. market and export. At full capacity the plant can manufacture up to 50,000 units annually. Activity under FTZ procedures would include manufacturing, testing, inspection, and packaging. Components to be purchased from abroad (representing about 30% of the value of the finished sensors) would include plates/sheets/film/foil of polycarbonates, fasteners, parts of circuit breakers, and electrical conductors (duty rate range: 2.6–8.5%). The application indicates that SICK would also admit foreign-origin photo-electronic sensors and related components to the proposed subzone for domestic distribution and export.

FTZ procedures could exempt SICK from customs duty payments on the foreign components used in export production. On domestic shipments, the company would be able to elect the duty rate that applies to finished photo-electronic sensors (free) for the foreign inputs noted above. Subzone status would further allow SICK to realize logistical benefits through the use of weekly customs entry procedures. Customs duties could possibly be deferred or reduced on foreign status production equipment. The application indicates that the savings from FTZ procedures would help improve the facility's international competitiveness.

In accordance with the Board's regulations, Pierre Duy of the FTZ Staff is designated examiner to evaluate and analyze the facts and information presented in the application and case record and to report findings and recommendations to the Board.

Public comment is invited from interested parties. Submissions (original and 3 copies) shall be addressed to the Board's Executive Secretary at the following address: Office of the Executive Secretary, Room 2111, U.S. Department of Commerce, 1401 Constitution Avenue, NW., Washington, DC 20230–0002. The closing period for receipt of comments is January 19, 2010. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to February 1, 2010.

A copy of the application will be available for public inspection at the Office of the Foreign-Trade Zones Board's Executive Secretary at the address listed above and in the ''Reading Room'' section of the Board's Web site, which is accessible via *http://www.trade.gov/ftz.*

For Further Information Contact: Pierre Duy at *Pierre.Duy@trade.gov* or (202) 482–1378.

Dated: November 10, 2009.

Andrew McGilvray,

Executive Secretary.

[FR Doc. E9–27681 Filed 11–17–09; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Docket 50–2009]

Foreign-Trade Zone 175—Cedar Rapids, IA; Application for Subzone; Deere & Company (Agricultural Tractors and Related Components Manufacturing); Waterloo, IA

An application has been submitted to the Foreign-Trade Zones Board (the Board) by the Cedar Rapids Airport Commission, grantee of FTZ 175, requesting special-purpose subzone status for the agricultural tractors, cabs, engines and components manufacturing facilities of Deere & Company (Deere), located in Waterloo, Iowa. The application was submitted pursuant to the provisions of the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a-81u), and the regulations of the Board (15 CFR part 400). It was formally filed on November 12, 2009.

The Deere facilities (approximately 4,000 employees) consist of 6 sites on approximately 1,437.58 acres in Waterloo, Iowa: *Site 1* (1,002.41 acres, 2,000,000 enclosed square feet) tractor and cab assembly operations located at 3500 E. Donald Street; *Site 2* (257.63 acres, 3,000,000 enclosed square feet) drivetrain, foundry & service parts operations located at 400 and 2000 Westfield Ave.; *Site 3* (26.22 acres, 276,480 enclosed square feet) Ryder warehouse and servicing facility located at 2280 Northeast Drive; *Site 4* (25 acres, 166,000 square feet) Waterloo warehouse located at 1519 W. Airline Hwy.; *Site 5* (20.37 acres, 242,240 square feet) FirstCo warehouse located at 3470 W. Airline Hwy.; and *Site 6* (105.95 acres, 1,137,213 enclosed square feet) Engine Works facility located at 3801 W. Ridgeway Ave. The facilities are used for the manufacture, testing, warehousing and distribution of: Medium and large row crop tractors (wheel and track versions); cab assemblies; marine and industrial diesel engines; drivetrain components; wheel assemblies; cast iron forgings; and, parts and components for these products. The Deere facilities annually can produce up to 45,000 tractors and engines, 45,000 cabs, 90,000 drivetrain units, 140,000 tons of foundry products, and $150 million of service parts and components. Components and materials sourced from abroad (representing 13 to 18% of the value of the finished products) include: putty and caulking compounds; glues and adhesives; self-adhesive plates; articles of plastic (incl. tubes, hoses, fittings, stoppers and lids); articles of rubber (incl. belts, tubes, hoses, grommets, plugs, mountings, sheets, strips); tires; floor coverings and mats; mirrors; gaskets; washers; paperboard; safety glass; iron tubes; pipes and fittings; chain; fasteners; springs; articles of copper; articles of steel; base metal mountings; sign plates; internal-combustion engines and parts; pumps; air conditioner components; refrigerators; filters; spraying machines; agricultural machinery and parts; valves; bearings; transmission shafts; electric motors; generators; clutches; brakes; ignitions; electromagnetic couplings; gears; flywheels; pulleys; antennas; windshield wipers; electrical lighting or signaling equipment; loudspeakers; heaters; defrosters; alarms; radios; clocks; resistors; switches; relays; lamps; wires; cables; seats; locks and keys; discs; tapes and media storage; motor vehicle parts and accessories; gauges; measuring instruments; geophysical instruments and appliances; desk equipment and parts (duty rates—free to 12.2%).

FTZ procedures could exempt Deere from customs duty payments on the foreign components used in export production. The company anticipates that some 30 to 35 percent of the facilities' shipments will be exported. On its domestic sales, Deere would be able to choose the duty rates during customs entry procedures that apply to its finished products (duty rates range between free and 8.6%) for the foreign inputs noted above. FTZ designation would further allow Deere to realize scrap benefits and certain logistical benefits through the use of customs procedures. Customs duties also could possibly be deferred or reduced on foreign status production equipment. The request indicates that the savings from FTZ procedures would help improve the plant's international competitiveness.

In accordance with the Board's regulations, Diane Finver of the FTZ Staff is designated examiner to evaluate and analyze the facts and information presented in the application and case record and to report findings and recommendations to the Board.

Public comment is invited from interested parties. Submissions (original and 3 copies) shall be addressed to the Board's Executive Secretary at the address below. The closing period for their receipt is January 19, 2010. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to February 1, 2010.

A copy of the application will be available for public inspection at the Office of the Executive Secretary, Foreign-Trade Zones Board, Room 2111, U.S. Department of Commerce, 1401 Constitution Avenue, NW., Washington, DC 20230–0002, and in the ''Reading Room'' section of the Board's Web site, which is accessible via *http://www.trade.gov/ftz.*

For Further Information Contact: Diane Finver at *Diane.Finver@trade.gov* or (202) 482–1367.

Dated: November 12, 2009.

Andrew McGilvray,

Executive Secretary.

[FR Doc. E9–27683 Filed 11–17–09; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XS95

Marine Mammals; Photography Permit Application No. 15128

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

ACTION: Notice; receipt of application.

SUMMARY: Notice is hereby given that Robert Pilley, Leighside, Bridge Road, Leighwoods, Bristol, BS8 3PB, United Kingdom, has applied in due form for a permit to conduct commercial/educational photography of bottlenose dolphins (*Tursiops truncatus*).

DATES: Written, telefaxed, or e-mail comments must be received on or before December 18, 2009.

ADDRESSES: The application and related documents are available for review upon written request or by appointment in the following offices:

Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301)713–2289; fax (301)713–0376; and

Southeast Region, NMFS, 263 13th Avenue South, Saint Petersburg, Florida 33701; phone (727)824–5312; fax (727)824–5309.

Written comments or requests for a public hearing on this application

should be mailed to the Chief, Permits, Conservation and Education Division, F/PR1, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910. Those individuals requesting a hearing should set forth the specific reasons why a hearing on this particular request would be appropriate.

Comments may also be submitted by facsimile at (301)713–0376, provided the facsimile is confirmed by hard copy submitted by mail and postmarked no later than the closing date of the comment period.

Comments may also be submitted by e-mail. The mailbox address for providing e-mail comments is *NMFS.Pr1Comments@noaa.gov*. Include in the subject line of the e-mail comment the following document identifier: File No. 15128.

FOR FURTHER INFORMATION CONTACT: Amy Hapeman or Carrie Hubard, (301)713–2289.

SUPPLEMENTARY INFORMATION: The subject permit is requested under the authority of section 104(c)(6) of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), the regulations governing the taking and importing of marine mammals (50 CFR part 216). Section 104(c)(6) provides for photography for educational or commercial purposes involving non-endangered and non-threatened marine mammals in the wild.

Mr. Pilley requests a two-year photography permit to film bottlenose dolphin strand feeding events in the estuaries and creeks of Bull Creek and around Hilton Head, South Carolina. Filmmakers plan to use four filming platforms: a static remotely operated camera placed on the mudflats, a radio-controlled camera helicopter, a radio-controlled camera glider, and a radio-controlled camera boat. Up to 128 dolphins annually may be approached and filmed. Filming will occur over 14 days and be completed by November 2010. Footage will be used to create a 6–part television series, *Earthflight*, for the British Broadcasting Corporation and Discovery Channel. The premise of the series is to follow migratory bird species around the world, with a bird's-eye perspective.

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

Concurrent with the publication of this notice in the **Federal Register**, NMFS is forwarding copies of this application to the Marine Mammal Commission and its Committee of Scientific Advisors.

Dated: November 13, 2009.

P. Michael Payne,

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

[FR Doc. E9–27676 Filed 11–17–09; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XR86

Endangered Species; File No. 14510

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

ACTION: Notice; receipt of application.

SUMMARY: Notice is hereby given that NMFS Southwest Fisheries Science Center, 3333 North Torrey Pines Court, La Jolla, CA 92037–1023, has applied in due form for a permit to take green (*Chelonia mydas*), loggerhead (*Caretta caretta*), olive ridley (*Lepidochelys olivacea*), and leatherback (*Dermochelys coriacea*) sea turtles for scientific research.

DATES: Written, telefaxed, or e-mail comments must be received on or before December 18, 2009.

ADDRESSES: The application and related documents are available for review by selecting ''Records Open for Public Comment'' from the Features box on the Applications and Permits for Protected Species (APPS) home page, *https://apps.nmfs.noaa.gov*, and then selecting File No. 14510 from the list of available applications. These documents are also available for review upon written request or by appointment in the following offices:

Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301)713–2289; fax (301)713–0376; and

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

Written comments or requests for a public hearing on this application should be mailed to the Chief, Permits, Conservation and Education Division, F/PR1, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910. Those individuals requesting a hearing should set forth the specific reasons why a hearing on this particular request would be appropriate.

Comments may also be submitted by facsimile at (301)713–0376, provided the facsimile is confirmed by hard copy submitted by mail and postmarked no later than the closing date of the comment period.

Comments may also be submitted by e-mail. The mailbox address for providing e-mail comments is *NMFS.Pr1Comments@noaa.gov*. Include in the subject line of the e-mail comment the following document identifier: File No. 14510.

FOR FURTHER INFORMATION CONTACT: Patrick Opay or Kate Swails, (301)713–2289.

SUPPLEMENTARY INFORMATION: The subject permit is requested under the authority of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*) and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR 222–226).

The purpose of the proposed research project is to initiate a baseline study of the status of sea turtles in the San Gabriel River and Alamitos Bay in Long Beach, California. Researchers would also opportunistically take samples and potentially track sea turtles incidentally taken in coastal power plants off California and that strand live in the marine environment. The applicant would study abundance, size ranges, growth, sex ratio, health status, diving behavior, local movements, habitat use, migration routes, and contaminant levels. Researchers would track the movements of healthy turtles released off the coast of California to determine their movements locally and/or offshore. Researchers would annually capture, measure, weigh, photograph/video, flipper tag, passive integrated transponder tag (PIT), tissue biopsy, blood sample, scute scrape, lavage, ultrasound, oral swab, cloacal swab, inject tetracycline, and release up to 35 green, six loggerhead, and six olive ridley sea turtles during captures as part of the San Gabriel and Los Alamitos Bay California project. Fifteen of the 35 green sea turtles would have a sonic transmitter attached, five of the green sea turtles would have a satellite transmitter attached, five would have a sonic transmitter and camera attached, and five would have a sonic transmitter and time depth recorder attached. One of the loggerhead sea turtles and two of the olive ridley sea turtles would also have a satellite transmitter attached.

Researchers would also annually measure, weigh, photograph/video, flipper tag, PIT tag, tissue biopsy, blood sample, scute scrape, lavage, ultrasound, oral swab, cloacal swab, inject tetracycline, transport, and release up to ten green, one olive ridley, and three loggerhead sea turtles taken in power plant entrainments. Three of the loggerheads, the one olive ridley, and one of the loggerhead sea turtles would also have a satellite transmitter attached. Researchers would also have authority to salvage, necropsy, and sample animals that die as a result of entrainment.

Researches would also annually measure, weigh, photograph/video, flipper tag, PIT tag, tissue biopsy, blood sample, scute scrape, lavage, ultrasound, oral swab, cloacal swab, transport, and release up to four green, one olive ridley, one loggerhead, and two leatherback sea turtles that strand in the marine environment. One of the green, the olive ridley, and the loggerhead would have a satellite transmitter attached. The leatherbacks would have a camera attached. Researchers would also have authority to authority to salvage, necropsy, and sample animals that die as a result of stranding. The applicant requests a five year permit.

Dated: November 12, 2009.

P. Michael Payne,

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

[FR Doc. E9–27677 Filed 11–17–09; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

International Trade Administration

(C–533–825)

Polyethylene Terephthalate Film, Sheet, and Strip (PET Film) from India: Rescission of Countervailing Duty Administrative Review

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

FOR FURTHER INFORMATION CONTACT: Elfi Blum, AD/CVD Operations, Office 6, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington DC 20230; telephone: (202) 482–0197.

SUPPLEMENTARY INFORMATION:

Background

On August 25, 2009, the Department of Commerce (the Department) initiated an administrative review of the countervailing duty (CVD) order on PET Film from India covering one producer/exporter of subject merchandise, Jindal Poly Films Limited of India (Jindal), for the period January 1, 2008, through December 31, 2008. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part,* 73 FR 50308 (August 26, 2008) (*Initiation Notice*). On October 26, 2009, Jindal filed a timely withdrawal from its request for a countervailing duty administrative review, in accordance with 19 CFR 351.213(d)(1). Jindal is the only respondent in this review. Petitioners[1] did not file a request for a review.

Rescission of Review

The Department's regulations at 19 CFR 351.213(d)(1) provide that the Department will rescind an administrative review if the party that requested the review withdraws its request for review within 90 days of the date of publication of the notice of initiation of the requested review, or withdraws its request at a later date if the Department determines that it is reasonable to extend the time limit for withdrawing the request. Jindal submitted its request within the 90 day limit set by the regulations. Since no other parties requested a review of Jindal, the Department is rescinding, the administrative review of the countervailing duty order on PET Film from India for the period January 1, 2008, through December 31, 2008, for Jindal.

Assessment Rates

The Department will instruct U.S. Customs and Border Protection (CBP) to assess countervailing duties on all appropriate entries. Jindal shall be assessed countervailing duty rates equal to the cash deposit of the estimated countervailing duties required at the time of entry, or withdrawal from warehouse, for consumption, in accordance with 19 CFR 351.212(c)(1)(i). The Department will issue appropriate assessment instructions directly to CBP within 15 days of publication of this notice.

Notification to Importers

This notice serves as a final reminder to importers for whom this review is being rescinded of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of the antidumping duties occurred and the subsequent assessment of double antidumping duties.

Notification Regarding Administrative Protective Orders

This notice also serves as a reminder to parties subject to administrative protective orders (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305, which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which may be subject to sanctions.

This notice is issued and published in accordance with section 777(i)(1) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.213(d)(4).

Dated: November 10, 2009.

John M. Andersen,

Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. E9–27679 Filed 11–17–09; 8:45 am]

BILLING CODE 3510–DS–S

[1] Dupont Teijin Films, Mitsubishi Polyester Film of America, and Toray Plastics (America), Inc. (collectively, Petitioners).

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN: 0648–XS94

Gulf of Mexico Fishery Management Council; Public Meeting

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

ACTION: Notice of a public meeting.

SUMMARY: The Gulf of Mexico Fishery Management Council will convene a meeting of its Ecosystem Scientific and Statistical Committee.

DATES: The Ecosystem and Statistical Committee meeting will begin at 1 p.m. on Monday, December 7, 2009 and conclude by 12 p.m. on Tuesday, December 8, 2009. The meeting will be webcast over the internet. A link to the webcast will be available on the Council's web site, http://www.gulfcouncil.org.

ADDRESSES: The meeting will be held at the Crowne Plaza, 5303 W. Kennedy Blvd., Tampa, FL 33609.

Council address: Gulf of Mexico Fishery Management Council, 2203 North Lois Avenue, Suite 1100, Tampa, FL 33607.

FOR FURTHER INFORMATION CONTACT: Dr. Karen Burns, Ecosystems Management Specialist, Gulf of Mexico Fishery Management Council; telephone: (813) 348–1630.

SUPPLEMENTARY INFORMATION: The Ecosystem and Statistical Committee will begin developing a conceptual framework for advancing an ecosystem approach for fishery management. They will also explore the use of ecological attributes in the Allowable Biological Catch Control Rule. There will also be an evaluation on the efficacy of various models and approaches to determine how recovering red snapper interact with vermilion snapper and groupers and future data and research needs for these models.

Copies of the agendas and other related materials can be obtained by calling (813) 348–1630 or can be downloaded from the Council's ftp site, *ftp.gulfcouncil.org*.

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

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Tina O'Hern at the Council (see **ADDRESSES**) at least 5 working days prior to the meeting.

Dated: November 13, 2009.

Tracey L. Thompson,

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

[FR Doc. E9–27690 Filed 11–17–09; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF DEFENSE

Department of the Navy

Notice of Partially Closed Meeting of the U.S. Naval Academy Board of Visitors

AGENCY: Department of the Navy, DOD.

ACTION: Notice.

SUMMARY: The U.S. Naval Academy Board of Visitors will meet to make such inquiry, as the Board shall deem necessary into the state of morale and discipline, the curriculum, instruction, physical equipment, fiscal affairs, and academic methods of the Naval Academy. The executive session of this meeting from 11 a.m. to 12 p.m. on December 7, 2009, will include discussions of disciplinary matters, law enforcement investigations into allegations of criminal activity, and personnel-related issues at the Naval Academy, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. For this reason, the executive session of this meeting will be closed to the public.

DATES: The open sessions of the meeting will be held on Monday, December 7, 2009, from 8 a.m. to 11 a.m. The closed session of this meeting will be the executive session held from 11 a.m. to 12 p.m. on December 7, 2009.

ADDRESSES: The meeting will be held in the Bo Coppedge Room of Alumni Hall, U.S. Naval Academy, Annapolis, MD. The meeting will be handicap accessible.

FOR FURTHER INFORMATION CONTACT: Lieutenant Commander David S. Forman, USN, Executive Secretary to the Board of Visitors, Office of the Superintendent, U.S. Naval Academy, Annapolis, MD 21402–5000, (410) 293–1503.

SUPPLEMENTARY INFORMATION: This notice of meeting is provided per the Federal Advisory Committee Act, as amended (5 U.S.C. App.). The executive session of the meeting from 11 a.m. to 12 p.m. on December 7, 2009, will consist of discussions of law enforcement investigations into allegations of criminal activity, new and pending administrative/minor disciplinary infractions and nonjudicial punishments involving the Midshipmen attending the Naval Academy to include but not limited to individual honor/conduct violations within the Brigade, and personnel-related issues. The discussion of such information cannot be adequately segregated from other topics, which precludes opening the executive session of this meeting to the public. Accordingly, the Secretary of the Navy has determined in writing that the meeting shall be partially closed to the public because the discussions during the executive session from 11 a.m. to 12 p.m. will be concerned with matters coming under sections 552b(c)(5), (6), and (7) of title 5, United States Code.

Dated: November 6, 2009.

A. M. Vallandingham

Lieutenant Commander, Judge Advocate General's Corps, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. E9–27682 Filed 11–17–09; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF EDUCATION

Office of Postsecondary Education; Overview Information; Business and International Education (BIE) Program; Notice Inviting Applications for New Awards for Fiscal Year (FY) 2010

Catalog of Federal Domestic Assistance (CFDA) Number: 84.153A.

Dates: Applications Available: November 18, 2009.

Deadline for Transmittal of Applications: January 8, 2010.

Deadline for Intergovernmental Review: March 9, 2010.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The BIE Program provides grants to enhance international business education programs and to expand the capacity of the business community to engage in international economic activities.

Priorities: This notice includes two competitive preference priorities and one invitational priority that are explained in the following paragraphs.

Competitive Preference Priority: In accordance with 34 CFR 75.105(b)(2)(ii), these priorities are from the regulations for this program (34 CFR 661.10 and 661.32). For FY 2010, these priorities are competitive preference priorities. Under 34 CFR 75.105(c)(2)(i) we award up to an additional five points under each priority to an application that meets that priority.

These priorities are:

Competitive Preference Priority I: Applications that propose projects that provide innovation and improvement of international education curricula to serve the needs of the business community, including the development of new programs for nontraditional, mid-career, or part-time students.

Competitive Preference Priority II: Applications that propose projects to internationalize curricula at junior and

community colleges, and at undergraduate and graduate schools of business.

Invitational Priority: For FY 2010, there is one invitational priority for this program. Under 34 CFR 75.105(c)(1) we do not give an application that meets this invitational priority a competitive or absolute preference over other applications.

This priority is:

Invitational Priority:

Applications that focus on language instruction in any of the following seventy-eight (78) languages selected from the U.S. Department of Education's list of Less Commonly Taught Languages (LCTLs):

Akan (Twi-Fante), Albanian, Amharic, Arabic (all dialects), Armenian, Azeri (Azerbaijani), Balochi, Bamanakan (Bamana, Bambara, Mandikan, Mandingo, Maninka, Dyula), Belarusian, Bengali (Bangla), Berber (all languages), Bosnian, Bulgarian, Burmese, Cebuano (Visayan), Chechen, Chinese (Cantonese), Chinese (Gan), Chinese (Mandarin), Chinese (Min), Chinese (Wu), Croatian, Dari, Dinka, Georgian, Gujarati, Hausa, Hebrew (Modern), Hindi, Igbo, Indonesian, Japanese, Javanese, Kannada, Kashmiri, Kazakh, Khmer (Cambodian), Kirghiz, Korean, Kurdish (Kurmanji), Kurdish (Sorani), Lao, Malay (Bahasa Melayu or Malaysian), Malayalam, Marathi, Mongolian, Nepali, Oromo, Panjabi, Pashto, Persian (Farsi), Polish, Portuguese (all varieties), Quechua, Romanian, Russian, Serbian, Sinhala (Sinhalese), Somali, Swahili, Tagalog, Tajik, Tamil, Telugu, Thai, Tibetan, Tigrigna, Turkish, Turkmen, Ukrainian, Urdu, Uyghur/Uigur, Uzbek, Vietnamese, Wolof, Xhosa, Yoruba, and Zulu.

Program Authority: 20 U.S.C. 1130–1130b.

Applicable Regulations: (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 79, 80, 81, 82, 84, 85, 86, 97, 98, and 99. (b) The regulations in 34 CFR parts 655 and 661.

Note: The regulations in 34 CFR part 86 apply to institutions of higher education only.

Areas of National Need: In accordance with section 601(c) of the Higher Education Act of 1965, as amended (HEA), 20 U.S.C. 1121(c), the Secretary has consulted with and received recommendations regarding the national need for expertise in foreign languages and world regions from the head officials of a wide range of Federal agencies. The Secretary has taken these recommendations into account in developing this notice inviting applications. A list of foreign languages and world regions identified by the Secretary as areas of national need may be found on links on the following Web sites: *http://www.ed.gov/about/offices/list/ope/policy.html http://www.ed.gov/programs/iegpsbie/legislation.html.*

Also included on these Web sites and links are the specific recommendations the Secretary received from Federal agencies.

II. Award Information

Type of Award: Discretionary grants.

Estimated Available Funds: The Administration has requested $102,335,000 for the Title VI International Education and Foreign Language Studies: Domestic Programs for FY 2010, of which we intend to allocate $2,152,000 for new awards under this program. The actual level of funding, if any, depends on final congressional action. However, we are inviting applications to allow enough time to complete the grant process if Congress appropriates funds for this program.

Estimated Range of Awards: $50,000–$95,000.

Estimated Average Size of Awards: $86,080.

Maximum Award: We will reject any application that proposes a budget exceeding $95,000 for a single budget period of 12 months. The Assistant Secretary for Postsecondary Education may change the maximum amount through a notice published in the **Federal Register**.

Estimated Number of Awards: 25.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 24 months.

III. Eligibility Information

1. *Eligible Applicants:* Institutions of higher education that have entered into agreements with business enterprises, trade organizations, or associations that are engaged in international economic activity—or a combination or consortium of these enterprises, organizations, or associations—for the purposes of pursuing the activities authorized under this program.

2. *Cost Sharing or Matching:* Section 613(d) of the HEA, (20 U.S.C. 1130a(d)) provides that the applicant's share of the total cost of carrying out a program supported by a grant under the BIE Program must be no less than 50 percent of the total cost of the project in each fiscal year. The non-Federal share of the cost may be provided either in-kind or in cash.

IV. Application and Submission Information

1. *Address to Request Application Package:* Tanyelle Richardson, International Education Programs Service, U.S. Department of Education, 1990 K Street, NW., room 6017, Washington, DC 20006–8521. Telephone: (202) 502–7626 or by e-mail: *tanyelle.richardson@ed.gov.*

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

Individuals with disabilities can obtain a copy of the application package in an accessible format (*e.g.,* braille, large print, audiotape, or computer diskette) by contacting the program contact person listed in this section.

2. *Content and Form of Application Submission:* Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this program.

Page Limit: The application narrative is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. You must limit the application narrative [Part III] to no more than 40 pages, using the following standards:

- A ''page'' is 8.5″ x 11″, on one side only, with 1″ margins at the top, bottom, and both sides. Page numbers and an identifier may be outside of the 1'' margin.
- Double space (no more than three lines per vertical inch) all text in the application narrative, except titles, headings, footnotes, quotations, references, captions, and all text in charts, tables, figures, and graphs. These items may be single-spaced. Charts, tables, figures, and graphs in the application narrative count toward the page limit.
- Use a font that is either 12 point or larger or no smaller than 10 pitch (characters per inch). However, you may use a 10 point font in charts, tables, figures, and graphs.
- Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial. An application submitted in any other font (including Times Roman and Arial Narrow) will not be accepted.

The page limit does not apply to Part I, the Application for Federal Assistance face sheet (SF 424); the supplemental information form required by the Department of Education; Part II, the budget information summary form (ED Form 524); or Part IV, the assurances and certifications. The page limit also does not apply to a table of contents.

However, the page limit does apply to all of the application narrative section [Part III]. If you include any attachments or appendices not specifically requested in the application package, these items will be counted as part of your application narrative [Part III] for purposes of the page limit requirement. You must include your complete response to the selection criteria in the application narrative.

We will reject your application if you exceed the page limit.

3. *Submission Dates and Times:*

Applications Available: November 18, 2009.

Deadline for Transmittal of Applications: January 8, 2010.

Applications for grants under this program must be submitted electronically using the Electronic Grant Application System (e-Application) accessible through the Department's e-Grants site. For information (including dates and times) about how to submit your application electronically, or in paper format by mail or hand delivery if you qualify for an exception to the electronic submission requirement, please refer to Section IV. 7. *Other Submission Requirements* of this notice.

4. *Other Submission Requirements* of this notice. We do not consider an application that does not comply with the deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice. If the Department provides an accommodation or auxiliary aid to an individual with a disability in connection with the application process, the individual's application remains subject to all other requirements and limitations in this notice.

Deadline for Intergovernmental Review: March 9, 2010.

5. *Intergovernmental Review:* This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this program.

6. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

7. *Other Submission Requirements:* Applications for grants under this program must be submitted electronically unless you qualify for an exception to this requirement in accordance with the instructions in this section.

a. *Electronic Submission of Applications.*

Applications for grants under the BIE Program—CFDA number 84.153A must be submitted electronically using e-Application, accessible through the Department's e-Grants Web site at: *http://e-grants.ed.gov.*

We will reject your application if you submit it in paper format unless, as described elsewhere in this section, you qualify for one of the exceptions to the electronic submission requirement and submit, no later than two weeks before the application deadline date, a written statement to the Department that you qualify for one of these exceptions. Further information regarding calculation of the date that is two weeks before the application deadline date is provided later in this section under *Exception to Electronic Submission Requirement.*

While completing your electronic application, you will be entering data online that will be saved into a database. You may not e-mail an electronic copy of a grant application to us.

Please note the following:

- You must complete the electronic submission of your grant application by 4:30:00 p.m., Washington, DC time, on the application deadline date. E-Application will not accept an application for this program after 4:30:00 p.m., Washington, DC time, on the application deadline date. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the application process.
- The hours of operation of the e-Grants Web site are 6:00 a.m. Monday until 7:00 p.m. Wednesday; and 6:00 a.m. Thursday until 8:00 p.m. Sunday, Washington, DC time. Please note that, because of maintenance, the system is unavailable between 8:00 p.m. on Sundays and 6:00 a.m. on Mondays, and between 7:00 p.m. on Wednesdays and 6:00 a.m. on Thursdays, Washington, DC time. Any modifications to these hours are posted on the e-Grants Web site.
- You will not receive additional point value because you submit your application in electronic format, nor will we penalize you if you qualify for an exception to the electronic submission requirement, as described elsewhere in this section, and submit your application in paper format.
- You must submit all documents electronically, including all information you typically provide on the following forms: The Application for Federal Assistance (SF 424), the Department of Education Supplemental Information for SF 424, Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications. You must attach any narrative sections of your application as files in a .DOC (document), .RTF (rich text), or .PDF (Portable Document) format. If you upload a file type other than the three file types specified in this paragraph or submit a password protected file, we will not review that material.
- Your electronic application must comply with any page limit requirements described in this notice.
- Prior to submitting your electronic application, you may wish to print a copy of it for your records.
- After you electronically submit your application, you will receive an automatic acknowledgment that will include a PR/Award number (an identifying number unique to your application).
- Within three working days after submitting your electronic application, fax a signed copy of the SF 424 to the Application Control Center after following these steps:

(1) Print SF 424 from e-Application.

(2) The applicant's Authorizing Representative must sign this form.

(3) Place the PR/Award number in the upper right hand corner of the hard-copy signature page of the SF 424.

(4) Fax the signed SF 424 to the Application Control Center at (202) 245–6272.

- We may request that you provide us original signatures on other forms at a later date.

Application Deadline Date Extension in Case of e-Application Unavailability: If you are prevented from electronically submitting your application on the application deadline date because e-Application is unavailable, we will grant you an extension of one business day to enable you to transmit your application electronically, by mail, or by hand delivery. We will grant this extension if—

(1) You are a registered user of e-Application and you have initiated an electronic application for this competition; and

(2)(a) E-Application is unavailable for 60 minutes or more between the hours of 8:30 a.m. and 3:30 p.m., Washington, DC time, on the application deadline date; or

(b) E-Application is unavailable for any period of time between 3:30 p.m. and 4:30:00 p.m., Washington, DC time, on the application deadline date.

We must acknowledge and confirm these periods of unavailability before granting you an extension. To request

this extension or to confirm our acknowledgment of any system unavailability, you may contact either (1) the person listed elsewhere in this notice under **FOR FURTHER INFORMATION CONTACT** (see VII. Agency Contact) or (2) the e-Grants help desk at 1–888–336–8930. If e-Application is unavailable due to technical problems with the system and, therefore, the application deadline is extended, an e-mail will be sent to all registered users who have initiated an e-Application. Extensions referred to in this section apply only to the unavailability of e-Application.

Exception to Electronic Submission Requirement: You qualify for an exception to the electronic submission requirement, and may submit your application in paper format, if you are unable to submit an application through e-Application because—

- You do not have access to the Internet; or
- You do not have the capacity to upload large documents to e-Application; and
- No later than two weeks before the application deadline date (14 calendar days or, if the fourteenth calendar day before the application deadline date falls on a Federal holiday, the next business day following the Federal holiday), you mail or fax a written statement to the Department, explaining which of the two grounds for an exception prevents you from using the Internet to submit your application. If you mail your written statement to the Department, it must be postmarked no later than two weeks before the application deadline date. If you fax your written statement to the Department, we must receive the faxed statement no later than two weeks before the application deadline date.

Address and mail or fax your statement to: Tanyelle Richardson, Business and International Education Program, U.S. Department of Education, 1990 K Street, NW., room 6017, Washington, DC 20006–8521. FAX: (202) 502–7860.

Your paper application must be submitted in accordance with the mail or hand delivery instructions described in this notice.

b. *Submission of Paper Applications by Mail.*

If you qualify for an exception to the electronic submission requirement, you may mail (through the U.S. Postal Service or a commercial carrier) your application to the Department. You must mail the original and two copies of your application, on or before the application deadline date, to the Department at the following address:

U.S. Department of Education,
Application Control Center,
Attention: (CFDA Number 84.153A),
LBJ Basement Level 1, 400 Maryland Avenue, SW., Washington, DC 20202–4260.

You must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

If your application is postmarked after the application deadline date, we will not consider your application.

Note: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

c. *Submission of Paper Applications by Hand Delivery.*

If you qualify for an exception to the electronic submission requirement, you (or a courier service) may deliver your paper application to the Department by hand. You must deliver the original and two copies of your application, by hand, on or before the application deadline date, to the Department at the following address:

U.S. Department of Education,
Application Control Center,
Attention: (CFDA Number 84.153A),
550 12th Street, SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8:00 a.m. and 4:30:00 p.m., Washington, DC time, except Saturdays, Sundays, and Federal holidays.

Note for Mail or Hand Delivery of Paper Applications: If you mail or hand deliver your application to the Department—

(1) You must indicate on the envelope and—if not provided by the Department—in Item 11 of the SF 424 the CFDA number, including suffix letter, if any, of the competition under which you are submitting your application; and

(2) The Application Control Center will mail to you a notification of receipt of your grant application. If you do not receive this grant notification within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

V. Application Review Information

1. *Selection Criteria:* The selection criteria for this program are in 34 CFR 661.31 and are as follows: (a) Need for the project (25 points); (b) plan of operation (20 points); (c) qualifications of the key personnel (10 points); (d) budget and cost effectiveness (15 points); (e) evaluation plan (25 points); and (f) adequacy of resources (5 points).

2. *General:* For FY 2010, applications are randomly divided into groupings. International business and outreach experts, organized into panels of three, will review each application. Each panel reviews, scores, and ranks its applications separately from the applications assigned to the other panels. However, ultimately, all applications, without being divided into groups, will be ranked from the highest to the lowest score for funding purposes.

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN). We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multi-year award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. Grantees are required to use the electronic data instrument, International Resource Information System (IRIS), to complete both the annual and final reports. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to:

http://www.ed.gov/fund/grant/apply/appforms/appforms.html.

4. *Performance Measures:* The purpose of the BIE program is to provide funds to institutions of higher education that enter into agreements with trade associations or businesses for one or both of the following purposes: to improve the academic teaching of the business curriculum at institutions of higher education and to conduct outreach activities that expand the capacity of the business community to engage in international economic activities.

The Department will use the following BIE measures to evaluate its success in meeting this objective:

Performance Measure 1: The number of outreach activities that are adopted or disseminated by grantees within a year, divided by the total number of BIE outreach activities conducted in the current reporting period.

Performance Measure 2: Percentage of BIE projects judged to be successful by the program officer, based on a review of information provided in annual performance reports.

Efficiency Measure: Cost per high-quality, successfully completed BIE project.

The Department will use information provided by grantees in their performance reports submitted via IRIS as the source of data for these measures. Reporting screens for institutions can be viewed at: *http://www.ieps-iris.org/iris/pdfs/BIE.pdf.*

VII. Agency Contact

For Further Information Contact: Ms. Tanyelle Richardson, International Education Programs Service, U.S. Department of Education, 1990 K Street, NW., room 6017, Washington, DC 20006–8521. Telephone: (202) 502–7626 or by e-mail: *tanyelle.richardson@ed.gov.*

If you use a TDD, call the FRS, toll free, at 1–800–877–8339.

VIII. Other Information

Accessible Format: Individuals with disabilities can obtain this document and a copy of the application package in an accessible format (*e.g.,* braille, large print, audiotape, or computer diskette) on request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice.

Electronic Access to This Document: You can 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.

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.*

Delegation of Authority: The Secretary of Education has delegated authority to Daniel T. Madzelan, Director, Forecasting and Policy Analysis for the Office of Postsecondary Education, to perform the functions and duties of the Assistant Secretary for Postsecondary Education.

Dated: November 12, 2009.

Daniel T. Madzelan,

Director, Forecasting and Policy Analysis.

[FR Doc. E9–27686 Filed 11–17–09; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Proposed Agency Information Collection; Comment Request; Energy Efficiency Conservation Block Grant Program

AGENCY: U.S. Department of Energy.

ACTION: Notice.

SUMMARY: The Department of Energy (DOE) invites public comment on a proposed collection of information that DOE is developing for submission to the Office of Management and Budget (OMB) pursuant to the Paperwork Reduction Act of 1995.

DATES: Comments regarding this proposed information collection must be received on or before January 19, 2010. If you anticipate difficulty in submitting comments within that period, contact the person listed in **ADDRESSES** as soon as possible. Any extension of the comment period will be applicable to all interested parties.

ADDRESSES: Written comments may be sent to Johanna Zetterberg, U.S. Department of Energy, EE–2K/Forrestal Building, 1000 Independence Ave., SW., Washington, DC 20585 or by fax at 202–586–1233, or by e-mail at *johanna.zetterberg@ee.doe.gov*.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Jody Barringer at *jody.barringer@ee.doe.gov*.

SUPPLEMENTARY INFORMATION: The Energy Efficiency and Conservation Block Grant program is a newly established program authorized by the Energy Independence and Security Act of 2007 (Pub. L. 110–140) and funded under the American Recovery and Reinvestment Act (Pub. L. 111–5). The program provides grants to states, territories, local governments and Native American tribal governments to fund programs that reduce energy use and fossil fuel emissions and increase energy efficiency. The information collected will be used to track the recipients' activities, their progress in achieving program objectives, and funds expended (including expenditure rates). The information will also enable DOE to provide timely information on program activities and accomplishments to OMB, Congress and the public. The President's pledge of transparency and accountability in the expenditure of ARRA funds makes this information especially important.

This information collection request contains: (1) OMB No. ''New''; (2) Information Collection Request Title: ''Energy Efficiency and Conservation Block Grant (EECBG) Program Status Report;'' (3) Type of Review: Regular Submission; (4) Purpose: To collect information on the status of grantee activities, expenditures, and results, to ensure that program funds are being used appropriately, effectively, and expeditiously; (5) Annual Estimated Number of Respondents: 2,357; (6) Annual Estimated Number of Total Responses: 28,284; (7) Estimated Time Required per Response: local governments/tribal governments—2 hours; states/territories—3 hours; (8) Annual Estimated Number of Burden Hours: 85,524; and (9) Annual Estimated Reporting and Recordkeeping Cost Burden: $3,985.

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

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

Authority: Title V, Subtitle E of the Energy Independence and Security Act (EISA), Public Law 110–140.

Issued in Washington, DC, on November 5, 2009.

Cathy Zoi,

Assistant Secretary, Energy Efficiency and Renewable Energy.

[FR Doc. E9–27597 Filed 11–17–09; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

[OE Docket No. EA–275–B]

Application To Export Electric Energy; NorthPoint Energy Solutions Inc.

AGENCY: Office of Electricity Delivery and Energy Reliability, DOE.

ACTION: Notice of Application.

SUMMARY: NorthPoint Energy Solutions Inc. (NorthPoint) has applied to renew its authority to transmit electric energy from the United States to Canada pursuant to section 202(e) of the Federal Power Act.

DATES: Comments, protests, or requests to intervene must be submitted on or before December 18, 2009.

ADDRESSES: Comments, protests or requests to intervene should be addressed as follows: Office of Electricity Delivery and Energy Reliability, Mail Code: OE–20, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585–0350 (FAX 202–586–8008).

FOR FURTHER INFORMATION CONTACT: Ellen Russell (Program Office) 202–586–9624 or Michael Skinker (Program Attorney) 202–586–2793.

SUPPLEMENTARY INFORMATION: Exports of electricity from the United States to a foreign country are regulated by the Department of Energy (DOE) pursuant to sections 301(b) and 402(f) of the Department of Energy Organization Act (42 U.S.C. 7151(b), 7172(f)) and require authorization under section 202(e) of the FPA (16 U.S.C.824a(e)).

On April 8, 2003, DOE issued Order No. EA–275 authorizing NorthPoint to transmit electric energy from the United States to Canada as a power marketer using existing international electric transmission facilities for two years. On December 10, 2004, DOE issued Order No. EA–275–A, which renewed NorthPoint's authority for a five-year period, effective April 8, 2005. That authorization will expire on April 8, 2010. On November 2, 2009, NorthPoint filed an application with DOE to renew the export authority contained in Order No. EA–275–A and has requested a ten-year term.

The electric energy which NorthPoint proposes to export to Canada would be surplus energy purchased from electric utilities, Federal power marketing agencies and other entities within the United States. Each of the international transmission facilities to be utilized by NorthPoint has previously been authorized by a Presidential permit issued pursuant to Executive Order 10485, as amended, and are appropriate for open access transmission by third parties.

Procedural Matters: Any person desiring to become a party to these proceedings or to be heard by filing comments or protests to this application should file a petition to intervene, comment, or protest at the address provided above in accordance with §§ 385.211 or 385.214 of the Federal Energy Regulatory Commission's Rules of Practice and Procedures (18 CFR 385.211, 385.214). Fifteen copies of each petition and protest should be filed with DOE on or before the date listed above.

Comments on the NorthPoint application to export electric energy to Canada should be clearly marked with Docket No. EA–275–B. Additional copies are to be filed directly with Douglas F. John and Elizabeth A. Zembruski, John & Hengerer, 1730 Rhode Island Ave., NW., Suite 600, Washington, DC, 20036 and General Counsel of SaskPower—Law, Land and Regulatory Affairs, 2025 Victoria Ave., Regina, Saskatchewan, Canada S4P 0S1. A final decision will be made on this application after the environmental impacts have been evaluated pursuant to the National Environmental Policy Act of 1969, and a determination is made by DOE that the proposed action will not adversely impact on the reliability of the U.S. electric power supply system.

Copies of this application will be made available, upon request, for public inspection and copying at the address provided above, by accessing the program Web site at *http://www.oe.energy.gov/permits_pending.htm,* or by e-mailing Odessa Hopkins at *Odessa.Hopkins@hq.doe.gov.*

Issued in Washington, DC, on November 12, 2009.

Anthony J. Como,

Director, Permitting and Siting, Office of Electricity Delivery and Energy Reliability.

[FR Doc. E9–27656 Filed 11–17–09; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

[OE Docket Nos. EA–247–C and 248–C]

Application To Export Electric Energy; Constellation NewEnergy, Inc.

AGENCY: Office of Electricity Delivery and Energy Reliability, DOE.

ACTION: Notice of Application.

SUMMARY: Under two separate applications, Constellation NewEnergy, Inc. (Constellation) has applied for authority to transmit electric energy from the United States to Mexico and from the United States to Canada pursuant to section 202(e) of the Federal Power Act.

DATES: Comments, protests, or requests to intervene must be submitted on or before December 18, 2009.

ADDRESSES: Comments, protests, or requests to intervene should be addressed as follows: Office of Electricity Delivery and Energy Reliability, Mail Code: OE–20, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585–0350 (FAX 202–586–8008).

FOR FURTHER INFORMATION CONTACT: Ellen Russell (Program Office) 202–586–9624 or Michael Skinker (Program Attorney) 202–586–2793.

SUPPLEMENTARY INFORMATION: Exports of electricity from the United States to a foreign country are regulated by the Department of Energy (DOE) pursuant to sections 301(b) and 402(f) of the Department of Energy Organization Act (42 U.S.C. 7151(b), 7172(f)) and require authorization under section 202(e) of the FPA (16 U.S.C. 824a(e)).

On November 13, 2001, DOE issued Order No. EA–247 authorizing Constellation to transmit electric energy from the United States to Mexico as a power marketer for a two year period. DOE has twice renewed Constellation's authority to export. The most recent authorization, in Order No. EA–247–B, will expire on April 8, 2010. On October 27, 2009, Constellation applied to DOE to renew the authorization contained in Order No. EA–247–B for an additional five-year term.

On November 26, 2001, DOE issued Order No. EA–248 which authorized Constellation to transmit electric energy from the United States to Canada as a power marketer. That Order was also twice-renewed and will expire on April 8, 2010. On October 27, 2009, Constellation applied to DOE to renew the authorization contained in Order No. EA–247–B for an additional five-year term.

The electric energy which Constellation proposes to export to Mexico and Canada would be surplus energy purchased from electric utilities, Federal power marketing agencies and other entities within the United States. Each of the international transmission facilities to be utilized by Constellation has previously been authorized by a Presidential permit issued pursuant to Executive Order 10485, as amended, and are appropriate for open access transmission by third parties.

Procedural Matters: Any person desiring to become a party to these proceedings or to be heard by filing comments or protests to this application should file a petition to intervene, comment, or protest at the address provided above in accordance with §§ 385.211 or 385.214 of the Federal Energy Regulatory Commission's Rules of Practice and Procedures (18 CFR 385.211, 385.214). Fifteen copies of each petition and protest should be filed with DOE on or before the date listed above.

Comments on the Constellation application to export electric energy to Mexico should be clearly marked with Docket No. EA–247–C. Comments on the Constellation application to export electric energy to Canada should be clearly marked with Docket No. EA–248–C. Additional copies are to be filed directly with Joseph Donovan, Senior Counsel, Constellation Energy Resources, LLC on behalf of Constellation NewEnergy, Inc., 111 Market Place, Suite 500, Baltimore, MD 21202. A final decision will be made on this application after the environmental impacts have been evaluated pursuant to the National Environmental Policy Act of 1969, and a determination is made by DOE that the proposed action will not adversely impact on the reliability of the U.S. electric power supply system.

Copies of these applications will be made available, upon request, for public inspection and copying at the address provided above, by accessing the program Web site at *http://www.oe.energy.gov/permits_pending.htm,* or by e-mailing Odessa Hopkins at *Odessa.hopkins@hq.doe.gov.*

Issued in Washington, DC, on November 12, 2009.

Anthony J. Como,

Director, Permitting and Siting, Office of Electricity Delivery and Energy Reliability.

[FR Doc. E9–27655 Filed 11–17–09; 8:45 am]

BILLING CODE 6450–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2009–0851; FRL–8800–1]

FIFRA Scientific Advisory Panel; Notice of Public Meeting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: There will be a 4–day meeting of the Federal Insecticide, Fungicide, and Rodenticide Act Scientific Advisory Panel (FIFRA SAP) to consider and review Draft Framework and Case Studies on Atrazine, Human Incidents, and the Agricultural Health Study: Incorporation of Epidemiology and Human Incident Data into Human Health Risk Assessment.

DATES: The meeting will be held on February 2 – 5, 2010, from approximately 8:30 a.m. to 5 p.m.

Comments. The Agency encourages that written comments be submitted by January 19, 2010 and requests for oral comments be submitted by January 26, 2010. However, written comments and requests to make oral comments may be submitted until the date of the meeting, but anyone submitting written comments after January 19, 2010 should contact the Designated Federal Official (DFO) listed under **FOR FURTHER INFORMATION CONTACT.** For additional instructions, see Unit I.C. of the **SUPPLEMENTARY INFORMATION**.

Nominations. Nominations of candidates to serve as ad hoc members of FIFRA SAP for this meeting should be provided on or before November 30, 2009.

Special accommodations. For information on access or services for individuals with disabilities, and to request accommodation of a disability, please contact the DFO listed under **FOR FURTHER INFORMATION CONTACT** 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 the Environmental Protection Agency, Conference Center, Lobby Level, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA 22202.

Comments. Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2009–0851, 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 Facility '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–2009–0851. If your comments contain any information that you consider to be CBI or otherwise protected, please contact the DFO listed under **FOR FURTHER INFORMATION CONTACT** to obtain special instructions before submitting your comments. 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 at *http://www.regulations.gov*. 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.

Nominations, requests to present oral comments, and requests for special accommodations. Submit nominations to serve as ad hoc members of FIFRA SAP, requests for special seating accommodations, or requests to present oral comments to the DFO listed under **FOR FURTHER INFORMATION CONTACT**.

FOR FURTHER INFORMATION CONTACT: Myrta R. Christian, DFO, Office of Science Coordination and Policy (7201M), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (202) 564–8498; fax number: (202) 564–8382; e-mail address: *christian.myrta@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general. This action may, however, be of interest to persons who are or may be required to conduct testing of chemical substances under the Federal Food, Drug, and Cosmetic Act (FFDCA), FIFRA, and the Food Quality Protection Act of 1996 (FQPA). Since other entities may also 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 DFO listed under **FOR FURTHER INFORMATION CONTACT**.

B. What Should I Consider as I Prepare My Comments for EPA?

When submitting comments, remember to:

1. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

2. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

3. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

4. Describe any assumptions and provide any technical information and/or data that you used.

5. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

6. Provide specific examples to illustrate your concerns and suggest alternatives.

7. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

8. Make sure to submit your comments by the comment period deadline identified.

C. How May I Participate in this Meeting?

You may participate in this meeting by following the instructions in this unit. To ensure proper receipt by EPA, it is imperative that you identify docket ID number EPA–HQ–OPP–2009–0851 in the subject line on the first page of your request.

1. *Written comments.* The Agency encourages that written comments be submitted, using the instructions in **ADDRESSES**, no later than January 19, 2010, to provide FIFRA SAP the time necessary to consider and review the written comments. Written comments are accepted until the date of the meeting, but anyone submitting written comments after January 19, 2010 should contact the DFO listed under **FOR FURTHER INFORMATION CONTACT.** Anyone submitting written comments at the meeting should bring 30 copies for distribution to FIFRA SAP.

2. *Oral comments.* The Agency encourages that each individual or group wishing to make brief oral comments to FIFRA SAP submit their request to the DFO listed under **FOR FURTHER INFORMATION CONTACT** no later than January 26, 2010, in order to be included on the meeting agenda. Requests to present oral comments will be accepted until the date of the meeting and, to the extent that time permits, the Chair of FIFRA SAP may permit the presentation of oral comments at the meeting by interested persons who have not previously requested time. The request should identify the name of the individual making the presentation, the organization (if any) the individual will represent, and any requirements for audiovisual equipment (e.g., overhead projector, 35mm projector, chalkboard). Oral comments before FIFRA SAP are limited to approximately 5 minutes unless prior arrangements have been made. In addition, each speaker should bring 30 copies of his or her comments and presentation slides for distribution to the FIFRA SAP at the meeting.

3. *Seating at the meeting.* Seating at the meeting will be open and on a first-come basis.

4. *Request for nominations to serve as ad hoc members of FIFRA SAP for this meeting.* As part of a broader process for developing a pool of candidates for each meeting, FIFRA SAP staff routinely solicits the stakeholder community for nominations of prospective candidates for service as ad hoc members of FIFRA SAP. Any interested person or organization may nominate qualified individuals to be considered as prospective candidates for a specific meeting. Individuals nominated for this meeting should have expertise in one or more of the following areas: Risk Assessment; Human Epidemiology (particularly occupational and environmental epidemiology); Mode of Action Analysis (particularly those with MOA framework experience); Human Relevance Framework; Pharmacokinetics (particularly animal to human extrapolation); Exposure Assessment of Pesticides (both residential & agricultural worker). Nominees should be scientists who have sufficient professional qualifications, including training and experience, to be capable of providing expert comments on the scientific issues for this meeting. Nominees should be identified by name, occupation, position, address, and telephone number. Nominations should be provided to the DFO listed under **FOR FURTHER INFORMATION CONTACT** on or before November 30, 2009. The Agency will consider all nominations of prospective candidates for this meeting that are received on or before this date. However, final selection of ad hoc members for this meeting is a discretionary function of the Agency.

The selection of scientists to serve on FIFRA SAP is based on the function of the panel and the expertise needed to address the Agency's charge to the panel. No interested scientists shall be ineligible to serve by reason of their membership on any other advisory committee to a Federal department or agency or their employment by a Federal department or agency except the EPA. Other factors considered during the selection process include availability of the potential panel member to fully participate in the panel's reviews, absence of any conflicts of interest or appearance of lack of impartiality, independence with respect to the matters under review, and lack of bias. Although financial conflicts of interest, the appearance of lack of impartiality, lack of independence, and bias may result in disqualification, the absence of such concerns does not assure that a candidate will be selected

to serve on FIFRA SAP. Numerous qualified candidates are identified for each panel. Therefore, selection decisions involve carefully weighing a number of factors including the candidates' areas of expertise and professional qualifications and achieving an overall balance of different scientific perspectives on the panel. In order to have the collective breadth of experience needed to address the Agency's charge for this meeting, the Agency anticipates selecting approximately 10 ad hoc scientists.

FIFRA SAP members are subject to the provisions of 5 CFR part 2634, Executive Branch Financial Disclosure, as supplemented by the EPA in 5 CFR part 6401. In anticipation of this requirement, prospective candidates for service on the FIFRA SAP will be asked to submit confidential financial information which shall fully disclose, among other financial interests, the candidate's employment, stocks and bonds, and where applicable, sources of research support. The EPA will evaluate the candidates financial disclosure form to assess whether there are financial conflicts of interest, appearance of a lack of impartiality or any prior involvement with the development of the documents under consideration (including previous scientific peer review) before the candidate is considered further for service on FIFRA SAP. Those who are selected from the pool of prospective candidates will be asked to attend the public meetings and to participate in the discussion of key issues and assumptions at these meetings. In addition, they will be asked to review and to help finalize the meeting minutes. The list of FIFRA SAP members participating at this meeting will be posted on the FIFRA SAP website at *http://epa.gov/scipoly/sap* or may be obtained from the OPP Regulatory Public Docket at *http://www.regulations.gov*.

II. Background

A. Purpose of FIFRA SAP

FIFRA SAP serves as the primary scientific peer review mechanism of EPA's Office of Prevention, Pesticides and Toxic Substances (OPPTS) and is structured to provide scientific advice, information and recommendations to the EPA Administrator on pesticides and pesticide-related issues as to the impact of regulatory actions on health and the environment. FIFRA SAP is a Federal advisory committee established in 1975 under FIFRA that operates in accordance with requirements of the Federal Advisory Committee Act. FIFRA SAP is composed of a permanent panel consisting of seven members who are appointed by the EPA Administrator from nominees provided by the National Institutes of Health and the National Science Foundation. FIFRA, as amended by FQPA, established a Science Review Board consisting of at least 60 scientists who are available to the SAP on an ad hoc basis to assist in reviews conducted by the SAP. As a peer review mechanism, FIFRA SAP provides comments, evaluations and recommendations to improve the effectiveness and quality of analyses made by Agency scientists. Members of FIFRA SAP are scientists who have sufficient professional qualifications, including training and experience, to provide expert advice and recommendation to the Agency.

B. Public Meeting

Data from epidemiology studies and human incident reports contain valuable information about human exposure and response to pesticides. This information can contribute to a weight of evidence analysis in the characterization of human health risks. Epidemiology and incident data do, however, pose challenges with respect to characterizing human health risks. EPA is convening a meeting of the FIFRA Scientific Advisory Panel (SAP) to discuss science issues related to using epidemiology and human incident data in human health risk assessment. The Office of Pesticide Programs (OPP) will solicit comment on a draft framework for implementing such data into human health risk assessment in addition to several case studies that illustrate scientific issues to be addressed at the SAP meeting. OPP's draft framework describes a weight of the evidence evaluation that uses the best available science on mode of action, exposure, pharmacokinetics, animal and human data from both *in vivo* and *in vitro* studies in addition to models such as physiologically-based pharmacokinetic models when available. Three case studies to be evaluated by the SAP are intended to illustrate the draft framework and to highlight key science challenges with incorporating epidemiology or human incident data into a risk assessment. The Agency will solicit comment on the weight of the evidence approach for evaluating and integrating the exposure, laboratory animal, and human information.

A case study on the evaluation of several epidemiology studies concerning atrazine will be presented. These epidemiology studies are either ecologic or retrospective cohort studies in design. OPP, in collaboration with EPA's Office of Water and Office of Research and Development (ORD), will solicit comment on the strengths and weaknesses of these types of epidemiology studies in addition to advice on the appropriate way to use such studies in the atrazine human health risk assessment. This case study is also the first step in EPA's atrazine science re-evaluation plan as described to the November 3, 2009 FIFRA SAP previously *(http://www.epa.gov/scipoly/sap/meetings/2009/110309meeting.html)*.

A case study is also included to illustrate an analysis of reported human incident cases using diazinon; a pesticide that has historically been used in residential settings.

Additionally, a case study concerning the collaborative work by scientists from OPP, ORD, and the National Cancer Institute (NCI) and the National Institute of Environmental Health Sciences (NIEHS) on the Agricultural Health Study (AHS) will be presented to: Compare the exposure algorithms used by OPP and the AHS, and; consider temporal relationships for multi-chemical exposure in the AHS. The purpose of on-going work to compare the OPP and AHS exposure algorithms is to better understand differences and similarities in the two approaches to estimating worker exposure. Evaluation of temporal relationships for multi-chemical exposure in the AHS will involve information on the timing of uses and combined uses of pesticides, with particular emphasis on pesticides which share the same mode of action. The Agency will solicit advice on types of evaluations conducted to date and those being proposed with the third case study.

The FIFRA SAP's advice will provide the Agency with input on approaches to integrate diverse types of experimental toxicology and epidemiology data. The SAP input will be considered in characterizing atrazine's human health risks which will be presented to the SAP in September 2010.

C. FIFRA SAP Documents and Meeting Minutes

EPA's background paper, related supporting materials, charge/questions to FIFRA SAP, FIFRA SAP composition (i.e., members and ad hoc members for this meeting), and the meeting agenda will be available by early January. In addition, the Agency may provide additional background documents as the materials become available. You may obtain electronic copies of these documents, and certain other related documents that might be available electronically, at *http://www.regulations.gov* and the FIFRA

SAP homepage at *http://www.epa.gov/scipoly/sap*.

FIFRA SAP will prepare meeting minutes summarizing its recommendations to the Agency approximately 90 days after the meeting. The meeting minutes will be posted on the FIFRA SAP website or may be obtained from the OPP Regulatory Public Docket at *http://www.regulations.gov*.

List of Subjects

Environmental protection, Pesticides and pests.

Dated: November 10, 2009.

Frank Sanders,

Director, Office of Science Coordination and Policy.

[FR Doc. E9–27671 Filed 11–17–09; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2009–0184; FRL–8795-5]

Pesticide Product; Registration Applications for a New Active Ingredient Flutriafol

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces receipt of applications to register pesticide products containing new active ingredients not included in any currently registered products pursuant to the provisions of section 3(c)(4) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended.

DATES: Comments must be received on or before December 18, 2009.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2009–0184, 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 Facility'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–2009–0184. 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 at *http://www.regulations.gov*. 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: Tamue L. Gibson, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–9096; e-mail address: *gibson.tamue@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

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

• Crop production (NAICS code 111).

• Animal production (NAICS code 112).

• Food manufacturing (NAICS code 311).

• Pesticide manufacturing (NAICS code 32532).

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

B. 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. Registration Applications

EPA received applications as follows to register pesticide products containing active ingredients not included in any previously registered products pursuant to the provision of section 3(c)(4) of FIFRA. Notice of receipt of these applications does not imply a decision by the Agency on the applications.

1. *File Symbol*: 4787–LL. *Applicant*: Cheminova A/S, c/o Cheminova, Inc., 1600 Wilson Blvd., Suite 700, Arlington, VA 22209. *Product name*: Cheminova Flutriafol Technical. *Active ingredient*: Flutriafol at 80%. *Proposal classification/Use*: None. For the manufacturing use formulation into end-use products for foliar use on soybeans to control soybean rust and on apples to control scab and powdery mildew.

2. *File Symbol*: 67760–TL. *Applicant*: Cheminova A/S, c/o Cheminova, Inc. *Product name*: Topguard Fungicide. *Active ingredient*: Flutriafol at 11.80%. *Proposal classification/Use*: None. For foliar use on soybeans to control soybean rust and on apples to control scab and powdery mildew.

List of Subjects

Environmental protection, Pesticides and pest.

Dated: November 2, 2009.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

[FR Doc. E9–27307 Filed 11–17–09; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2006–0145; FRL–8799–3]

Xylene; Addendum to the Reregistration Eligibility Decision

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces EPA's decision to modify certain provisions and risk mitigation measures that were specified in the 2005 Reregistration Eligibility Decision (RED) for the pesticide xylene, an aquatic herbicide used in irrigation canals. EPA conducted this reassessment of the xylene RED in response to comments received during the public comment period. Based on new information received, and in a continuing effort to mitigate risk, the Agency has made certain modifications to the xylene RED.

FOR FURTHER INFORMATION CONTACT: Tracy L. Perry, Pesticide Re-evaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–0128; fax number: (703) 308–7070; e-mail address: *perry.tracy@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, farm worker 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?

EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2006–0145. 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.

II. Background

A. What Action is the Agency Taking?

Section 4 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) directs EPA to reevaluate existing pesticides to ensure that they meet current scientific and regulatory standards. In 2005, EPA issued a RED for xylene under section 4(g)(2)(A) of FIFRA. In response to a notice of availability published in the **Federal Register** of May 22, 2006 (71 FR 14511) (FRL–7766–3), the Agency received substantive comments and information from commenters. The Agency's response to comments is available for viewing in the docket. The amended xylene RED reflects changes resulting from Agency consideration of the comments received on provisions of the RED, as well as efforts by the Agency to appropriately mitigate overall risk. The addendum to the RED for xylene concludes EPA's reregistration eligibility decision-making process for this pesticide.

The xylene addendum includes: A summary of additional usage information provided by the Bureau of Reclamation and other stakeholders; a summary of the conclusions from revised human health risk assessments; Agency reconsideration of the need for removing the existing exemption from a tolerance; the addition of an ecological data requirement; revised ecological mitigation measures; and an updated Label Table, which summarizes specific labeling language required on product labels. Based on studies from the open literature and other information, the Agency has determined that crops irrigated with xylene-treated water may bear finite residues of xylene, albeit, at very low levels. Therefore, it is appropriate to retain the existing tolerance exemption for xylene to address any potential residues in food. The Agency has determined, based on additional usage information and revised assessments, that use of xylene does not present dermal risks of concern for occupational workers. As the potential for inhalation exposures to workers is uncertain at this time, given the lack of data, the Agency is requiring additional personal protective equipment (i.e., half-face respirator with an organic vapor-removing cartridge) for workers who apply or otherwise handle xylene. In order to mitigate potential

risks of concern for nontarget aquatic organisms, the Agency is requiring that treated canal water either be used to irrigate crops or be held for 96 hours prior to release into receiving water bodies. In addition, as there are currently a limited number of aquatic herbicides registered for use in irrigation canals, the Agency has determined that xylene may continue to be used within all states identified under the Bureau of Reclamation Act, provided that the appropriate state registrations are also in place.

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, xylene.

Dated: November 5, 2009.

Richard P. Keigwin, Jr.,

Director, Pesticide Re-evaluation Division, Office of Pesticide Programs.

[FR Doc. E9–27643 Filed 11–17–09; 8:45 am]

BILLING CODE 6560–50–S

EXPORT-IMPORT BANK OF THE UNITED STATES

Economic Impact Policy

This notice is to inform the public that the Export-Import Bank of the United States has received an application to guarantee approximately $20 million in commercial bank financing for the export of approximately $22 million of U.S. iron ore mining equipment to Ukraine. The U.S. exports will enable the Ukrainian company to produce approximately 10 million metric tons of iron ore pellets per year during the 7-year repayment term of the loan. Available information indicates that this new Ukrainian iron ore production will be consumed in the Ukraine, Europe (Eastern, Western and Central), China, and India. Interested parties may submit comments on this transaction by e-mail to *economic.impact@exim.gov* or by mail to 811 Vermont Avenue, NW., Room 1238, Washington, DC 20571, within 14 days of the date this notice appears in the **Federal Register**.

Jonathan J. Cordone,

Senior Vice President and General Counsel.

[FR Doc. E9–27627 Filed 11–17–09; 8:45 am]

BILLING CODE 6690–01–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission, Comments Requested

November 13, 2009.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3520. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Comments are requested concerning (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Persons wishing to comments on this information collection should submit comments on January 19, 2010. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicholas A. Fraser, Office of Management and Budget (OMB), via fax at (202) 395–5167, or via the Internet at Nicholas_A._Fraser@omb.eop.gov and to Judith B. Herman, Federal Communications Commission (FCC). To submit your PRA comments by e–mail send them to: PRA@fcc.gov.

FOR FURTHER INFORMATION CONTACT: Judith B. Herman, OMD, 202–418–0214. For additional information about the information collection(s) send an e–mail to *PRA@fcc.gov* or contact Judith–B.Herman, 202–418–0214.

SUPPLEMENTARY INFORMATION:

OMB Control No: 3060–XXXX.

Title: Sections 1.49 and 1.54, Forbearance Petition Filing Requirements.

Form No.: N/A.

Type of Review: New collection.

Respondents: Business or other for–profit.

Number of Respondents: 10 respondents; 10 responses.

Estimated Time Per Response: 640 hours.

Frequency of Response: On occasion reporting requirement, recordkeeping requirement and third party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. Sections 151, 154(i), 154(j), 155(c), 160, 201 and 303(r).

Total Annual Burden: 6,400 hours.

Total Annual Cost: N/A.

Privacy Act Impact Assessment: N/A.

Nature and Extent of Confidentiality: The Commission is not requesting that the respondents submit confidential information to the Commission. Respondents may, however, request confidential treatment for information they believe to be confidential under 47 CFR 0.459 of the Commission's rules.

Need and Uses: The Commission is requesting OMB approval of this new information collection request in order to obtain the full three year clearance from them. The Commission is estimating 6,400 total annual burden hours.

Under section 10 of the Communications Act of 1934, as amended, telecommunications carriers may petition the Commission to forbear from applying to a telecommunications carrier any statutory provision or Commission regulation. When a carrier petitions the Commission for forbearance, section 10 requires the Commission to make three determinations with regard to the need for the challenged provision or regulation. If the Commission fails to act within one year (extended by three additional months, if necessary) the petition is ''deemed granted'' by operation of law. These determinations require complex, fact–intensive analysis, e.g., ''whether forbearance from enforcing the provision or regulation will promote competitive market conditions.''

Under the new filing procedures, the Commission requires that petitions for forbearance must be ''complete as filed'' and explain in detail what must be included in the forbearance petition. The Commission also incorporates by reference its rule, 47 CFR 1.49, which states the Commission's standard ''specifications as to pleadings and documents.'' Precise filing requirements are necessary because of section 10's strict time limit for Commission action. Also, commenters must be able to understand clearly the scope of the petition in order to comment on it. Finally, standard filing procedures inform petitioners precisely what the Commission expects from them in order to make the statutory determinations that the statute requires.

Federal Communications Commission.

Marlene H. Dortch,

Secretary, Office of the Secretary, Office of Managing Director.

[FR Doc. E9–27723 Filed 11–17–09; 8:45 am]

BILLING CODE 6712–01–S

FEDERAL COMMUNICATIONS COMMISSION

[PS Docket No. 07–114; DA 09–2397]

E911 Location Accuracy

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: In this document, the Federal Communications Commission seeks to refresh the record in the proceeding regarding service rules for wireless Enhanced 911 (E911) Phase II location accuracy and reliability. The Public Notice seeks comment on whether, since the most recent activity in the docket, subsequent developments in the industry and technology may have affected parties' positions on the issues raised. The intended effect of this document is to provide an updated record for the Commission to fully consider what service rules concerning location accuracy and reliability might be adopted.

DATES: Comments are due November 20, 2009. Reply Comments are due December 4, 2009.

ADDRESSES: All filings must be addressed to: Marlene H. Dortch, Office of the Secretary, Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554. Parties must also serve one copy with the Commission's copy contractor, Best Copy and Printing, Inc. (BCPI), Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, (202) 488–5300, or via e-mail to *fcc@bcpiweb.com.* The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class, Express, and Priority mail should be addressed to 445 12th Street, SW., Washington, DC 20554. In addition to filing comments with the Secretary, a copy of any comments on the Paperwork Reduction Act information collection requirements contained herein should be submitted to the Federal Communications Commission via e-mail to *PRA@fcc.gov* and to Nicholas A. Fraser, Office of Management and Budget, via e-mail to *Nicholas_A._Fraser@omb.eop.gov* or via fax at 202–395–5167.

FOR FURTHER INFORMATION CONTACT: David Siehl, Public Safety and Homeland Security Bureau, (202) 418–1313, *david.siehl@fcc.gov.* For additional information concerning the Paperwork Reduction Act information collection requirements that this document contains, send an e-mail to *PRA@fcc.gov* or contact Judith Boley Herman at (202) 418–0214.

SUPPLEMENTARY INFORMATION: By this Public Notice, DA 09–2397, released November 6, 2009, the Public Safety and Homeland Security Bureau (Bureau) seeks to refresh the record in the above-referenced docket addressing location accuracy standards for wireless E911 calls. In light of the passage of time since the most recent activity in this docket, we seek comment on whether subsequent developments in the industry and technology may have affected parties' positions on the issues raised.

Recent developments in this proceeding include the vacatur and remand of the Commission's 2007 Report and Order in this proceeding, the submission by the Association of Public Safety Communications Officials-International (APCO), the National Emergency Number Association (NENA), Verizon Wireless, Sprint Nextel Corporation, and AT&T of written ex parte letters recommending new E911 accuracy requirements for both handset-based and network-based technologies in order to achieve E911 accuracy compliance at the county-level, the Bureau's September 2008 Public Notice seeking comment on these proposals, as well as the subsequent voluntary commitments by Verizon Wireless and Sprint Nextel to implement their proposed accuracy standards in connection with separate transactions approved by the Commission in 2008.

We also seek to refresh the record given that in response to the Bureau's September 2008 Public Notice, several parties proposed alternative timeframes for implementation of revised location accuracy standards, and approximately a year has passed since some of those proposals were made. For example, in addition to the timetables proposed by APCO, NENA, Verizon Wireless, Sprint, and AT&T, T–Mobile and the Rural Cellular Association suggested that several of the benchmarks proposed by AT&T should be extended by two years. We request that interested parties refresh the record on these proposed timeframes for implementation in light of the passage of time and any other relevant developments in the industry or economy.

Comment Filing Procedures

Interested parties may file comments on the above-referenced petition on or before November 20, 2009, and reply comments may be filed on or before December 4, 2009. All comments should reference the appropriate petition(s) and PS Docket No. 07–114.

All comments may be filed using: (1) The Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies. See Electronic Filing of Documents in Rulemaking Proceedings, 63 FR 24121 (1998).

- Electronic Filers: Statements in support of or in opposition to the Petition and replies to such statements may be filed electronically using the Internet by accessing the ECFS: *http://www.fcc.gov/cgb/ecfs* or the Federal eRulemaking Portal: *http://www.regulations.gov.* Filers should follow the instructions provided on the website for submitting comments.
- For ECFS filers, in completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the rulemaking number. Parties may also submit an electronic statement in support of or in opposition to the Petition and/or replies thereto by Internet e-mail. To get filing instructions, filers should send an e-mail to *ecfs@fcc.gov* and include the following words in the body of the message: ''get form.'' A sample form and directions will be sent in response.

• *Paper Filers:* Parties who choose to file by paper must file an original and four copies of each filing.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although the Commission continues to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to: Marlene H. Dortch, Office of the Secretary, Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554. Parties must also serve one copy with the Commission's copy contractor, Best Copy and Printing, Inc. (BCPI), Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, (202) 488–5300, or via e-mail to *fcc@bcpiweb.com.*

• The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.

• Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

• U.S. Postal Service first-class, Express, and Priority mail should be addressed to 445 12th Street, SW., Washington, DC 20554.

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

Documents submitted in PS Docket No. 07–114, including each petition, will be accessible via the Commission's ECFS (at: *http://www.fcc.gov/cgb/ecfs*) by listing 07–114 in the ''Proceeding'' search field. These documents also will be available for public inspection and copying during business hours at the FCC Reference Information Center, Portals II, 445 12th St., SW., Room CY A257, Washington, DC 20554. The documents may also be purchased from BCPI, telephone (202) 488–5300, facsimile (202) 488–5563, TTY (202) 488–5562, e-mail *fcc@bcpiweb.com.* Document DA 09–2397 can also be downloaded in Word or Portable Document Format (PDF) at: *http://www.publicsafety.fcc.gov/pshs/releases/index.htm.*

These matters shall be treated as ''permit-but-disclose'' proceedings in accordance with the Commission's ex parte rules. Persons making oral ex parte presentations are reminded that memoranda summarizing such presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one- or two-sentence description of the views and arguments presented generally is required. Other requirements pertaining to oral and written presentations are set forth in section 1.1206(b) of the Commission's rules.

This document contains proposed new information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document as required by the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, the Commission notes that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4), we previously sought specific comment on how the Commission might ''further reduce the information collection burden for small business concerns with fewer than 25 employees.''

For further information regarding this proceeding, contact David Siehl, Public Safety and Homeland Security Bureau, (202) 418–1313, *david.siehl@fcc.gov.*

Federal Communications Commission.

Thomas J. Beers,

Division Chief, Policy, Public Safety and Homeland Security Bureau.

[FR Doc. E9–27666 Filed 11–17–09; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Determination of Insufficient Assets To Satisfy Claims Against Financial Institution in Receivership

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Notice.

SUMMARY: The FDIC, by its Board of Directors, has determined that insufficient assets exist in the receivership of IndyMac Bank, F.S.B., Pasadena, California and the receivership of IndyMac Federal Bank, FSB, Pasadena, California to make any distribution to general unsecured claims, and therefore such claims will recover nothing and have no value.

DATES: The Board made its determination on November 12, 2009.

FOR FURTHER INFORMATION CONTACT: If you have questions regarding this notice, contact Thomas P. Bolt, Counsel, Legal Division, (703) 562–2046 or *tbolt@fdic.gov*; Shane Kiernan, Senior Attorney, Legal Division, 703) 562–2632 or *skiernan@fdic.gov*, FDIC, 3501 N. Fairfax Drive, Arlington, VA 22226

SUPPLEMENTARY INFORMATION: On July 11, 2008, IndyMac Bank, F.S.B., Pasadena, California (''IndyMac Bank'') (FIN # 10007) was closed by the Office of Thrift Supervision and the Federal Deposit Insurance Corporation (''FDIC'') was appointed as its receiver. In complying with its statutory duty to resolve the institution in the method that is least costly to the deposit insurance fund (see 12 U.S.C. 1823(c)(4)), the FDIC effected a pass-through receivership. Accordingly, the FDIC organized IndyMac Federal Bank, FSB, Pasadena, California (''IndyMac Federal''), a new federal savings bank for which the FDIC was appointed as conservator. IndyMac Bank's assets were transferred to IndyMac Federal under an agreement whereby the amount (if any) realized from the final resolution of IndyMac Federal after payment in full of IndyMac Federal's obligations was to be paid to the IndyMac Bank receivership. On March 19, 2009, IndyMac Federal was placed in receivership and substantially all of its assets were sold. The amount realized from the resolution of IndyMac Federal is insufficient to pay all of its liabilities, and therefore there will be no amount to pay to the IndyMac Bank receivership.

Section 11(d)(11)(A) of the FDI Act, 12 U.S.C. 1821(d)(11)(A), sets forth the order of priority for distribution of amounts realized from the liquidation or other resolution of an insured depository institution to pay claims. Under the statutory order of priority, administrative expenses and deposit liabilities must be paid in full before any distribution may be made to general unsecured creditors or any lower priority claims. The FDIC has determined that the assets of IndyMac Bank are insufficient to make any distribution on general unsecured claims and therefore, such claims, asserted or unasserted, will recover nothing and have no value. The FDIC has also determined that the assets of IndyMac Federal are insufficient to make any distribution on general unsecured claims and therefore, such claims, asserted or unasserted, will recover nothing and have no value.

Dated at Washington, DC, this 12th day of November, 2009.

By Order of the FDIC Board of Directors.

Federal Deposit Insurance Corporation.

Valerie J. Best,

Assistant Executive Secretary.

[FR Doc. E9–27593 Filed 11–17–09; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL ELECTION COMMISSION

Sunshine Act Notices

AGENCY: Federal Election Commission.

DATE AND TIME: Tuesday, November 17, 2009, at 10 a.m.

PLACE: 999 E Street, NW., Washington, DC.

STATUS: This meeting will be closed to the public.

ITEMS TO BE DISCUSSED:

Compliance matters pursuant to 2 U.S.C. 437g.

Audits conducted pursuant to 2 U.S.C. 437g, 438(b), and Title 26, U.S.C.

Matters concerning participation in civil actions or proceedings or arbitration.

Internal personnel rules and procedures or matters affecting a particular employee.

PERSON TO CONTACT FOR INFORMATION: Judith Ingram, Press Officer, Telephone: (202) 694–1220.

Mary W. Dove,

Secretary of the Commission.

[FR Doc. E9–27549 Filed 11–17–09; 8:45 am]

BILLING CODE 6715–01–M

FEDERAL RESERVE SYSTEM

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: Board of Governors of the Federal Reserve System.

TIME AND DATE: 11:30 a.m., Monday, November 23, 2009.

PLACE: Marriner S. Eccles Federal Reserve Board Building, 20th and C Streets, N.W., Washington, D.C. 20551.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

1. Personnel actions (appointments, promotions, assignments, reassignments, and salary actions) involving individual Federal Reserve System employees.

2. Any items carried forward from a previously announced meeting.

FOR FURTHER INFORMATION CONTACT: Michelle Smith, Director, or Dave Skidmore, Assistant to the Board, Office of Board Members at 202–452–2955.

SUPPLEMENTARY INFORMATION: You may call 202–452–3206 beginning at approximately 5 p.m. two business days before the meeting for a recorded announcement of bank and bank holding company applications scheduled for the meeting; or you may contact the Board's Web site at *http://www.federalreserve.gov* for an electronic announcement that not only lists applications, but also indicates procedural and other information about the meeting.

Board of Governors of the Federal Reserve System, November 13, 2009.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E9–27695 Filed 11–16–09; 11:15 am]

BILLING CODE 6210–01–S

FEDERAL MARITIME COMMISSION

Notice of Agreement Filed

The Commission hereby gives notice of the filing of the following agreement under the Shipping Act of 1984. Interested parties may submit comments on the agreement to the Secretary, Federal Maritime Commission, Washington, DC 20573, within ten days of the date this notice appears in the **Federal Register**. Copies of the agreement are available through the Commission's Web site (*http://www.fmc.gov*) or by contacting the Office of Agreements at (202)-523–5793 or *tradeanalysis@fmc.gov.*

Agreement No.: 011223–044.

Title: Transpacific Stabilization Agreement.

Parties: American President Lines, Ltd. and APL Co. PTE Ltd.; (operating as a single carrier); China Shipping Container Lines (Hong Kong) Company Limited and China Shipping Container Lines Company Limited (operating as a single carrier); CMA CGM, S.A.; COSCO Container Lines Company Ltd; Evergreen Line Joint Service Agreement; Hanjin Shipping Co., Ltd.; Hapag-Lloyd AG; Hyundai Merchant Marine Co., Ltd.; Kawasaki Kisen Kaisha Ltd.; Mediterranean Shipping Company; Nippon Yusen Kaisha; Orient Overseas Container Line Limited; Yangming Marine Transport Corp.; and Zim Integrated Shipping Services, Ltd.

Filing Party: David F. Smith, Esq.; Sher & Blackwell LLP; 1850 M Street, NW.; Suite 900; Washington, DC 20036.

Synopsis: The amendment adds A.P. Moller-Maersk A/S as a party to the agreement.

Dated: November 13, 2009.

By Order of the Federal Maritime Commission.

Tanga S. FitzGibbon,

Assistant Secretary.

[FR Doc. E9–27647 Filed 11–17–09; 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 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

Ship Beyond, Inc., 263 E. Redondo Beach Blvd., Gardena, CA 90245. Officer: Jimmy Lee, President (Qualifying Individual)

Seafair International Logistics, LLC, 910 W. Philips Street, #220, Ontario, CA 91762. Officers: Hengyi (Kelvin) Gu, Manager (Qualifying Individual), Tao Lu, Member

Daudry Business Group, Corp., dba Adam Logistics, 6713 NW 84th Ave., Miami, FL 33166. Officer: Darcy G. Perez, President (Qualifying Individual)

Inter-American Movers and Forwarders, LLC, 3032 N.W. 72nd Avenue, Miami, FL 33122. Officers: Terence A. Rignault, Director (Qualifying Individual), Alejandro Jerez, Managing Member

Non-Vessel-Operating Common Carrier and Ocean Freight Forwarder Transportation Intermediary Applicants

The Ultimate Freight Management & Logistics, Inc., 9215 Hall Road, Downey, CA 90241. Officers: Charles Chen, President (Qualifying Individual), Yi Li, CFO

Royalty Logistics, Inc., 6356 NW 99 Ave., Miami, FL 33178. Officers: Doumit Shmouni, President (Qualifying Individual), Diane Aboukhalil, Secretary

Prime Movers Inc., 242 South Coastal Highway 17, Midway, GA 31320.

Officers: Olugbenga A. Awe, CEO (Qualifying Individual), Akinwole A. Awujo, Treasurer

Power Freight Systems, Inc., 7447A Morton Ave., Newark, CA 94560. Officers: Sandra K. Thoroughman, Dir. Of Int'l Services (Qualifying Individual), Malcom Winspear, President

Pangaea Logistics, Inc., 45–09 104th Street, Corona, NY 11368. Officers: Anthony C. Vozzolo, President (Qualifying Individual), David S. Fine, Vice President

K&K Global LLC, 6820 Ravens Crest Drive, Plainsboro, NJ 08536. Officer: Katsiaryna Dzemyaniuk, President (Qualifying Individual)

JBH Worldwide LLC dba JBH Worldwide, 701 Tennent Road, Manalapan, NJ 07726. Officer: Jay Horowitz, President (Qualifying Individual)

JCC International Enterprises Inc., State Road #190 Km. 3.4 Sabana Abajo Ward, Carolina, PR 00984. Officer: Liza Vilanova, President (Qualifying Individual)

United Logistics Corp, 3650 Mansell Rd., #400, Alpharetta, GA 30022. Officers: Wei Wen Li, Secretary (Qualifying Individual), Chuanxiang Li, President

Ocean Freight Forwarder—Ocean Transportation Intermediary Applicants

Mariela N. Lopez-Torres, 665 NW 85th Place, Apt. 103, Miami, FL 33126. Sole Proprietor

Blue Supply Chain Solutions, LLC, 4061 Windward Cove Lane, Apison, TN 37302. Officers: Corey P. Bonner, Chief Manager (Qualifying Individual), Dana D. Reeves, Secretary

International Cargo Freight Forwarder, Inc., 105–20 Liberty Ave., Ozone Park, NY 11417. Officers: Edul Ahmad, CEO (Qualifying Individual), Steve Massiah, Vice President

World Express & Connection Inc, 63 Hook Road, Bayonne, NJ 07002. Officers: Raya Bakhirev, General Manager (Qualifying Individual), Aleksandr Solovyev, President

Logistics Management Solutions, L.C., One City Place, Suite 415, Saint Louis, MO 63141. Officers: Gregory L. Umstead, Company Officer (Qualifying Individual), Dennis F. Schoemehl, President

PJC Express Inc., 16611 Living Rock Court, Chino Hills, CA 91709. Officers: Ching C. Lei, Secretary (Qualifying Individual), Paul H. Tsui, President

Dated: November 13, 2009.

Tanga S. FitzGibbon,

Assistant Secretary.

[FR Doc. E9–27648 Filed 11–17–09; 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: 021721NF.

Name: T.E.E. Transportation Services, LLC.

Address: 4027 Joe Street, Charlotte, NC 28206.

Date Revoked: November 6, 2009.

Reason: Surrendered license voluntarily.

License Number: 020611NF.

Name: Pro Cargo Solutions, Inc.

Address: 2324 Pennsylvania Ave., Ste. #3, Lomita, CA 90717.

Date Revoked: October 12, 2009.

Reason: Surrendered license voluntarily.

License Number: 018275NF.

Name: Global Fritz Logistics Service Co., Ltd.

Address: 15155 El Selinda Dr., Hacienda Heights, CA 91745.

Date Revoked: October 30, 2009.

Reason: Surrendered license voluntarily.

Sandra L. Kusumoto,

Director, Bureau of Certification and Licensing.

[FR Doc. E9–27650 Filed 11–17–09; 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
013253N	Total Service Line Corporation dba Total Shipping Line Corp., 12140 E. Artesia Blvd., #208, Artesia, CA 90701.	October 14, 2009.

Sandra L. Kusumoto,

Director, Bureau of Certification and Licensing.

[FR Doc. E9–27649 Filed 11–17–09; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL TRADE COMMISSION

Granting of Request for Early Termination of the Waiting Period Under the Premerger Notification Rules

Section 7A of the Clayton Act, 15 U.S.C. 18a, as added by Title II of the Hart-Scott Rodino Antitrust Improvements Act of 1976, requires persons contemplating certain mergers or acquisitions to give the Federal Trade Commission and the Assistant Attorney General advance notice and to wait designated periods before consummation of such plans. Section 7A(b)(2) of the Act permits the agencies, in individual cases, to terminate this waiting period prior to its expiration and requires that notice of this action be published in the **Federal Register**.

The following transactions were granted early termination of the waiting period provided by law and the premerger notification rules. The grants were made by the Federal Trade Commission and the Assistant Attorney General for the Antitrust Division of the Department of Justice. Neither agency intends to take any action with respect to these proposed acquisitions during the applicable waiting period.

ETDate	Trans No.	ET Req status	Party name
Transaction Granted Early Termination			
05–OCT–09	20090758	G	Adobe Systems Incorporated.
		G	Omniture, Inc.
		G	Omniture, Inc.
07–OCT–09	20090780	G	Aurora Equity Partners III, LP.
		G	HLTH Corporation.
		G	Porex Corporation.
	20090786	G	American Securities Partners V. L.P.
		G	GenTek Inc.
		G	GenTek Inc.
08–OCT–09	20090768	G	AstraZeneca plc.
		G	Nektar Therapeutics.
		G	Nektar Therapeutics.
09–OCT–09	20090707	G	Alamo Group Inc.
		G	Henry Crown and Company.
		G	Bush Hog, LLC.
	20090764	G	SAS Rue La Boetie.
		G	Societe Generale.
		G	The TCW Group, Inc.
	20090794	G	SteelRiver Infrastructure Fund North America LP.
		G	Dominion Resources, Inc.
		G	Hope Gas, Inc.
		G	The Peoples Natural Gas Company.
	20090796	G	Comcast Corporation.
		G	William A. Capraro, Jr.
		G	CIMCO Communications, Inc.
		G	Capraro Development, LLC.
	20100002	G	Institutional Venture Partners XII, L.P.
		G	Twitter, Inc.
		G	Twitter, Inc.
13–OCT–09	20090738	G	Syniverse Holdings, Inc.
		G	VeriSign, Inc.
		G	VeriSign ICX Corporation.
	20090739	G	NYSE Euronext.
		G	NYFIX, Inc.
		G	NYFIX, Inc.
	20090791	G	J&F Participacoes S.A.
		G	Lonnie A. ''Bo'' Pilgrim.
		G	Pilgrim's Pride Corporation.
	20090795	G	Adage Capital Partners, L.P.
		G	AMAG Pharmaceuticals, Inc.
		G	AMAG Pharmaceuticals, Inc.
14–OCT–09	20090325	G	Pfizer Inc.
		G	Wyeth.
		G	Wyeth.
15–OCT–09	20090763	G	Abbott Laboratories, Inc.
		G	Visiogen Inc.
		G	Visiogen Inc.
19–OCT–09	20100006	G	Exterran Partners, LP.
		G	Exterran Holdings, Inc.
		G	Exterran Energy Solutions, L.P.
	20100009	G	Great Hill Equity Partners III, LP.
		G	LECG Corporation.
		G	LECG Corporation.
	20100011	G	Prospect Acquisition Corp.
		G	William J. McMorrow.
		G	Kennedy-Wilson, Inc.
	20100012	G	Blackstone Capital Partners (Cayman III) V L.P.
		G	Jorge Paulo Lemann.
		G	Busch Entertainment Corporation.
	20100013	G	Blackstone Capital Partners (Cayman III) V L.P.
		G	Eugenie Path Sebastien EPS, SA.
		G	Busch Entertainment Corporation.
	20100020	G	Sanofi-Aventis.
		G	Fovea Pharmaceuticals, S.A.
		G	Fovea Pharmaceuticals, S.A.
	20100030	G	Berkshire Fund VII, L.P.
		G	GOBP Holdings, Inc.
		G	GOBP Holdings, Inc.
21–OCT–09	20090767	G	Raytheon Company.
		G	BBN Technologies Holding Corp.
		G	BBN Technologies Holding Corp.

ETDate	Trans No.	ET Req status	Party name
	20090769	G	Intuit Inc.
		G	Mint Software Inc.
		G	Mint Software Inc.
23–OCT–09	20100025	G	Clayton, Dubilier & Rice Fund VIII, L.P.
		G	Appointive Distributing Trust B u/a Samuel Johnson, 1988 T#1.
		G	JohnsonDiversey Holdings, Inc.
	20100036	G	Emerson Electric Co.
		G	Avocent Corporation.
		G	Avocent Corporation.
26–OCT–09	20090788	G	Oak Hill Capital Partners III, L.P.
		G	ODN Holding Corporation.
		G	ODN Holding Corporation.
	20100022	G	Macquarie Group Limited.
		G	Fox-Pitt Kelton Cochran Caronia, Waller LLC
		G	Fox-Pitt Kelton Cochran Caronia Waller LLC.
27–OCT–09	20100024	G	GrainCorp Limited.
		G	United Malt Holdings LP.
		G	Malt U.K. Holdco Limited.
		G	Malt Luxco S.a.r.l.
		G	Malt U.S. Holdco, Inc.
	20100037	G	Iconix Brand Group, Inc.
		G	Seth Gerszberg.
		G	Yakira, L.L.C.
	20100038	G	Iconix Brand Group, Inc.
		G	Marc Ecko.
		G	Yakira, L.L.C.
	20100041	G	Macquarie Group Limited.
		G	Lincoln National Corporation.
		G	Delaware Management Holdings, Inc.
28–OCT–09	20090501	G	AOI Bedding Super Holdings, LLC.
		G	Thomas H. Lee Equity Fund V, L.P.
		G	THL–SC Bedding Company.
	20090691	G	Bayer AG.
		G	Athenix Corp.
		G	Athenix Corp.
	20090792	G	Abbott Laboratories.
		G	Evalve, Inc.
		G	Evalve, Inc.
	20100035	G	ViaSat, Inc.
		G	WildBlue Holding, Inc.
		G	WildBlue Holding, Inc.
29–OCT–09	20090405	G	Schering-Plough Corporation.
		G	Merck & Co., Inc.
		G	Merck & Co., Inc.

For Further Information Contact: Sandra M. Peay, Contact Representative, or Renee Hallman, Contact Representative, Federal Trade Commission, Premerger Notification Office, Bureau of Competition, Room H–303, Washington, DC 20580, (202) 326–3100.

By Direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. E9–27413 Filed 11–17–09; 8:45 am]

BILLING CODE 6750–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Indian Health Service

Request for Public Comment: 60-Day Proposed Information Collection: Office of Urban Indian Health Programs Uniform Data System

AGENCY: Indian Health Service.

ACTION: Notice.

SUMMARY: In compliance with Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 which requires 60 day advance opportunity for public comment on proposed information collection projects, the Indian Health Service (IHS) is publishing for comment a summary of a proposed information collection to be submitted to the Office of Management and Budget (OMB) for review.

Proposed Collection: Title: Office of Urban Indian Health Programs (OUIHP) Uniform Data System (UDS). *Type of Information Collection Request:* Initial request and four year extension, for data collection to ensure compliance with legislative mandates and report to Congress and policymakers on program accomplishments. *Form Number(s):* New data collection. There are currently no form numbers. Reporting formats are contained in the UDS Instruction Manual. *Need and Use of Information Collection:* The Uniform Data System (UDS) contains the annual reporting requirements for the cluster of primary health care and case management/outreach and referral grantees funded by the IHS. The UDS includes reporting requirements for grantees of the OUIHP. The authorizing statute is Title V of Public Law 94–437, of the Indian Health Care Improvement Act, as amended. IHS

will collect data in the UDS which will be used to ensure compliance with the legislative mandates and report to Congress and policymakers on program accomplishments. To meet these objectives, the OUIHP requires a core set of data collected annually that is appropriate for monitoring and evaluating performance and reporting on annual trends. *Affected Public:* Title V funded Urban Indian health programs. *Type of Respondents:* Title V Urban Indian health programs.

The table below provides: Types of data collection instruments, Number of respondents, Response per respondent, Total annual responses, Average burden hour per response, and Total annual burden hours.

Data collection instrument(s)	Number of respondents	Responses per respondent	Total annual responses	Average burden hour per response *	Total annual burden hours
Universal Report	34	1	34	8.00 (480 min)	272
American Indian/Alaska Native Report.	34	1	34	8.00 (480 min)	272
Total	68				544

* For ease of understanding, burden hours are also provided in actual minutes.

There are no Capital Costs, Operating Costs, and/or Maintenance Costs to report.

Request for Comments: Your written comments and/or suggestions are invited on one or more of the following points: (a) Whether the information collection activity is necessary to carry out an agency function; (b) whether the agency processes the information collected in a useful and timely fashion; (c) the accuracy of public burden estimate (the estimated amount of time needed for individual respondents to provide the requested information); (d) whether the methodology and assumptions used to determine the estimate are logical; (e) ways to enhance the quality, utility, and clarity of the information being collected; and (f) ways to minimize the public burden through the use of automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Send Comments and Requests for Further Information: Send your written comments and requests for more information on the proposed collection or requests to obtain a copy of the data collection instrument(s) and instructions to: Ms. Betty Gould, Reports Clearance Officer, 801 Thompson Avenue, TMP, Suite 450, Rockville, MD 20852; call non-toll free (301) 443–7899; send via facsimile to (301) 443–9879; or send your e-mail requests, comments, and return address to: *betty.gould@ihs.gov*.

Comment Due Date: Your comments regarding this information collection are best assured of having full effect if received within 60 days of the date of this publication.

Dated: November 10, 2009.

Yvette Roubideaux,

Director, Indian Health Service.

[FR Doc. E9–27540 Filed 11–17–09; 8:45 am]

BILLING CODE 4165–16–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2009–N–0291]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Infectious Disease Issues in Xenotransplantation

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Fax written comments on the collection of information by December 18, 2009.

ADDRESSES: To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: FDA Desk Officer, FAX: 202–395–6974, or e-mailed to *oira_submission@omb.eop.gov*. All comments should be identified with the OMB control number 0910–0456. Also include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Liz Berbakos, Office of Information Management (HFA–710), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–796–3792, *Elizabeth.berbakos@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Infectious Disease Issues in Xenotransplantation—(OMB Control Number 0910–0456)—Extension

The statutory authority to collect this information is provided under sections 351 and 361 of the Public Health Service (PHS) Act (42 U.S.C. 262 and 264) and the provisions of the Federal Food, Drug, and Cosmetic Act that apply to drugs (21 U.S.C. 301 *et seq.*). The PHS guideline recommends procedures to diminish the risk of transmission of infectious agents to the xenotransplantation product recipient and to the general public. The PHS guideline is intended to address public health issues raised by xenotransplantation, through identification of general principles of prevention and control of infectious diseases associated with xenotransplantation that may pose a hazard to the public health. The collection of information described in this guideline is intended to provide to sponsors general guidance on the following topics: (1) The development of xenotransplantation clinical protocols, (2) the preparation of submissions to FDA, and (3) the conduct of xenotransplantation clinical trials. Also, the collection of information will help ensure that the sponsor maintains important information in a cross-referenced system that links the relevant records of the xenotransplantation product recipient, xenotransplantation product, source animal(s), animal procurement center, and significant nosocomial exposures. The PHS guideline describes an occupational health service program for the protection of health care workers involved in xenotransplantation procedures, caring for xenotransplantation product recipients,

and performing associated laboratory testing. The guideline also describes a public health need for a national xenotransplantation database, which is currently under development by the PHS. The PHS guideline is intended to protect the public health and to help ensure the safety of using xenotransplantation products in humans by preventing the introduction, transmission, and spread of infectious diseases associated with xenotransplantation. The PHS guideline also recommends that certain specimens and records be maintained for 50 years beyond the date of the xenotransplantation. These include: (1) Records linking each xenotransplantation product recipient with relevant health records of the source animal, herd or colony, and the specific organ, tissue, or cell type included in or used in the manufacture of the product (3.2.7.1); (2) aliquots of serum samples from randomly selected animal and specific disease investigations (3.4.3.1); (3) source animal biological specimens designated for PHS use (3.7.1); animal health records (3.7.2), including necropsy results (3.6.4); and (4) recipients' biological specimens (4.1.2). The retention period is intended to assist health care practitioners and officials in surveillance and in tracking the source of an infection, disease, or illness that might emerge in the recipient, the source animal, or the animal herd or colony after a xenotransplantation. The recommendation for maintaining records for 50 years is based on clinical experience with several human viruses that have presented problems in human to human transplantation and are therefore thought to share certain characteristics with viruses that may pose potential risks in xenotransplantation. These characteristics include long latency periods and the ability to establish persistent infections. Several also share the possibility of transmission among individuals through intimate contact with human body fluids. Human immunodeficiency virus (HIV) and Human T-lymphotropic virus are human retroviruses. Retroviruses contain ribonucleic acid that is reverse-transcribed into deoxyribonucleic acid (DNA) using an enzyme provided by the virus and the human cell machinery. That viral DNA can then be integrated into the human cellular DNA. Both viruses establish persistent infections and have long latency periods before the onset of disease, 10 years and 40 to 60 years, respectively.

The human hepatitis viruses are not retroviruses, but several share with HIV the characteristic that they can be transmitted through body fluids, can establish persistent infections, and have long latency periods, e.g., approximately 30 years for Hepatitis C. In addition, the PHS guideline recommends that a record system be developed that allows easy, accurate, and rapid linkage of information among the specimen archive, the recipient's medical records, and the records of the source animal for 50 years. The development of such a record system is a one-time burden. Such a system is intended to cross-reference and locate relevant records of recipients, products, source animals, animal procurement centers, and nosocomial exposures. Respondents to this collection of information are the sponsors of clinical studies of investigational xenotransplantation products under investigational new drug applications (INDs) and xenotransplantation product procurement centers, referred to as source animal facilities. There are an estimated 12 respondents who are sponsors of INDs that include protocols for xenotransplantation in humans. Other respondents for this collection of information are an estimated 18 source animal facilities that provide source xenotransplantation product material to sponsors for use in human xenotransplantation procedures. These 18 source animal facilities keep medical records of the herds/colonies as well as the medical records of the individual source animal(s). The total annual reporting and recordkeeping burden is estimated to be approximately 156 hours. The burden estimates are based on FDA's records of xenotransplantation-related INDs and estimates of time required to complete the various reporting and recordkeeping tasks described in the guideline. FDA does not expect the level of clinical studies using xenotransplantation to increase significantly in the next few years.

In the **Federal Register** of July 10, 2009 (74 FR 33260), FDA published a notice requesting public comment on the proposed collection of information. No comments were received.

TABLE 1.—REPORTING RECOMMENDATIONS

PHS Guideline Section	Description
3.2.7.2	Notify sponsor or FDA of new archive site when the source animal facility or sponsor ceases operations.
3.4	Standard operating procedures (SOPs) of source animal facility should be available to review bodies.
3.5.1	Include increased infectious risk in informed consent if source animal quarantine period of 3 weeks is shortened.
3.5.4	Sponsor to make linked records described in section 3.2.7 available for review.
3.5.5	Source animal facility to notify clinical center when infectious agent is identified in source animal or herd after xenotransplantation product procurement.

TABLE 2.—RECORDKEEPING RECOMMENDATIONS

PHS Guideline Section	Description
3.2.7	Establish records linking each xenotransplantation product recipient with relevant records.
4.3	Sponsor to maintain cross-referenced system that links all relevant records (recipient, product, source animal, animal procurement center, and nosocomial exposures).

TABLE 2.—RECORDKEEPING RECOMMENDATIONS—Continued

PHS Guideline Section	Description
3.4.2	Document results of monitoring program used to detect introduction of infectious agents which may not be apparent clinically.
3.4.3.2	Document full necropsy investigations including evaluation for infectious etiologies.
3.5.1	Justify shortening a source animal's quarantine period of 3 weeks prior to xenotransplantation product procurement.
3.5.2	Document absence of infectious agent in xenotransplantation product if its presence elsewhere in source animal does not preclude using it.
3.5.4	Add summary of individual source animal record to permanent medical record of the xenotransplantation product recipient.
3.6.4	Document complete necropsy results on source animals (50-year record retention).
3.7	Link xenotransplantation product recipients to individual source animal records and archived biologic specimens.
4.2.3.2	Record base-line sera of xenotransplantation health care workers and specific nosocomial exposure.
4.2.3.3 and 4.3.2	Keep a log of health care workers' significant nosocomial exposure(s).
4.3.1	Document each xenotransplant procedure.
5.2	Document location and nature of archived PHS specimens in health care records of xenotransplantation product recipient and source animal.

FDA estimates the burden of this collection of information as follows:

TABLE 3.—ESTIMATED ANNUAL REPORTING BURDEN[1]

PHS Guideline Section	No. of Respondents	Annual Frequency per Response	Total Annual Responses	Hours per Response	Total Hours
3.2.7.2[2]	1	1	1	0.5	0.5
3.4[3]	12	0.17	2	0.08	0.16
3.5.1[4]	12	0.08	(0–1) 1	0.25	0.25
3.5.4[5]	12	1	12	0.5	6.0
3.5.5[4]	18	0.06	(0–1) 1	0.2	0.2
Total					7.11

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.
[2] No animal facility or sponsor has ceased operations in the last 3 years, however, we are using 1 for estimation purposes.
[3] FDA's records indicate that an average of two INDs are expected to be submitted per year.
[4] To our knowledge, has not occurred in the past 3 years and is expected to continue to be a rare occurrence.
[5] Based on an estimate of 36 patients treated over a 3-year period, the average number of xenotransplantation product recipients per year is estimated to be 12.

TABLE 4.—ESTIMATED ANNUAL RECORDKEEPING BURDEN[1]

PHS Guideline Section	No. of Recordkeepers	Annual Frequency per Recordkeeping	Total Annual Records	Hours per Record	Total Hours
3.2.7[2]	1	1	1	16	16.0
4.3[3]	12	1	12	0.83	9.96
3.4.2[4]	12	11	132	0.25	33.0
3.4.3.2[5]	18	4	72	0.3	21.6
3.5.1[6]	12	0.08	(0–1) 1	0.5	0.5
3.5.2[6]	12	0.08	(0–1) 1	0.25	0.25

TABLE 4.—ESTIMATED ANNUAL RECORDKEEPING BURDEN[1]—Continued

PHS Guideline Section	No. of Recordkeepers	Annual Frequency per Recordkeeping	Total Annual Records	Hours per Record	Total Hours
3.5.4	12	1	12	0.17	2.04
3.6.4[7]	12	2	24	0.25	6.0
3.7[7]	18	1.33	24	0.08	1.92
4.2.3.2[8]	12	25	300	0.17	51.0
4.2.3.2[6]	12	0.08	(0–1) 1	0.17	0.17
4.2.3.3 and 4.3.2[6]	12	0.08	(0–1) 1	0.17	0.17
4.3.1	12	1	12	0.25	3.0
5.2[9]	12	3	36	0.08	2.88
Total					148.49

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.
[2] A one-time burden for new respondents to set up a recordkeeping system linking all relevant records. FDA estimates one new sponsor annually.
[3] FDA estimates there is minimal recordkeeping burden associated with maintaining the record system.
[4] Monitoring for sentinel animals (subset representative of herd) plus all source animals. There are approximately 6 sentinel animals per herd x 1 herd per facility x 18 facilities = 108 sentinel animals. There are approximately 24 source animals per year (see footnote 7 of this table); 108 + 24 = 132 monitoring records to document.
[5] Necropsy for animal deaths of unknown cause estimated to be approximately 4 per herd per year x 1 herd per facility x 18 facilities = 72.
[6] Has not occurred in the past 3 years and is expected to continue to be a rare occurrence.
[7] On average two source animals are used for preparing xenotransplantation product material for one recipient. The average number of source animals is 2 source animals per recipient x 12 recipients annually = 24 source animals per year. (See footnote 5 of table 3 of this document.)
[8] FDA estimates there are approximately 12 clinical centers doing xenotransplantation procedures x approximately 25 health care workers involved per center = 300 health care workers.
[9] Twenty-four source animal records + 12 recipient records = 36 total records.

Because of the potential risk for cross-species transmission of pathogenic persistent virus, the guideline recommends that health records be retained for 50 years. Because these records are medical records, the retention of such records for up to 50 years is not information subject to the PRA (5 CFR 1320.3(h)(5)). Also, because of the limited number of clinical studies with small patient populations, the number of records is expected to be insignificant at this time. Information collections in this guideline not included in tables 1 through 4 of this document can be found under existing regulations and approved under the OMB control numbers as follows: (1) ''Current Good Manufacturing Practice for Finished Pharmaceuticals,'' 21 CFR 211.1 through 211.208, approved under OMB control number 0910–0139; (2) ''Investigational New Drug Application,'' 21 CFR 312.1 through 312.160, approved under OMB control number 0910–0014; and (3) information included in a license application, 21 CFR 601.2, approved under OMB control number 0910–0338. (Although it is possible that a xenotransplantation product may not be regulated as a biological product (e.g., it may be regulated as a medical device), FDA believes, based on its knowledge and experience with xenotransplantation, that any xenotransplantation product subject to FDA regulation within the next 3 years will most likely be regulated as a biological product.) However, FDA recognized that some of the information collections go beyond approved collections; assessments for these burdens are included in tables 1 through 4.

In table 5 of this document, FDA identifies those collection of information activities that are already encompassed by existing regulations or are consistent with voluntary standards which reflect industry's usual and customary business practice.

TABLE 5.—COLLECTION OF INFORMATION REQUIRED BY CURRENT REGULATIONS AND STANDARDS

PHS Guideline Section	Description of Collection of Information Activity	21 CFR Section (unless otherwise stated)
2.2.1	Document off-site collaborations	312.52
2.5	Sponsor ensures counseling patient + family + contacts	312.62(c)
3.1.1 and 3.1.6	Document well-characterized health history and lineage of source animals	312.23(a)(7)(a) and 211.84
3.1.8	Registration with and import permit from the Centers for Disease Control and Prevention	42 CFR 71.53
3.2.2	Document collaboration with accredited microbiology labs	312.52
3.2.3	Procedures to ensure the humane care of animals	9 CFR parts 1, 2, and 3 and PHS Policy[1]

TABLE 5.—COLLECTION OF INFORMATION REQUIRED BY CURRENT REGULATIONS AND STANDARDS—Continued

PHS Guideline Section	Description of Collection of Information Activity	21 CFR Section (unless otherwise stated)
3.2.4	Procedures consistent for accreditation by the Association for Assessment and Accreditation of Laboratory Animal Care International (AAALAC International) and consistent with the National Research Council's (NRC) Guide	AAALAC International Rules of Accreditation[2] and NRC Guide[3]
3.2.5, 3.4, and 3.4.1	Herd health maintenance and surveillance to be documented, available, and in accordance with documented procedures; record standard veterinary care	211.100 and 211.122
3.2.6	Animal facility SOPs	PHS Policy[1]
3.3.3	Validate assay methods	211.160(a)
3.6.1	Procurement and processing of xenografts using documented aseptic conditions	211.100 and 211.122
3.6.2	Develop, implement, and enforce SOP's for procurement and screening processes	211.84(d) and 211.122(c)
3.6.4	Communicate to FDA animal necropsy findings pertinent to health of recipient	312.32(c)
3.7.1	PHS specimens to be linked to health records; provide to FDA justification for types of tissues, cells, and plasma, and quantities of plasma and leukocytes collected	312.23(a)(6)
4.1.1	Surveillance of xenotransplant recipient; sponsor ensures documentation of surveillance program life-long (justify >2 yrs.); investigator case histories (2 yrs. After investigation is discontinued)	312.23(a)(6)(iii)(*f*) and (a)(6)(iii)(*g*), and 312.62(b) and (c)
4.1.2	Sponsor to justify amount and type of reserve samples	211.122
4.1.2.2	System for prompt retrieval of PHS specimens and linkage to medical records (recipient and source animal)	312.57(a)
4.1.2.3	Notify FDA of a clinical episode potentially representing a xenogeneic infection	312.32
4.2.2.1	Document collaborations (transfer of obligation)	312.52
4.2.3.1	Develop educational materials (sponsor provides investigators with information needed to conduct investigation properly)	312.50
4.3	Sponsor to keep records of receipt, shipment, and disposition of investigative drug; investigator to keep records of case histories	312.57 and 312.62(b)

[1] The "Public Health Service Policy on Humane Care and Use of Laboratory Animals" (*http://www.grants.nih.gov/grants/olaw/references/phspol.htm*). (FDA has verified the Web site address, but is not responsible for subsequent changes to the Web site after this document publishes in the **Federal Register**.)

[2] AAALAC International Rules of Accreditation (*http://www.aaalac.org/accreditation/rules.cfm*). (FDA has verified the Web site address, but is not responsible for subsequent changes to the Web site after this document publishes in the **Federal Register**.)

[3] The NRC's "Guide for the Care and Use of Laboratory Animals" (1996).

Dated: November 12, 2009.

David Horowitz,

Assistant Commissioner for Policy.

[FR Doc. E9–27658 Filed 11–17–09; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Agency Information Collection Activities: Submission for OMB Review; Comment Request

Periodically, the Substance Abuse and Mental Health Services Administration (SAMHSA) will publish a summary of information collection requests under OMB review, in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these documents, call the SAMHSA Reports Clearance Officer on (240) 276–1243.

Project: Recovery Services for Adolescents and Families—New

The Substance Abuse and Mental Health Services Administration's (SAMHSA) Center for Substance Abuse Treatment will conduct a data collection on the helpfulness of recovery support services for young people and their families after leaving substance abuse treatment. Specifically, the Recovery Services for Adolescents and Families (RSAF) project is evaluating a pilot test of the following recovery support services for young people and their families find the following recovery support services helpful: (1) Telephone/text message support; (2) a recovery-oriented social networking site; and (3) a family program. Approximately 200 adolescent respondents will be asked to complete 4 data collection forms (some repeated) during 5 interviews (baseline and 4 follow-ups) over a 12 month period after enrollment or discharge from treatment. Approximately 200 collateral respondents (*i.e.,* a parent/guardian/concerned other) will be asked to complete 7 data collection forms (some repeated) during 5 interviews (baseline and 4 follow-ups) over a 12 month period after their adolescent's enrollment or discharge from treatment. Approximately 15 to 20 project staff respondents, including Project Coordinators, Telephone Support Volunteers, a Social Network Site Moderator, Family Program Clinicians,

and a Support Services Supervisor, will be asked to complete between 2 and 5 data collection forms at varying intervals during the delivery of recovery support services. Across all respondents, a total of 28 data collection forms will be used. Depending on the time interval and task, information collections will take anywhere from about 5 minutes to 2 hours to complete. A description of each data collection form follows:

Adolescent Participant

• *Global Appraisal of Individual Needs—Initial (GAIN–I 5.6.0 Full).* The GAIN is an evidence-based assessment used with both adolescents and adults and in outpatient, intensive outpatient, partial hospitalization, methadone, short-term residential, long-term residential, therapeutic community, and correctional programs. There are over 1,000 questions in this initial version that are in multiple formats, including multiple choice, yes/no, and open-ended. Eight content areas are covered: Background, Substance Use, Physical Health, Risk Behaviors and Disease Prevention, Mental and Emotional Health, Environment and Living Situation, Legal, and Vocational. Each section contains questions on the recency of problems, breadth of symptoms, and recent prevalence as well as lifetime service utilization, recency of utilization, and frequency of recent utilization. GPRA data are gathered as part of this instrument in support of performance measurement for SAMHSA programs. It is administered at intake into treatment by clinical staff and used as baseline data for the project.

• *Global Appraisal of Individual Needs—Monitoring 90 Days (GAIN–M90 5.6.0 Full).* The GAIN is an evidence-based assessment used with both adolescents and adults and in outpatient, intensive outpatient, partial hospitalization, methadone, short-term residential, long-term residential, therapeutic community, and correctional programs. There are over 500 questions in this follow-up version that are in multiple formats, including multiple choice, yes/no, and open-ended. Eight content areas are covered: Background, Substance Use, Physical Health, Risk Behaviors and Disease Prevention, Mental and Emotional Health, Environment and Living Situation, Legal, and Vocational. Each section contains questions on the recency of problems, breadth of symptoms, and recent prevalence as well as lifetime service utilization, recency of utilization, and frequency of recent utilization. GPRA data are gathered as part of this instrument in support of performance measurement for SAMHSA programs. It is administered by project staff at each of the follow-up timepoints.

• *Supplemental Assessment Form (SAF 0309).* The SAF contains 72 questions that are a combination of multiple choice, yes/no, and open-ended formats. Content areas include: race, happiness with parent or caregiver in several life areas, participation in prosocial activities, receipt of and satisfaction with telephone support services, and usage of and satisfaction with the project's social networking site. It is administered by project staff at each of the follow-up timepoints.

Collateral Participant (Parent/Guardian)

• *Global Appraisal of Individual Needs—Collateral Monitoring—Initial (GCI).* The GCI contains over 200 items in this initial version that are in multiple formats, including multiple choice, yes/no, and open-ended. The following content areas are covered: relationship to the adolescent respondent, background, and the adolescent's background and substance use, environment and living situation, and vocational information. There are questions on the recency of problems, breadth of symptoms, and recent prevalence as well as lifetime service utilization, recency of utilization, and frequency of recent utilization. It is administered at baseline by project staff.

• *Global Appraisal of Individual Needs—Collateral Monitoring—Monitoring (GCM 5.3.3).* The GCM contains over 200 items in this follow-up version that are in multiple formats, including multiple choice, yes/no, and open-ended. The following content areas are covered: relationship to the adolescent respondent, background, and the adolescent's background and substance use, environment and living situation, and vocational information. There are questions on the recency of problems, breadth of symptoms, and recent prevalence as well as lifetime service utilization, recency of utilization, and frequency of recent utilization. It is administered at each of the follow-up timepoints by project staff.

• *Supplemental Assessment Form—Collateral (SAF—Collateral).* The SAF contains 72 questions that are a combination of multiple choice, yes/no, and open-ended formats. Content areas include: knowledge about the adolescent's participation in prosocial activities, receipt of and satisfaction with telephone support services, and usage of and satisfaction with the project's social networking site. It is administered at each of the follow-up timepoints by project staff.

• *Self-Evaluation Questionnaire (SEQ).* The SEQ contains 40 multiple choice items that ask the collateral about feelings and symptoms of anxiety. It is administered at each of the follow-up timepoints by project staff.

• *Family Environment Scale (FES).* The FES contains 18 yes/no items that measure family cohesion and conflict. It is administered at each of the follow-up timepoints by project staff.

• *Relationship Happiness Scale (Caregiver Version).* The Relationship Happiness Scale contains 8 items that ask the collateral about happiness with his/her relationship with the adolescent respondent in various life areas. It is administered at each of the follow-up timepoints by project staff.

Project Coordinator

• *Eligibility Checklist.* The Eligibility Checklist contains 12 yes/no items that are used to determine whether or not an adolescent meets inclusion/exclusion criteria for the project and is eligible to be approached for informed consent. It is completed prior to informed consent by project staff.

• *Telephone Support Volunteer Notification Form.* This form contains a participant's name and contact information. It is completed by project staff and given to volunteers to notify them when someone is assigned to receive telephone support.

• *Family Program Notification Form.* This form contains a participant's name. It is completed by project staff and given to clinicians to notify them when someone is assigned to the family support group.

• *Follow-Up Locator Form—Participant (FLF–P).* The FLF–P contains over 50 items that are a combination of yes/no, multiple choice, and open-ended formats. At the time of informed consent, data are gathered by project staff about an adolescent's contact information, personal contacts, criminal justice contacts, school/job contacts, hang-out information, Internet contacts, and identifying information in order to locate and interview that adolescent over multiple follow-up intervals.

• *Follow-Up Locator Form—Collateral (FLF–C).* The FLF–C contains over 50 items that are a combination of yes/no, multiple choice, and open-ended formats. Data are gathered about a collateral's contact information, personal contacts, and job contacts in order to locate and interview that collateral over multiple follow-up

intervals. It is administered at the time of informed consent by project staff.

• *Follow-Up Contact Log.* The Follow-Up Contact Log is open-ended and provides space for all data collected during attempted and completed follow-up contacts, over the phone and in-person, to be recorded. It is completed throughout the follow-up time period.

• *Volunteer/Staff Survey.* The Volunteer/Staff Survey contains 10 items in fill-in-the-blank, yes/no, and multiple choice formats. Items ask about background, demographic information, and role in the project. It is completed once by all volunteers and staff at the start of the project.

Telephone Support Volunteer

• *Telephone Support Case Review Form.* The Telephone Support Case Review Form contains multiple rows that allow a volunteer to record 5 pieces of data about adolescents that they make phone calls to: initials, treatment discharge status/date, weeks since treatment discharge, date of last telephone session, and number of completed telephone sessions since discharge. This allows the volunteer and supervisor to monitor the progress of active cases. The form is completed by the volunteers every week.

• *Telephone Support Call Log.* The Telephone Support Call Log is open-ended and provides space for all data collected during attempted and completed support contacts to be recorded. The form is completed by the volunteer throughout the period of telephone support.

• *Adolescent Telephone Support Documentation Form.* The Adolescent Telephone Support Documentation Form contains 22 items that are asked of an adolescent during a telephone support contact by a volunteer. The form is used to record yes/no and open-ended responses to questions asking about substance use and recovery-related activities. The volunteers complete the form every time there is a telephone support session with an adolescent.

• *Telephone Support Discharge Form.* The Telephone Support Discharge Form contains 10 fields to record the following information at the end of an adolescent's participation in telephone support: adolescent name, today's date, volunteer name, notification date, telephone support intake date, telephone support discharge date, reason for discharge, number of completed sessions, referral for more intervention, and successful contact for more intervention. This form is completed by volunteers when telephone support ends for each adolescent.

• *Volunteer/Staff Survey (Telephone Support Volunteer)*—See *Volunteer/Staff Survey (Project Coordinator)* above.

Social Network Site Moderator

• *Social Networking Moderator Log.* The Social Networking Moderator Log contains 11 fields for the moderator to record usage data for the project's social networking site. The moderator tracks number of visits to the site, number of unique visitors, messages posted, chat room attendance, and problems with users. This form is completed weekly by project staff.

• *Volunteer/Staff Survey*—See *Volunteer/Staff Survey (Project Coordinator)* above.

Family Program Clinician

• *Family Program Progress Notes.* The Family Program Progress Notes form is open-ended and provides space for all data collected during attempted and completed family program contacts to be recorded. This form is completed by the clinician throughout the time family members are active in the family support program.

• *Family Program Attendance Log.* The Family Program Attendance Log is used to record 6 pieces of information about each attempted session: Session number, scheduled date, was the session rescheduled (yes/no), was the family member a no-show (yes/no), did the family member attend the session (yes/no), and comments. This form is completed by the clinician throughout the time family members are active in the family support program.

• *Family Program Case Review Report.* The Family Program Case Review Report contains multiple rows that allow a clinician to record information that allows the clinician and supervisor to monitor the progress of active cases. Areas asked about include: family program procedures delivered, date of last session, and weeks in family program. This form is completed by the clinician weekly throughout the time family members are active in the family support program.

• *Family Program Discharge Form.* The Family Program Discharge Form contains 9 fields to record the following information at the end of participation in the family program: caregiver name, today's date, adolescent name, notification date, clinician name, family program intake date, family program discharge date, reason for discharge, and number of completed sessions. This form is completed by the clinician each time family members of a given participant end involvement in the family support program.

• *Volunteer/Staff Survey*—See *Volunteer/Staff Survey (Project Coordinator)* above.

Support Services Supervisor

• *Adolescent Telephone Support Quality Assurance Checklist.* This checklist contains 43 items that ask the supervisor to rate how well a telephone support volunteer delivered required service components to adolescents. Volunteers are rated on a scale of 1 through 5 in the following areas: substance use since last call (no use), substance use since last call (use), substance use since last call (still using), substance use since last call (stopped using), attendance at 12-step meetings, recovery-related activities, activities related to global health, follow-up since last call, closing the call, overall, general clinical skills, and overall difficulty of session. This form is completed for each reviewed recording of a telephone session by a supervisor.

• *Social Networking Quality Assurance Checklist.* This checklist contains 17 items that ask the supervisor to rate how well a social networking site moderator delivered required service components to adolescents. The moderator is rated on a scale of 1 through 5 in the following areas: group discussions, administrative tasks, overall, and general skills. This form is completed for each review of the social networking site by a supervisor.

• *Family Program QA Checklist.* This checklist contains 72 items that ask the supervisor to rate how well a family program clinician delivered required service components to family members. The clinician is rated on a scale of 1 through 5 in the following areas: initial meeting motivational strategies, domestic violence precautions, functional analysis of substance use, positive communication skills, use of positive reinforcement, time out from positive reinforcement, allowing the identified patient to experience the natural consequences of substance use, helping concerned significant others' enrich their own lives, maintaining the identified patient in recovery-oriented systems of care, and general. This form is completed for each reviewed recording of a family session by a supervisor.

• *Volunteer/Staff Survey*—See *Volunteer/Staff Survey (Project Coordinator)* above.

The following table is a list of the hour burden of the information collection by form and by respondent:

DETAILED INFORMATION ON FORMS GROUPED BY RESPONDENT

Instrument/form	Number of respondents	Responses per respondent	Total responses	Hours per response	Total annualized hour burden *
Adolescent Participant					
GAIN–I 5.6.0 Full	200	1	200	2	400
GAIN–M90 5.6.0 Full	200	4	800	1	800
SAF	200	5	1,000	.25	250
Subtotal	200		2,000		1,450
Collateral (Parent/Guardian/Concerned Other) Participant					
Collateral-I	200	1	200	.25	50
Collateral-M	200	4	800	.25	200
Collateral SAF	200	5	1,000	.25	250
Self-Evaluation Questionnaire	200	5	1,000	.16	250
Family Environment Scale (Cohesion and Conflict Scales)	200	5	1,000	.08	80
Relationship Happiness Scale (Caregiver)	200	5	1,000	.08	80
Subtotal	200		5,000		910
Project Coordinator					
Eligibility Checklist	4	50	200	.25	50
Locator—Participant	4	50	200	.32	64
Locator—Collateral	4	50	200	.25	50
Follow-Up Contact Log	4	50	200	.16	32
Telephone Support Volunteer Notification Form	4	50	200	.16	32
Family Program Notification Form	4	50	200	.16	32
Volunteer/Staff Survey	4	1	4	.25	1
Subtotal	4		1,204		261
Telephone Support Volunteer					
Telephone Support Case Review Form	8	450	3,600	.25	900
Telephone Support Call Log	8	25	200	.16	32
Telephone Support Documentation Form	8	450	3,600	.5	1,800
Telephone Support Discharge Form	8	25	200	.16	32
Volunteer/Staff Survey	8	1	8	.25	2
Subtotal	8		7,608		2,766
Social Network Site Moderator					
Social Networking Moderator Log	1	52	52	.5	26
Volunteer/Staff Survey	1	1	1	.25	.25
Subtotal	1		53		26.25
Family Program Clinician					
Family Program Progress Notes	4	650	2,600	.16	416
Family Program Attendance Log	4	50	200	.08	16
Family Program Case Review Form	4	650	2,600	.25	650
Family Program Discharge Form	4	50	200	.16	32
Volunteer/Staff Survey	4	1	4	.25	1
Subtotal	4		5,604		1,115
Support Services Supervisor					
Telephone Support QA Checklist	1	12	12	1	12
Social Networking QA Checklist	1	12	12	.5	6
Family Program QA Checklist	1	12	12	1	12
Volunteer/Staff Survey	1	1	1	.25	.25
Subtotal	1		37		30.25
Total	418		21,506		6,558.50

ANNUALIZED SUMMARY TABLE

Respondents	Number of respondents	Total responses	Total annualized hour burden *
Adolescent	200	2,000	1,450
Collateral	200	5,000	910
Project Coordinator	4	1,204	261
Telephone Support Volunteer	8	7,608	2,766
Social Network Site Moderator	1	53	26.25
Family Program Clinician	4	5,604	1,115
Support Services Supervisor	1	37	30.25
Total	418	21,506	6,558.50

Written comments and recommendations concerning the proposed information collection should be sent by December 18, 2009 to: SAMHSA Desk Officer, Human Resources and Housing Branch, Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503; due to potential delays in OMB's receipt and processing of mail sent through the U.S. Postal Service, respondents are encouraged to submit comments by fax to: 202–395–5806.

Dated: November 12, 2009.

Elaine Parry,

Director, Office of Program Services.

[FR Doc. E9–27641 Filed 11–17–09; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2009–N–0532]

Agency Information Collection Activities; Proposed Collection; Comment Request; Experimental Study of Nutrition Facts Label Formats

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on an experimental study of Nutrition Facts label formats.

* Total Annualized Hour Burden = Total Responses × Hours per Response.

DATES: Submit written or electronic comments on the collection of information by January 19, 2010.

ADDRESSES: Submit electronic comments on the collection of information to *http://www.regulations.gov*. Submit written comments on the collection of information to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. All comments should be identified with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Denver Presley, Jr., Office of Information Management (HFA–710), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–796–3793.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Experimental Study of Nutrition Facts Label Formats—(Section 903(d)(2)(C) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 393(d)(2)(C))) (OMB Control Number 0910–NEW)

I. Description

Nutrition information is required on most packaged foods and this information must be provided in a specific format as defined in 21 CFR 101. 9. When FDA was determining which Nutrition Facts label format to require, the agency undertook consumer research to evaluate alternatives (Refs. 1, 2, and 3). More recently, FDA conducted qualitative consumer research on the format of the Nutrition Facts label on behalf of the agency's Obesity Working Group (OWG) (Ref. 4), which was formed in 2003 and tasked with outlining a plan to help confront the problem of obesity in the United States (Ref. 5). In addition to conducting consumer research, in response to the OWG plan FDA issued two Advance Notices of Proposed Rulemaking (ANPRM) requesting comments on format changes to the Nutrition Facts label. One ANPRM requested comments on whether and, if so, how to give greater emphasis to calories on the Nutrition Facts label (Ref. 6) and the other requested comments on whether and, if so, how to amend the agency's serving size regulations (Ref. 7). In 2007, FDA issued an ANPRM requesting comments on whether the agency should require that certain nutrients be added or removed from the Nutrition Facts label (Ref. 8).

FDA conducts consumer research under its broad statutory authority, set forth in section 903(b)(2) of the Federal Food, Drug, and Cosmetic Act (the act), to protect the public health by ensuring that foods are ''safe, wholesome, sanitary, and properly labeled,'' and in section 903(d)(2)(C) of the act, to conduct research relating to foods, drugs, cosmetics, and devices in carrying out the act.

FDA is proposing to conduct an experimental study to quantitatively assess consumer reactions to potential options for modifying the Nutrition Facts label format. The purpose of the study is to help enhance FDA's understanding of consumer comprehension and acceptance of modifications to the Nutrition Facts label format. The study is part of the agency's continuing effort to enable consumers to make informed dietary choices and construct healthful diets.

The proposed study will use a Web-based experiment to collect information from a sample of adult members in an online consumer panel established by a contractor. The study plans to randomly assign each of 3,600 participants to view Nutrition Facts labels from a set of Nutrition Facts labels that vary by the format, the type of food product, and the quality of nutritional attributes of the product. The study will focus on the following types of consumer reactions: (1) Judgments about a food product in terms of its nutritional attributes and overall healthfulness and (2) ability to use the Nutrition Facts label to, for example, calculate calories and estimate serving sizes needed to meet objectives. To help understand consumer reactions, the study will also collect information on participants' background, including but not limited to use of the Nutrition Facts label and health status.

The study results will be used to help the agency to understand whether modifications to the Nutrition Facts label format could help consumers to make informed food choices. The results of the experimental study will not be used to develop population estimates.

FDA estimates the burden of this collection of information as follows:

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN[1]

Portion of Study	No. of Respondents	Annual Frequency per Response	Total Annual Responses	Hours per Response	Total Hours
Cognitive interview screener	96	1	96	0.083	8
Cognitive interview	12	1	12	1	12
Pretest invitation	1,000	1	1,000	0.033	33
Pretest	150	1	150	0.20	30
Experiment invitation	24,000	1	24,000	0.033	792
Experiment	3,600	1	3,600	0.20	720
Total					1,595

[1]There are no capital costs or operating and maintenance costs associated with this collection of information.

To help design and refine the questionnaire to be used for the experimental study, we plan to conduct cognitive interviews by screening 96 adult consumers in order to obtain 12 participants in the interviews. Each screening is expected to take 5 minutes (0.083 hours) and each cognitive interview is expected to take 1 hour. The total for cognitive interview activities is 20 hours (8 hours + 12 hours). Subsequently, we plan to conduct pretests of the questionnaire before it is administered in the study. We expect that 1,000 invitations, each taking 2 minutes (0.033 hours), will need to be sent to adult members of an online consumer panel to have 150 of them complete a 12-minute (0.20 hours) pretest. The total for the pretest activities is 63 hours (33 hours + 30 hours). For the experiment, we estimate that 24,000 invitations, each taking 2 minutes (0.033 hours), will need to be sent to adult members of an online consumer panel to have 3,600 of them complete a 12-minute (0.20 hours) questionnaire. The total for the experiment activities is 1,512 hours (792 hours + 720 hours). Thus, the total estimated burden is 1,595 hours. FDA's burden estimate is based on prior experience with research that is similar to this proposed study.

II. References

The following references have been placed on display in the Division of Dockets Management (see **ADDRESSES**), and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday.

1. Levy A., S. Fein, and R. Schucker, ''Nutrition Labeling Formats: Performance and Preference,'' *Food Technology*, 45: 116–121, 1991.

2. Levy A., S. Fein, and R. Schucker, ''More Effective Nutrition Label Formats Are Not Necessarily Preferred,'' *Journal of the American Dietetic Association,* 92: 1230–1234, 1992.

3. Levy A., S. Fein, and R. Schucker, ''Performance Characteristics of Seven Nutrition Label Formats,'' *Journal of Public Policy and Marketing*, 15: 1–15, 1996.

4. Lando A. and J. Labiner-Wolfe, ''Helping Consumers to Make More Healthful Food Choices: Consumer Views on Modifying Food Labels and Providing Point-of-Purchase Nutrition Information at Quick-Service Restaurants,'' *Journal of Nutrition Education and Behavior*, 39: 157–163, 2007.

5. U.S. Food and Drug Administration, Calories Count: Report of the Working Group on Obesity, 2004 (*http://www.fda.gov/Food/LabelingNutrition/ReportsResearch/ucm081696.htm).*

6. 70 FR 17008, April 4, 2005.

7. 70 FR 17010, April 4, 2005.

8. 72 FR 62149, November 2, 2007.

Dated: November 12, 2009.

David Horowitz,

Assistant Commissioner for Policy.

[FR Doc. E9–27720 Filed 11–17–09; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2009–N–0251]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; User Fee Cover Sheet; Form FDA 3397

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Fax written comments on the collection of information by December 18, 2009.

ADDRESSES: To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: FDA Desk Officer, FAX: 202–395–6974, or e-mailed to *oira_submission@omb.eop.gov*. All comments should be identified with the OMB control number 0910–0297. Also include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Liz Berbakos, Office of Information Management (HFA–710), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–796–3792, *Elizabeth.Berbakos@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

User Fee Cover Sheet; Form FDA 3397—(OMB Control Number 0910–0297)—Extension

Under sections 735 and 736 of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 379g and 379h), the Prescription Drug User Fee Act of 1992 (PDUFA) (Public Law 102–571), as amended by the Food and Drug Administration Modernization Act of 1997 (Public Law 105–115), the Public Health Security and Bioterrorism Preparedness and Response Act of 2002, which includes the Prescription Drug User Fee Amendments of 2002 (Public Law 107–188), and most recently by the Food and Drug Administration Amendments Act of 2007 (Public Law 110–85), FDA has the authority to assess and collect user fees for certain drug and biologics license applications and supplements. Under this authority, pharmaceutical companies pay a fee for certain new human drug applications, biologics license applications, or supplements submitted to the agency for review. Because the submission of user fees concurrently with applications and supplements is required, review of an application by FDA cannot begin until the fee is submitted. Form FDA 3397, the user fee cover sheet, is designed to provide the minimum necessary information to determine whether a fee is required for review of an application, to determine the amount of the fee required, and to account for and track user fees. The form provides a cross-reference of the fee submitted for an application by using a unique number tracking system. The information collected is used by FDA's Center for Drug Evaluation and Research (CDER) and Center for Biologics Evaluation and Research (CBER) to initiate the administrative screening of new drug applications, biologics license applications, and supplemental applications.

Respondents to this collection of information are new drug and biologics manufacturers. Based on FDA's database system for fiscal year (FY) 2008, there are an estimated 255 manufacturers of products subject to the user fee provisions of PDUFA. However, not all manufacturers will have any submissions, and some may have multiple submissions in a given year. The total number of annual responses is based on the number of submissions received by FDA in FY 2008. CDER received 3,107 annual responses that include the following submissions: 147 new drug applications; 13 biologics license applications; 1,813 manufacturing supplements; 987 labeling supplements; and 147 efficacy supplements. CBER received 810 annual responses that include the following submissions: 9 biologics license applications; 743 manufacturing supplements; 48 labeling supplements; and 10 efficacy supplements. Based on the previous submissions that were received, the rate of these submissions is not expected to change significantly in the next few years. The estimated hours per response are based on past FDA experience with the various submissions, and the average is 30 minutes.

FDA is revising Form FDA 3397 in the following ways: (1) By including an additional question regarding redemption of a priority review voucher; (2) by deleting the exclusion for certain applications submitted under section 505(b)(2) of the act (21 U.S.C. 355(b)(2)); and (3) by making several minor editorial changes.

In the **Federal Register** of June 8, 2009 (74 FR 27145), FDA published a 60-day notice requesting public comment on the proposed collection of information. No comments were received on the information collection.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

Form	No. of Respondents	Annual Frequency per Response	Total Annual Responses	Hours per Response	Total Hours
FDA 3397	255	15.36	3,917	0.5	1,959

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Dated: November 12, 2009.

David Horowitz,

Assistant Commissioner for Policy.

[FR Doc. E9–27719 Filed 11–17–09; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2009–N–0545]

Agency Information Collection Activities; Proposed Collection; Comment Request; Biological Products: Reporting of Biological Product Deviations and Human Cells, Tissues, and Cellular and Tissue-Based Product Deviations in Manufacturing; Form FDA 3486 and Addendum 3486A

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on the information collection requirements relating to the reporting of biological product deviations (BPDs) and human cells, tissues, and cellular and tissue-based product (HCT/P) deviations, and Form FDA 3486 and Addendum 3486A.

DATES: Submit written or electronic comments on the collection of information by January 19, 2010.

ADDRESSES: Submit electronic comments on the collection of information to: *http://www.regulations.gov*. Submit written comments on the collection of information to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. All comments should be identified with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Elizabeth Berbakos, Office of Information Management (HFA–710), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–796–3792.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Biological Products: Reporting of Biological Product Deviations and Human Cells, Tissues, and Cellular and Tissue-Based Product Deviations; Form FDA 3486 and Addendum 3486A (OMB Control Number 0910–0458)—Extension

Under section 351 of the Public Health Service Act (PHS Act) (42 U.S.C. 262), all biological products, including human blood and blood components, offered for sale in interstate commerce must be licensed and meet standards, including those prescribed in the FDA regulations, designed to ensure the continued safety, purity, and potency of such products. In addition under section 361 of the PHS Act (42 U.S.C. 264), FDA may issue and enforce regulations necessary to prevent the introduction, transmission, or spread of communicable diseases between the States or possessions or from foreign countries into the States or possessions. Further, the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 351) provides that drugs and devices (including human blood and blood components) are adulterated if they do not conform with current good manufacturing practice (CGMP) assuring that they meet the requirements of the act. Establishments manufacturing biological products including human blood and blood components must comply with the applicable CGMP regulations (parts 211, 606, and 820 (21 CFR parts 211, 606, and 820)) and current good tissue practice (CGTP) regulations (part 1271 (21 CFR part 1271)) as appropriate. FDA regards BPD reporting and HCT/P deviation reporting to be an essential tool in its directive to protect public health by establishing and maintaining surveillance programs that provide timely and useful information.

Section 600.14, in brief, requires the manufacturer who holds the biological product license, for other than human blood and blood components, and who had control over a distributed product when the deviation occurred, to report to the Center for Biologics Evaluation and Research (CBER) or to the Center for Drugs Evaluation and Research (CDER) as soon as possible but not to exceed 45 calendar days after acquiring information reasonably suggesting that a reportable event has occurred. Section 606.171, in brief, requires a licensed manufacturer of human blood and blood components, including Source Plasma; an unlicensed registered blood establishment; or a transfusion service who had control over a distributed product when the deviation occurred, to report to CBER as soon as possible but not to exceed 45 calendar days after acquiring information reasonably suggesting that a reportable event has occurred. Similarly § 1271.350(b), in brief, requires non-reproductive HCT/P establishments described in § 1271.10 to report to CBER all HCT/P deviations relating to a distributed HCT/P that relates to the core CGTP requirements, if the deviation occurred in the establishment's facility or in a facility that performed a manufacturing step for the establishment under contract, agreement or other arrangement. Form FDA 3486 is used to submit BPD reports and HCT/P deviation reports.

Respondents to this collection of information are the licensed manufacturers of biological products other than human blood and blood components, licensed manufacturers of blood and blood components including Source Plasma, unlicensed registered blood establishments, transfusion services, and establishments that manufacture non-reproductive HCT/Ps

regulated solely under section 361 of the PHS Act as described in § 1271.10. The number of respondents and total annual responses are based on the BPD reports and HCT/P deviation reports FDA received in fiscal year (FY) 2008. The number of licensed manufacturers and total annual responses under 21 CFR 600.14 include the estimates for BPD reports submitted to both CBER and CDER. Based on the information from industry, the estimated average time to complete a deviation report is 2 hours. The availability of the standardized report form, Form FDA 3486, and the ability to submit this report electronically to CBER (CDER does not currently accept electronic filings) further streamlines the report submission process.

CBER has developed an addendum to Form FDA 3486. The web-based addendum 3486A provides additional information when a BPD report has been reviewed by FDA and evaluated as a possible recall. The additional information requested includes information not contained in the Form FDA 3486 such as: (1) Distribution pattern, (2) method of consignee notification, (3) consignee(s) of products for further manufacture, (4) additional product information, (5) updated product disposition, and (6) industry recall contacts. This information is requested by CBER through e-mail notification to the submitter of the BPD report. This information is used by CBER for recall classification purposes. At this time Addendum 3486A is being used only for those BPD reports submitted under § 606.171. CBER estimates that 5 percent of the total BPD reports submitted to CBER under § 606.171 would need additional information submitted in the addendum. CBER further estimates that it would take between 10 to 20 minutes to complete the addendum. For calculation purposes, CBER is using 15 minutes.

Activities such as investigating, changing standard operating procedures or processes, and follow-up are currently required under 21 CFR parts 211, (approved under OMB control number 0910–0139), part 606 (approved under OMB control number 0910–0116), part 820 (approved under OMB control number 0910–0073), and part 1271 are approved under OMB Control No. 0910–0543 and, therefore, are not included in the burden calculation for the separate requirement of submitting a deviation report to FDA.

FDA estimates the burden of this collection of information as follows:

ESTIMATED ANNUAL REPORTING BURDEN[1]

21 CFR Section	FDA Form Number	No. of Respondents	Annual Frequency per Response	Total Annual Responses	Hours per Response	Total Hours
600.14	3486	51	7.78	397	2.0	794
606.171	3486	1,533	28.78	44,125	2.0	88,250
1271.350(b)	3486	84	2.64	222	2.0	444
	3486A[2]	77	28.65	2,206	0.25	551.5
Total						90,039.5

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.
[2] Five percent of the number of respondents (1,533 x 0.05 = 77) and total annual responses to CBER (44,125 x 0.05 = 2,206).

Dated: November 12, 2009.

David Horowitz,

Assistant Commissioner for Policy.

[FR Doc. E9–27716 Filed 11–17–09; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Submission for OMB review; Comment Request; Parental Knowledge, Attitudes, and Behaviors Related to Pediatric Cardiovascular Health

SUMMARY: Under the provisions of Section 3507(a)(1)(D) of the Paperwork Reduction Act of 1995, the National Heart, Lung, and Blood Institute (NHLBI), the National Institutes of Health has submitted to the Office of Management and Budget (OMB) a request to review and approve the information collection listed below. This proposed information collection was previously published in the **Federal Register** on Wednesday, July 29, 2009, Volume 74, Number 144 and allowed 60-days for public comment. No public comments were received. The purpose of this notice is to allow an additional 30 days for public comment.

5 CFR 1320.5 (General requirements) Reporting and Recordkeeping Requirements:

Final Rule requires that the agency inform the potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number. This information is required to be stated in the 30-day **Federal Register** Notice.

Proposed Collection: Describe the proposed information collection activity as follows. Include: *Title:* Parental Knowledge, Attitudes, and Behaviors Related to Pediatric Cardiovascular Health; *Type of Information Collection Request:* New; *Need and Use of Information Collection:* Coinciding with the release of the Integrated Pediatric Cardiovascular Risk Reduction Guidelines, the National Heart, Lung, and Blood Institute (NHLBI) will conduct a national public awareness campaign to help parents understand that risk for cardiovascular disease (CVD) begins in childhood, and to engage them in encouraging healthy habits in their children to promote heart health and reduce their children's CVD risk now and as they grow. Currently, little is known about parental knowledge, attitudes, and behaviors related to heart health in children. Serving as a baseline for evaluation of NHLBI's outreach activities related to the campaign, this study seeks to learn the following: (a) Parents' awareness of cardiovascular disease risk factors in children and knowledge of what to do for risk reduction, (b) parents' level of efficacy toward taking action to promote cardiovascular health and reduce risk factors, and (c) parents' behaviors related to cardiovascular health. The findings will provide valuable information that will enable NHLBI to identify the gaps in knowledge and awareness and target specific

information in communications with parents. NHLBI will also be able to determine parents' efficacy related to the actions needed to promote their children's heart health, allocating resources for the campaign to provide support to overcome perceived barriers; *Frequency of Response:* One-time survey; *Affected Public:* Individuals or households; and *Type of Respondents:* Parents and caregivers of children ages 0–7. The annual reporting burden is as follows: *Estimated Number of Respondents:* 1,175; *Estimated Number of Responses per Respondent:* 1; *Average Burden Hours Per Response:* .167; and *Estimated Total Annual Burden Hours Requested:* 196.23. There are no Capital Costs, Operating Costs, and/or Maintenance Costs to report.

Request for Comments: Written comments and/or suggestions from the public and affected agencies should address one or more of the following points: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the function of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Direct Comments to OMB: Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the: Office of Management and Budget, Office of Regulatory Affairs, *OIRA_submission@omb.eop.gov* or by fax to 202–395–6974, Attention: Desk Officer for NIH. To request more information on the proposed project or to obtain a copy of the data collection plans and instruments, contact: Amy Pianalto, National Heart, Lung, and Blood Institute, NIH, 31 Center Drive, Building 31A, Room 4A10, Bethesda, MD 20892; or call non-toll-free number 301–594–2093 or e-mail request, including your address, to *pianaltoa@nhlbi.nih.gov.*

Comments Due Date: Comments regarding this information collection are best assured of having their full effect if received within 30 days of the date of this publication.

Dated: October 30, 2009.

Amy Pianalto,

Technical Writer, Office of Communications and Legislative Activities, NHLBI, National Institutes of Health.

[FR Doc. E9–27688 Filed 11–17–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2009–N–0535]

Agency Information Collection Activities; Proposed Collection; Comment Request; ''Real Time'' Surveys of Consumers' Knowledge, Perceptions, and Reported Behavior Concerning Foodborne Illness Outbreaks or Food Recalls

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information and to allow 60 days for public comment in response to the notice. This notice solicits comments on ''Real Time'' surveys of consumers' knowledge, perceptions, and beliefs concerning foodborne illness outbreaks or food recalls.

DATES: Submit written or electronic comments on the collection of information by January 19, 2010.

ADDRESSES: Submit electronic comments on the collection of information to *http://www.regulations.gov*. Submit written comments on the collection of information to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. All comments should be identified with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Denver Presley Jr., Office of Information Management (HFA–710), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–796–3793.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

''Real Time'' Surveys of Consumers' Knowledge, Perceptions, and Reported Behavior Concerning Foodborne Illness Outbreaks or Food Recalls—Federal Food, Drug, and Cosmetic Act/Section 903(d)(2)(C)—(OMB Control Number 0910–NEW)

I. Description

FDA communicates with consumers about food recalls directly, on its own Web site, and through various mass media channels, such as television and newspapers, during a foodborne illness outbreak or food recall. In these communications, FDA typically identifies the implicated food, the symptoms of the foodborne illness at issue, any subpopulations at elevated risk of infection or illness, and protective measures individuals can or should take. The purpose of these communications is to provide consumers with information so they can protect themselves from potential health risks associated with an outbreak or food recall. Consumers also get information about an outbreak or recall from other sources, including other federal and state agencies, industry, consumer groups, and the mass media,

which may or may not relay FDA's public announcements.

Existing data show that many consumers do not take appropriate protective actions during a foodborne illness outbreak or food recall (Refs. 1 and 2). For example, 41 percent of U.S. consumers say they have never looked for any recalled product in their home (Ref. 2). Conversely, some consumers overreact to the announcement of a foodborne illness outbreak or food recall. In response to the 2006 fresh, bagged spinach recall which followed a multistate outbreak of *E coli* 0157: H7 infections (Ref. 3), 18 percent of consumers said they stopped buying other bagged, fresh produce because of the spinach recall (Ref. 1). Existing research also suggests that many consumers may not have correct knowledge about products subject to a given recall. For example, in a survey conducted 2 months after the onset of the 2006 spinach recall, one third of respondents did not know that, in addition to bagged spinach, fresh loose spinach was part of the recall, while 22 percent believed that frozen spinach was subject to the recall (it was not) (Refs. 1 and 3). In order for FDA to protect the public health during foodborne illness outbreaks or food recalls, the agency needs timely information collected from consumers as the events unfold to ensure that consumers understand the extent of the incident and that they are taking appropriate actions. Results from the information collection will indicate to FDA whether the agency should adjust its communications to help consumers react appropriately.

FDA conducts research and educational and public information programs relating to food safety under to its broad statutory authority, set forth in section 903(b)(2) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 393 (b)(2), to protect the public health by ensuring that foods are ''safe, wholesome, sanitary, and properly labeled,'' and in section 903(d)(2)(C), to conduct research relating to foods, drugs, cosmetics and devices in carrying out the act.

FDA plans to survey U.S. consumers using a web-based panel of U.S. households to collect information on consumers' ''real time'' knowledge, perceptions, beliefs, and self-reported behaviors for up to five foodborne illness outbreaks or food recalls a year. Moreover, because the information environment during certain foodborne illness outbreaks or food recalls evolves as new information emerges, the agency plans to field up to three waves of independent surveys per event (i.e., outbreak or recall). The surveys will query consumers on topics such as: (1) The products that are subject to the outbreak or recall; (2) the implicated pathogens; (3) the food vehicle of the outbreak or recall; and (4) how consumers can protect themselves. FDA plans to conduct the surveys soon after the onset of an outbreak or recall and whenever the agency suspects that: (1) Messages are not reaching consumers; and/or (2) consumers do not understand the messages; and/or (3) consumers are not taking appropriate actions in response to the messaging. Collecting information quickly during a foodborne illness outbreak or food recall is important because erroneous perceptions or misinterpreted information about an outbreak or recall can impede consumer adoption of recommended protective behaviors. Criteria for selecting a particular foodborne illness outbreak or food recall for a survey will include a qualitative assessment of the salience of some or all of the following: the geographical dispersion of the event, the number of illnesses or deaths associated with it, the relative familiarity of the food product, the complexity of consumer precaution instructions, and the presence of national media focus.

The agency will use the survey results to help adjust its communication strategies and messages for foodborne illness outbreaks or food recalls, when needed. The results will not be used to develop population estimates.

FDA estimates the burden of this collection of information as follows:

TABLE 1.--ESTIMATED ANNUAL REPORTING BURDEN[1]

Portion of Study	No. of Respondents	Annual Frequency per Response	Total Annual Responses	Hours per Response	Total Hours
Screener	30,000	1	30,000	.0055	165
Pretest	40	1	40	.167	7
Survey	15,000	1	15,000	.167	2,505
Total					2,677

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Approximately 30,000 respondents of a web-based consumer panel will be screened, (3 waves (independent surveys) for each of 5 incidents; 2,000 respondents per wave). We estimate that it will take a respondent 20 seconds (0.0055 hours) to complete the screening questions, for a total of 165 hours. We will conduct a pretest of the first survey with 40 respondents; we estimate that it will take a respondent 10 minutes (0.167 hours) to complete the pretest, for a total of 7 hours. Fifteen thousand (15,000) respondents will complete the surveys (3 waves (independent surveys) for each of 5 incidents; 1,000 respondents per wave). We estimate that it will take a respondent 10 minutes (0.167 hours) to complete the survey, for a total of 2,505 hours. Thus, the total estimated annual reporting burden is 2,677 hours. FDA's burden estimate is based on prior experience with consumer surveys that are similar to these.

II. References

The following references have been placed on display in the Division of Dockets Management (see **ADDRESSES**) and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday.

1. Cuite, C., S. Condry, M. Nucci, and W. Hallman, ''Public Response to the Contaminated Spinach Recall of 2006,''Publication number RR–0107–013, New Brunswick, New Jersey: Rutgers, the State University of New Jersey, Food Policy Institute, 2007.

2. Hallman, W., C. Cuite, and N. Hooker, ''Consumer Responses to Food Recalls: 2009 National Survey Report,'' Publication number RR–0109–018, New Brunswick, New Jersey: Rutgers, the State University of New Jersey, Food Policy Institute, 2009.

3. Acheson, D., ''Outbreak of Escherichia coli 0157 Infections Associated With Fresh Spinach—United States, August-September 2006,'' 2007, (*http://first.fda.gov/cafdas/documents/Acheson_Spinach_Outbreak_2006_FDA_pres.ppt*).

Dated: November 12, 2009.

David Horowitz,

Assistant Commissioner for Policy.

[FR Doc. E9–27659 Filed 11–17–09; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Administration on Children, Youth and Families; Notice To Award One Expansion Supplement Grant

AGENCY: Family and Youth Services Bureau, ACYF, ACF, HHS.

ACTION: Notice to award one expansion supplement grant.

CFDA Number: 93.592.

Legislative Authority: The Family Violence Prevention and Services Act, 42 U.S.C. 10401 through 10421, as extended by the Department of Health and Human Services Appropriations Act, 2009, Public Law 111–8.

Total Amount of Award: $225,000.

Project Period: September 30, 2009–September 29, 2010.

SUMMARY: This notice announces the award of an expansion supplement grant to one grantee under the Family and Youth Services Bureau (FYSB)/Family Violence Prevention and Services Program. The expansion supplement award is made to the Pennsylvania Coalition Against Domestic Violence, Harrisburg, PA, a technical assistance provider, to support their capacity to provide technical support and training to State and local domestic violence advocates and social service agencies. These efforts will allow FYSB to support collaborative work to enhance the capacity of Temporary Assistance to Needy Families (TANF) and other Federal programs to provide assistance to eligible victims of domestic violence.

FOR FURTHER INFORMATION CONTACT: Marylouise Kelley, Ph.D., Director, Family Violence Prevention and Services Program, 1250 Maryland Avenue, SW., Suite 8216, Washington, DC 20024. Telephone: 202–104–5756 E-mail: *Marylouise.kelley@acf.hhs.gov*.

Dated: November 10, 2009.

Maiso L. Bryant,

Acting Commissioner, Administration on Children, Youth and Families.

[FR Doc. E9–27667 Filed 11–17–09; 8:45 am]

BILLING CODE 4184–32–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2009–C–0543]

Sauflon Pharmaceuticals Ltd.; Filing of Color Additive Petition

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that Sauflon Pharmaceuticals Ltd. has filed a petition proposing that the color additive regulations be amended to provide for the safe use of disodium 1-amino-4-[[4-[(2-bromo-1-oxoallyl)amino]-2-sulfonatophenyl]amino]-9,10-dihydro-9,10-dioxoanthracene-2-sulfonate (CAS Reg. No. 70209–99–3) as a color additive in contact lenses.

FOR FURTHER INFORMATION CONTACT: Raphael A. Davy, Center for Food Safety and Applied Nutrition (HFS–265), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740–3835, 301–436–1272.

SUPPLEMENTARY INFORMATION: Under the Federal Food, Drug, and Cosmetic Act (sec. 721(d)(1) (21 U.S.C. 379e(d)(1))), notice is given that a color additive petition (CAP 8C0287) has been filed by Sauflon Pharmaceuticals Ltd., 49–53 York St., Twickenham, Middlesex, TW1 3LP, United Kingdom. The petition proposes to amend the color additive regulations in 21 CFR part 73, subpart D, *Medical Devices* to provide for the safe use of disodium 1-amino-4-[[4-[(2-bromo-1-oxoallyl)amino]-2-sulfonatophenyl]amino]-9,10-dihydro-9,10-dioxoanthracene-2-sulfonate (CAS Reg. No. 70209–99–3) as a color additive in contact lenses.

The agency has determined under 21 CFR 25.32(l) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

Dated: November 10, 2009.

Laura M. Tarantino,

Director, Office of Food Additive Safety, Center for Food Safety and Applied Nutrition.

[FR Doc. E9–27629 Filed 11–17–09; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Government-Owned Inventions; Availability for Licensing

AGENCY: National Institutes of Health, Public Health Service, HHS.

ACTION: Notice.

SUMMARY: The inventions listed below are owned by an agency of the U.S. Government and are available for licensing in the U.S. in accordance with 35 U.S.C. 207 to achieve expeditious commercialization of results of federally-funded research and development. Foreign patent applications are filed on selected inventions to extend market coverage for companies and may also be available for licensing.

ADDRESSES: Licensing information and copies of the U.S. patent applications listed below may be obtained by writing to the indicated licensing contact at the Office of Technology Transfer, National Institutes of Health, 6011 Executive Boulevard, Suite 325, Rockville, Maryland 20852–3804; telephone: 301/496–7057; fax: 301/402–0220. A signed Confidential Disclosure Agreement will be required to receive copies of the patent applications.

A Novel Treatment for Malarial Infections

Description of Invention: The inventions described herein are antimalarial small molecule inhibitors of the plasmodial surface anion channel (PSAC), an essential nutrient acquisition ion channel expressed on human erythrocytes infected with malaria parasites. These inhibitors were discovered by high-throughput screening of chemical libraries and analysis of their ability to kill malaria parasites in culture. Two separate classes of inhibitors were found to work synergistically in combination against PSAC and killed malaria cultures at markedly lower concentrations than separately. These inhibitors have high affinity and specificity for PSAC and have acceptable cytotoxicity profiles. Preliminary *in vivo* testing of these compounds in a mouse malaria model is currently ongoing.

Applications: Treatment of malarial infections.

Advantages: Novel drug treatment for malarial infections; Synergistic effect of these compounds on PSAC.

Development Status: In vitro and *in vivo* data can be provided upon request.

Market: Treatment of malarial infection.

Inventor: Sanjay A. Desai (NIAID)

Publications

1. M Kang, G Lisk, S Hollingworth, SM Baylor, SA Desai. Malaria parasites are rapidly killed by dantrolene derivatives specific for the plasmodial surface anion channel. Mol. Pharmacol. 2005 Jul;68(1):34–40.

2. SA Desai, SM Bezrukov, J Zimmerberg. A voltage-dependent channel involved in nutrient uptake by red blood cells infected with the malaria parasite. Nature. 2000 Aug 31;406(6799):1001–1005.

Patent Status: International Patent Application No. PCT/US09/50637 (HHS Reference No. E–202–2008/0–PCT–02) filed 15 Jul 2009.

Licensing Status: Available for licensing.

Licensing Contact: Kevin W. Chang; 301–435–5018; *changke@mail.nih.gov.*

Collaborative Research Opportunity: The NIAID Office of Technology Development is seeking statements of capability or interest from parties interested in collaborative research to further develop, evaluate, or commercialize antimalarial drugs that target PSAC or other parasite-specific transporters. Please contact Dana Hsu at 301–496–2644 for more information.

Optimized Expression of IL–12 Cytokine Family

Description of Invention: The IL–12 family of cytokines (IL–12, IL–23, and IL–27) has an important role in inflammation and autoimmune diseases. IL–12 is produced by macrophages and dendritic cells in response to certain bacterial and parasitic infections and is a powerful inducer of IFN-gamma production. IL–23 is proposed to stimulate a subset of T cells to produce IL–17, which in turn induce the production of proinflammatory cytokines that lead to a protective response during infection. IL–27 appears to have duel functions as an initiator of TH1-type (cellular immunity) immune responses and as an attenuator of immune/inflammatory responses.

The present inventions provide methods for improved expression of multimeric proteins by engineering different ratios of the subunit expression units in a cell or upon expression from a multi-promoter plasmid having different strength promoters. The inventors have improved the levels and efficiency of expression of the IL–12 family of cytokines, which includes IL–12, IL–23, and IL–27, by adjusting the transcription and translation of the alpha and beta subunits that comprise the heterodimeric proteins. Optimal ratios of expression for the two (2) subunits were determined for IL–12, IL–23, and IL–27.

Applications: Tumor treatment; Anti-viral therapy; Anti-inflammatory therapy.

Advantages: Increased expression and stability of in vitro expressed IL–12, IL–23 and IL–27 cytokines.

Development Status: In vitro data and data in animal models can be provided upon request.

Market: Infectious Diseases; Cancer; Inflammatory Diseases.

Inventors: George N. Pavlakis and Barbara K. Felber (NCI).

Patent Status: International PCT Patent Application No. PCT/US09/043481 filed 11 May 2009 (HHS Reference No. E–192–2008/1–PCT–02).

Licensing Status: Available for licensing.

Licensing Contact: Kevin W. Chang, Ph.D.; 301–435–5018; *changke@mail.nih.gov.*

Collaborative Research Opportunity: The Center for Cancer Research, Human Retrovirus Section, is seeking statements of capability or interest from parties interested in collaborative research to further develop, evaluate, or commercialize delivery of cytokines of the IL–12 family in cancer and other indications. Please contact John D. Hewes, Ph.D. at 301–435–3121 or *hewesj@mail.nih.gov* for more information.

Dated: November 9, 2009.

Richard U. Rodriguez,

Director, Division of Technology Development and Transfer, Office of Technology Transfer, National Institutes of Health.

[FR Doc. E9–27633 Filed 11–17–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Indian Health Service

Loan Repayment Program for Repayment of Health Professions Educational Loans

Announcement Type: Initial.

CFDA Number: 93.164.

Key Dates: January 15, 2010 first award cycle deadline date, September 30, 2010 entry on duty deadline date.

I. Funding Opportunity Description

The Indian Health Service (IHS) estimated budget request for Fiscal Year (FY) 2010 includes $17,488,854 for the IHS Loan Repayment Program (LRP) for health professional educational loans (undergraduate and graduate) in return for full-time clinical service in Indian health programs.

This program announcement is subject to the appropriation of funds. This notice is being published early to coincide with the recruitment activity of the IHS, which competes with other Government and private health management organizations to employ qualified health professionals.

This program is authorized by Section 108 of the Indian Health Care Improvement Act (IHCIA) as amended, 25 U.S.C. 1601 *et seq.* The IHS invites potential applicants to request an application for participation in the LRP.

II . Award Information

The estimated amount available is approximately $17,488,854 to support approximately 391 competing awards averaging $44,740 per award for a two year contract. One year contract continuations will receive priority consideration in any award cycle. Applicants selected for participation in the FY 2010 program cycle will be expected to begin their service period no later than September 30, 2010.

III. Eligibility Information

1. Eligible Applicants

Pursuant to Section 108(b), to be eligible to participate in the LRP, an individual must:

(1) (A) Be enrolled—

(i) In a course of study or program in an accredited institution, as determined by the Secretary, within any State and be scheduled to complete such course of study in the same year such individual applies to participate in such program; or

(ii) In an approved graduate training program in a health profession; or

(B) Have a degree in a health profession and a license to practice in a state; and

(2) (A) Be eligible for, or hold an appointment as a Commissioned Officer in the Regular or Reserve Corps of the Public Health Service (PHS); or

(B) Be eligible for selection for service in the Regular or Reserve Corps of the PHS; or

(C) Meet the professional standards for civil service employment in the IHS; or

(D) Be employed in an Indian health program without service obligation; and

(E) Submit to the Secretary an application for a contract to the LRP. The Secretary must approve the contract before the disbursement of loan repayments can be made to the participant. Participants will be required to fulfill their contract service agreements through full-time clinical practice at an Indian health program site determined by the Secretary. Loan

repayment sites are characterized by physical, cultural, and professional isolation, and have histories of frequent staff turnover. All Indian health program sites are annually prioritized within the Agency by discipline, based on need or vacancy.

Any individual who owes an obligation for health professional service to the Federal Government, a State, or other entity is not eligible for the LRP unless the obligation will be completely satisfied before they begin service under this program.

Section 108 of the IHCIA, as amended by Public Laws 100–713 and 102–573, authorizes the IHS LRP and provides in pertinent part as follows:

''(a)(1) The Secretary, acting through the Service, shall establish a program to be known as the Indian Health Service Loan Repayment Program (hereinafter referred to as the ''Loan Repayment Program'') in order to assure an adequate supply of trained health professionals necessary to maintain accreditation of, and provide health care services to Indians through, Indian health programs.''

Section 4(n) of the IHCIA, as amended by the Indian Health Care Improvement Technical Corrections Act of 1996, Public Law 104–313, provides that:

''Health Profession'' means *allopathic medicine,* family medicine, internal medicine, pediatrics, geriatric medicine, obstetrics and gynecology, podiatric medicine, nursing, public health nursing, dentistry, psychiatry, osteopathy, optometry, pharmacy, psychology, public health, social work, marriage and family therapy, chiropractic medicine, environmental health and engineering, and allied health profession, *or any other health profession.*

For the purposes of this program, the term ''Indian health program'' is defined in Section 108(a)(2)(A), as follows:

(A) The term ''Indian health program'' means any health program or facility funded, in whole or in part, by the Service for the benefit of Indians and administered—

(i) Directly by the Service;

(ii) By any Indian Tribe or Tribal or Indian organization pursuant to a contract under—

(I) The Indian Self-Determination Act, or

(II) Section 23 of the Act of April 30, 1908, (25 U.S.C. 47), popularly known as the Buy Indian Act; or

(iii) By an urban Indian organization pursuant to Title V of this act.''

Section 108 of the IHCIA, as amended by Public Laws 100–713 and 102–573, authorizes the IHS to determine specific health professions for which IHS LRP contracts will be awarded. The list of priority health professions that follows is based upon the needs of the IHS as well as upon the needs of American Indians and Alaska Natives.

(a) Medicine: Allopathic and Osteopathic.

(b) Nurse: Associate, B.S., and M.S. Degree.

(c) Clinical Psychology: Ph.D. only.

(d) Social Work: Masters level only.

(e) Chemical Dependency Counseling: Baccalaureate and Masters level.

(f) Dentistry.

(g) Dental Hygiene.

(h) Pharmacy: B.S., Pharm.D.

(i) Optometry: O.D.

(j) Physician Assistant, Certified.

(k) Advanced Practice Nurses: Nurse Practitioner, Certified Nurse Midwife, Registered Nurse Anesthetist (Priority consideration will be given to Registered Nurse Anesthetists.).

(l) Podiatry: D.P.M.

(m) Physical Rehabilitation Services: Physical Therapy, Occupational Therapy, Speech-Language Pathology, and Audiology: M.S. and D.P.T.

(n) Diagnostic Radiology Technology: Certificate, Associate, and B.S.

(o) Medical Technology: Associate, and B.S.

(p) Public Health Nutritionist/ Registered Dietitian.

(q) Engineering (Environmental): B.S. (Engineers must provide environmental engineering services to be eligible.).

(r) Environmental Health (Sanitarian): B.S.

(s) Health Records: R.H.I.T. and R.H.I.A.

(t) Respiratory Therapy.

(u) Ultrasonography.

2. Cost Sharing or Matching

Not applicable.

3. Other Requirements

Interested individuals are reminded that the list of eligible health and allied health professions is effective for applicants for FY 2010. These priorities will remain in effect until superseded.

IV. Application and Submission Information

1. Address To Request Application Package

Application materials may be obtained online at *http://www.loanrepayment.ihs.gov/* or by calling or writing to the address below. In addition, completed applications should be returned to: IHS Loan Repayment Program, 801 Thompson Avenue, Suite 120, Rockville, Maryland 20852, Telephone: 301/443–3396 [between 8 a.m. and 5 p.m. (EST) Monday through Friday, except Federal holidays].

2. Content and Form of Application Submission

Applications must be submitted on the form entitled ''Application for the Indian Health Service Loan Repayment Program,'' identified with the Office of Management and Budget approval number of OMB #0917–0014, Expiration Date 02/29/2012.

3. Submission Dates and Times

Completed applications may be submitted to the IHS Loan Repayment Program, 801 Thompson Avenue, Suite 120, Rockville, Maryland 20852. Applications for the FY 2010 LRP will be accepted and evaluated monthly beginning January 15, 2010, and will continue to be accepted each month thereafter until all funds are exhausted for FY 2010. Subsequent monthly deadline dates are scheduled for Friday of the second full week of each month.

Applications shall be considered as meeting the deadline if they are either:

(a) Received on or before the deadline date; or

(b) Sent on or before the deadline date. (Applicants should request a legibly dated U.S. Postal Service postmark or obtain a legibly dated receipt from a commercial carrier or U.S. Postal Service. Private metered postmarks are not acceptable as proof of timely mailing.).

Applications received after the monthly closing date will be held for consideration in the next monthly funding cycle. Applicants who do not receive funding by September 30, 2010, will be notified in writing.

4. Intergovernmental Review

This program is not subject to review under Executive Order 12372.

5. Funding Restrictions

Not applicable.

6. Other Submission Requirements

All applicants must sign and submit to the Secretary, a written contract agreeing to accept repayment of educational loans and to serve for the applicable period of obligated service in a priority site as determined by the Secretary, and submit a signed affidavit attesting to the fact that they have been informed of the relative merits of the U.S. PHS Commissioned Corps and the Civil Service as employment options.

V. Application Review Information

1. Criteria

The IHS has identified the positions in each Indian health program for which there is a need or vacancy and ranked those positions in order of priority by

developing discipline-specific prioritized lists of sites. Ranking criteria for these sites may include the following:

(a) Historically critical shortages caused by frequent staff turnover;

(b) Current unmatched vacancies in a health profession discipline;

(c) Projected vacancies in a health profession discipline;

(d) Ensuring that the staffing needs of Indian health programs administered by an Indian Tribe or Tribal health organization receive consideration on an equal basis with programs that are administered directly by the Service; and

(e) Giving priority to vacancies in Indian health programs that have a need for health professionals to provide health care services as a result of individuals having breached LRP contracts entered into under this section.

Consistent with this priority ranking, in determining applications to be approved and contracts to accept, the IHS will give priority to applications made by American Indians and Alaska Natives and to individuals recruited through the efforts of Indian Tribes or Tribal or Indian organizations.

2. Review and Selection Process

Loan repayment awards will be made only to those individuals serving at facilities which have a site score of 70 or above during the first and second quarters and the first month of the third quarter of FY 2010, if funding is available.

One or all of the following factors may be applicable to an applicant, and the applicant who has the most of these factors, all other criteria being equal, will be selected.

(a) An applicant's length of current employment in the IHS, Tribal, or urban program.

(b) Availability for service earlier than other applicants (first come, first served).

(c) Date the individual's application was received.

3. Anticipated Announcement and Award Dates

Not applicable.

VI. Award Administration Information

1. Award Notices

Notice of awards will be mailed on the last working day of each month. Once the applicant is approved for participation in the LRP, the applicant will receive confirmation of his/her loan repayment award and the duty site at which he/she will serve his/her loan repayment obligation.

2. Administrative and National Policy Requirements

Applicants may sign contractual agreements with the Secretary for two years. The IHS may repay all, or a portion of the applicant's health profession educational loans (undergraduate and graduate) for tuition expenses and reasonable educational and living expenses in amounts up to $20,000 per year for each year of contracted service. Payments will be made annually to the participant for the purpose of repaying his/her outstanding health profession educational loans. Payment of health profession education loans will be made to the participant within 120 days, from the date the contract becomes effective. The effective date of the contract is calculated from the date it is signed by the Secretary or his/her delegate, or the IHS, Tribal, urban, or ABuy-Indian@ health center entry-on-duty date, whichever is more recent.

In addition to the loan payment, participants are provided tax assistance payments in an amount not less than 20 percent and not more than 39 percent of the participant's total amount of loan repayments made for the taxable year involved. The loan repayments and the tax assistance payments are taxable income and will be reported to the Internal Revenue Service (IRS). The tax assistance payment will be paid to the IRS directly on the participant's behalf. LRP award recipients should be aware that the IRS may place them in a higher tax bracket than they would otherwise have been prior to their award.

3. Contract Extensions

Any individual who enters this program and satisfactorily completes his or her obligated period of service may apply to extend his/her contract on a year-by-year basis, as determined by the IHS. Participants extending their contracts may receive up to the maximum amount of $20,000 per year plus an additional 20 percent for Federal withholding.

VII. Agency Contacts

Please address inquiries to Ms. Jacqueline K. Santiago, Chief, IHS Loan Repayment Program, 801 Thompson Avenue, Suite 120, Rockville, Maryland 20852, Telephone: 301/443–3396 [between 8 a.m. and 5 p.m. (EST) Monday through Friday, except Federal holidays].

VIII. Other Information

IHS Area Offices and Service Units that are financially able are authorized to provide additional funding to make awards to applicants in the LRP, but not to exceed $35,000 a year plus tax assistance. All additional funding must be made in accordance with the priority system outlined below. Health professions given priority for selection above the $20,000 threshold are those identified as meeting the criteria in 25 U.S.C. 1616a(g)(2)(A) which provides that the Secretary shall consider the extent to which each such determination:

(i) Affects the ability of the Secretary to maximize the number of contracts that can be provided under the LRP from the amounts appropriated for such contracts;

(ii) Provides an incentive to serve in Indian health programs with the greatest shortages of health professionals; and

(iii) Provides an incentive with respect to the health professional involved remaining in an Indian health program with such a health professional shortage, and continuing to provide primary health services, after the completion of the period of obligated service under the LRP.

Contracts may be awarded to those who are available for service no later than September 30, 2010, and must be in compliance with any limits in the appropriation and Section 108 of the IHCIA not to exceed the amount authorized in the IHS appropriation (up to $32,000,000 for FY 2010). In order to ensure compliance with the statutes, Area Offices or Service Units providing additional funding under this section are responsible for notifying the LRP of such payments before funding is offered to the LRP participant.

Should an IHS Area Office contribute to the LRP, those funds will be used for only those sites located in that Area. Those sites will retain their relative ranking from the national site-ranking list. For example, the Albuquerque Area Office identifies supplemental monies for dentists. Only the dental positions within the Albuquerque Area will be funded with the supplemental monies consistent with the national ranking and site index within that Area.

Should an IHS Service Unit contribute to the LRP, those funds will be used for only those sites located in that Service Unit. Those sites will retain their relative ranking from the national site-ranking list. For example, Chinle Service Unit identifies supplemental monies for pharmacists. The Chinle Service Unit consists of two facilities, namely the Chinle Comprehensive Health Care Facility and the Tsaile PHS Indian Health Center. The national ranking will be used for the Chinle Comprehensive Health Care Facility (Score = 44) and the Tsaile PHS Indian Health Center (Score = 46). With a score

of 46, the Tsaile PHS Indian Health Center would receive priority over the Chinle Comprehensive Health Care Facility.

Dated: November 6, 2009.

Yvette Roubideaux,

Director, Indian Health Service.

[FR Doc. E9–27721 Filed 11–17–09; 8:45 am]

BILLING CODE 4165–16–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Advisory Committee on Heritable Disorders in Newborns and Children; Notice of Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), notice is hereby given of the following meeting:

Name: Secretary's Advisory Committee on Heritable Disorders in Newborns and Children.

Dates and Times: January 21, 2010, 8:30 a.m. to 5 p.m.

January 22, 2010, 8:30 a.m. to 3 p.m.

Place: Washington Marriott at Metro Center, 775 12th Street, NW., Washington, DC 20005.

Status: The meeting will be open to the public with attendance limited to space availability. Participants are asked to register for the meeting by going to the registration Web site at *http://events.SignUp4.com/ACHDNC0110*. The registration deadline is Tuesday, January 19, 2010. Individuals who need special assistance, such as sign language interpretation or other reasonable accommodations should indicate their needs on the registration Web site. The deadline for special accommodation requests is Friday, January 15, 2010. If there are technical problems gaining access to the Web site, please contact Feven Habteab, Meetings Coordinator at *conferences@altarum.org*.

Purpose: The Secretary's Advisory Committee on Heritable Disorders in Newborns and Children (Advisory Committee) was established to advise and guide the Secretary regarding the most appropriate application of universal newborn screening tests, technologies, policies, guidelines and programs for effectively reducing morbidity and mortality in newborns and children having or at risk for heritable disorders. The Advisory Committee also provides advice and recommendations concerning the grants and projects authorized under the Public Health Service Act, 42 U.S.C. 300b-10, (Heritable Disorders Program) as amended in the Newborn Screening Saves Lives Act of 2008.

Agenda: The meeting will include: (1) A presentation of the External Review Workgroup's preliminary report on the nomination of Alpha-Thalassemia (Hemoglobin H) disease to the Advisory Committee's uniform newborn screening panel; (2) a discussion of the Advisory Committee's final draft of the report on the use and storage of newborn screening Residual Blood Spots; (3) an update on the development of the Newborn Screening Information Clearinghouse; and (4) presentations on the continued work and reports of the Advisory Committee's subcommittees on laboratory standards and procedures, follow-up and treatment, and education and training.

Proposed Agenda items are subject to change as priorities dictate. You can locate the Agenda, Committee Roster and Charter, presentations, and meeting materials at the home page of the Advisory Committee's Web site at *http://www.hrsa.gov/heritabledisorderscommittee/*.

Web cast: The meeting will be Web cast. Information on how to access the Web cast will be available one week prior to the meeting, January 14, 2010, by clicking on the meeting date link at *http://events.SignUp4.com/ACHDNC0110*.

Public Comments: Members of the public can present oral comments during the public comment periods of the meeting, which are scheduled for both days of the meeting. Those individuals who want to make a comment are requested to register online by Tuesday, January 19, 2010 at *http://events.SignUp4.com/ACHDNC0110*. Requests will contain the name, address, telephone number, and any professional or business affiliation of the person desiring to make an oral presentation. Groups having similar interests are requested to combine their comments and present them through a single representative. The list of public comment participants will be posted on the Web site. Written comments should be e-mailed via e-mail no later than Tuesday, January 19, 2010 for consideration. Comments should be submitted to Feven Habteab, Meetings Coordinator, Conference and Meetings Management, Altarum Institute, 1200 18th Street, NW., Suite 700, Washington, DC 20036, telephone: 202 828–5100; fax: 202 785–3083, or e-mail: *conferences@altarum.org*.

Contact Person: Anyone interested in obtaining other relevant information should write or contact Alaina M. Harris, Maternal and Child Health Bureau, Health Resources and Services Administration, Room 18A–19, Parklawn Building, 5600 Fishers Lane, Rockville, Maryland 20857, Telephone (301) 443–0721, aharris@hrsa.gov. More information on the Advisory Committee is available at *http://mchb.hrsa.gov/heritabledisorderscommittee*.

Dated: November 12, 2009.

Alexandra Huttinger,

Director, Division of Policy Review and Coordination.

[FR Doc. E9–27660 Filed 11–17–09; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Biomedical Imaging and Bioengineering; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the National Advisory Council for Biomedical Imaging and Bioengineering.

The meeting will be open to the public as indicated below, with attendance 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 Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and/or contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications and/or contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Advisory Council for Biomedical Imaging and Bioengineering; NACBIB, January, 2010.

Date: December 11, 2009.

Open: 9 a.m. to 1 p.m.

Agenda: Report from the Institute Director, other Institute Staff and presentations of working group reports.

Place: Bethesda Marriott Suites, 6711 Democracy Boulevard, Independence Room (2nd Level), Bethesda, MD 20817.

Closed: 1 p.m. to 3:30 p.m.

Agenda: To review and evaluate grant applications and/or proposals.

Place: Bethesda Marriott Suites, 6711 Democracy Boulevard, Independence Room (2nd Level), Bethesda, MD 20817.

Contact Person: Anthony Demsey, PhD, Director, National Institute of Biomedical Imaging and Bioengineering, 6701 Democracy Boulevard, Room 241, Bethesda, MD 20892.

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

Information is also available on the Institute's/Center's home page: *http://www.nibib1.nih.gov/about/NACBIB/NACBIB.htm*, where an agenda and any

additional information for the meeting will be posted when available.

Dated: November 12, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–27713 Filed 11–17–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Dental & Craniofacial Research; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Dental and Craniofacial Research Special Emphasis Panel; Review PAR–07–332 T32.

Date: January 13, 2010.

Time: 12 p.m. to 1 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Mary Kelly, Scientific Review Officer, Scientific Review Branch, National Inst of Dental & Craniofacial Research, NIH 6701 Democracy Blvd., room 672, MSC 4878, Bethesda, MD 20892–4878, 301–594–4809, *mary_kelly@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.121, Oral Diseases and Disorders Research, National Institutes of Health, HHS)

Dated: November 12, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–27712 Filed 11–17–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Eunice Kennedy Shriver National Institute of Child Health & Human Development; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Child Health and Human Development Special Emphasis Panel, Functions and Development of the Mirror Neuron System.

Date: December 8, 2009.

Time: 1 p.m. to 4:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6100 Executive Blvd., Room 5B01, Bethesda, MD (Telephone Conference Call).

Contact Person: Marita R. Hopmann, PhD, Scientific Review Officer, Division of Scientific Review Eunice Kennedy Shriver National Institute of Child Health and Human Development, NIH, 6100 Building, Room 5B01, Bethesda, MD 20892, (301) 435–6911, *hopmannm@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: November 12, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–27711 Filed 11–17–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Center for Research Resources; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Center for Research Resources Special Emphasis Panel; ARRA STRB DEC. MTG.–1.

Date: December 7–11, 2009.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, One Democracy Plaza, 6701 Democracy Boulevard, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Barbara J. Nelson, PhD, Scientific Review Officer, Office of Review, National Center for Research Resources, 6701 Democracy Blvd. Room 1080, 1 Democracy Plaza, Bethesda, MD 20892, 301–435–0806, *nelsonbj@mail.nih.gov.*

Name of Committee: National Center for Research Resources Special Emphasis Panel; ARRA STRB DEC. MTG.–2.

Date: December 7–11, 2009.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Bethesda, MD (Telephone Conference Call).

Contact Person: Barbara J. Nelson, PhD, Scientific Review Officer, Office of Review, National Center for Research Resources, 6701 Democracy Blvd., Room 1080, 1 Democracy Plaza, Bethesda, MD 20892, 301–435–0806, *nelsonbj@mail.nih.gov.*

Name of Committee: National Center for Research Resources Special Emphasis Panel; ARRA STRB DEC. MTG.–3.

Date: December 7–11, 2009.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Bethesda, MD (Telephone Conference Call).

Contact Person: Carol Lambert, PhD, Scientific Review Officer, Office of Review, National Center for Research Resources, 6701 Democracy Blvd., 1 Democracy Plaza, Room 1076, Bethesda, MD 20892, 301–435–0814, *lambert@mail.nih.gov.*

Name of Committee: National Center for Research Resources Special Emphasis Panel; ARRA STRB DEC. MTG.–4.

Date: December 7–11, 2009.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Bethesda, MD (Telephone Conference Call).

Contact Person: Carol Lambert, PhD, Scientific Review Officer, Office of Review, National Center for Research Resources, 6701 Democracy Blvd., 1 Democracy Plaza, Room

1076, Bethesda, MD 20892, 301–435–0814, *lambert@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research; 93.371, Biomedical Technology; 93.389, Research Infrastructure, 93.306, 93.333; 93.702, ARRA Related Construction Awards., National Institutes of Health, HHS)

Dated: November 12, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–27710 Filed 11–17–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; DEM Training Grant Conflict Review.

Date: December 16, 2009.

Time: 1 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Robert Wellner, PhD, Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 757, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–4721, *rw175w@nih.gov.*

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; R24 Seed Application Review.

Date: December 17, 2009.

Time: 1 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Robert Wellner, PhD, Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 757, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–4721, *rw175w@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: November 12, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–27709 Filed 11–17–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; CRRT Effects on Pharmacokinetics in Critically Ill Patients.

Date: December 16, 2009.

Time: 3 p.m. to 3:45 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Lakshmanan Sankaran, PhD, Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 755, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–7799, *ls38z@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: November 12, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–27708 Filed 11–17–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Center for Complementary & Alternative Medicine; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Center for Complementary and Alternative Medicine Special Emphasis Panel; Omics and Variable Responses to CAM (R21, R01).

Date: December 15, 2009.

Time: 12 p.m. to 2 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Martina Schmidt, PhD, Scientific Review Officer, Office of Scientific Review, National Center for Complementary & Alternative Medicine, NIH, 6707 Democracy Blvd., Suite 401, Bethesda, MD 20892, 301–594–3456, *schmidma@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.213, Research and Training in Complementary and Alternative Medicine, National Institutes of Health, HHS)

Dated: November 9, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–27707 Filed 11–17–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Neurological Disorders and Stroke; Notice of Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the Muscular Dystrophy Coordinating Committee (MDCC).

The meeting will be open to the public, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should inform the Contact Person listed below in advance of the meeting.

Name of Committee: Muscular Dystrophy Coordinating Committee.

Date: November 30, 2009.

Time: 8 a.m. to 3:30 p.m.

Agenda: The 2009 meeting of the MDCC will focus on Federal funding for muscular dystrophy, activities of the Paul Wellstone Cooperative Muscular Dystrophy Research Centers, plans to review the Action Plan for the Muscular Dystrophies, and activities of MDCC member agencies and organizations.

An agenda will be posted prior to the meeting on the MDCC Web site: *http://www.ninds.nih.gov/find_people/groups/mdcc/index.htm.*

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, Bethesda, MD 20814.

Contact Person: John D. Porter, PhD, Executive Secretary, Muscular Dystrophy Coordinating Committee, National Institute of Neurological Disorders and Stroke, NIH, 6001 Executive Boulevard, NSC 2172, Bethesda, MD 20892, (301) 496–5739, *porterjo@ninds.nih.gov*.

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

(Catalogue of Federal Domestic Assistance Program Nos. 93.853, Clinical Research Related to Neurological Disorders; 93.854, Biological Basis Research in the Neurosciences, National Institutes of Health, HHS)

Dated: November 13, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–27706 Filed 11–17–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict Applications; CMBK and UKGD.

Date: December 2, 2009.

Time: 2 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Najma Begum, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2186, MSC 7818, Bethesda, MD 20892, 301–435–1243, *begumn@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; RFA–OD–09–007: ARRA AREA Grants Panel 09.

Date: December 7, 2009.

Time: 8 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: Palomar Hotel, 2121 P Street, NW., Washington, DC 20037.

Contact Person: Carole L. Jelsema, PhD, Chief and Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4176, MSC 7850, Bethesda, MD 20892, (301) 435–1248, *jelsemac@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Emergency Medical Services for Children.

Date: December 10, 2009.

Time: 1 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Jacinta Bronte-Tinkew, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3164, MSC 7770, Bethesda, MD 20892, (301) 435–1503, *brontetinkewjm@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: November 12, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–27705 Filed 11–17–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Board of Scientific Counselors, National Institute for Occupational Safety and Health (BSC, NIOSH)

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 following meeting for the aforementioned committee:

Time and Date: 8:30 a.m.–3:45 p.m., December 2, 2009.

Place: Holiday Inn Capitol, 550 C Street, SW., Washington, DC 20024.

Status: Open to the public, limited only by the space available. The meeting room accommodates approximately 50 people. Teleconference available toll-free; please dial (866) 423–5960, Participant Pass Code 2988491.

Purpose: The Secretary, the Assistant Secretary for Health, and by delegation the Director, Centers for Disease Control and Prevention, are authorized under Sections 301 and 308 of the Public Health Service Act to conduct directly or by grants or contracts, research, experiments, and demonstrations relating to occupational safety and health and to mine health. The Board of Scientific Counselors shall provide guidance to the Director, National Institute for Occupational Safety and Health on research and prevention programs. Specifically, the Board shall provide guidance on the Institute's research activities related to developing and evaluating hypotheses, systematically documenting findings and disseminating results. The Board shall evaluate the degree to which the activities of the National Institute for Occupational Safety and Health: (1) Conform to appropriate scientific standards, (2) address current, relevant needs, and (3) produce intended results.

Matters To Be Discussed: Agenda items include NIOSH Implementation of National Academies Program Recommendations for Traumatic Injuries, Construction Research, and Health Hazard Evaluations; Future Directions for Evaluation of NIOSH Research Programs; Future Meetings and Closing Remarks.

Agenda items are subject to change as priorities dictate.

Contact Person for More Information: Roger Rosa, Executive Secretary, BSC, NIOSH, CDC, 395 E Street, SW., Suite 9200,

Patriots Plaza Building, Washington, DC 20201, telephone (202) 245–0655, fax (202) 245–0664.

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 the CDC and the Agency for Toxic Substances and Disease Registry.

Dated: November 6, 2009.

Elaine L. Baker,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. E9–27623 Filed 11–17–09; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2009–N–0143]

Risk Evaluation and Mitigation Strategies for Certain Opioid Drugs; Notice of Public Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of public meeting.

SUMMARY: The Food and Drug Administration (FDA) is announcing a meeting with sponsors of certain opioid drug products regarding the development of Risk Evaluation and Mitigation Strategies (REMS) for these products. Other members of the public are invited to attend and observe. The REMS is intended to ensure that the benefits of these drugs continue to outweigh certain risks. FDA has encouraged affected sponsors to work collectively to develop a proposed REMS. The purpose of this meeting is to hear from sponsors about the status of the development of a proposed REMS and their views regarding the specific features of the REMS for these products. To promote transparency of the REMS development process, other members of the public are invited to attend the meeting as observers. Additional opportunities for public input will be provided before FDA finalizes the elements of the REMS.

DATES: The meeting will be held on December 4, 2009, from 9 a.m. to 1 p.m. To ensure consideration at the meeting, submit comments by November 27, 2009. Register to attend the meeting by November 27, 2009. See section III of this document for information on how to register for the meeting.

ADDRESSES: The public meeting will be held at the Holiday Inn Washington-College Park, 10000 Baltimore Ave., College Park, MD 20740.

Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061. Rockville, MD 20852. Submit electronic comments to *http://www.regulations.gov*. All comments should be identified with the docket number found in brackets in the heading of this document.

A live webcast of this meeting will be viewable at *http://ConnectLive.com/events/fda120409* on the day of the meeting. A video record of the meeting will be available at the same Web address for 1 year.

FOR FURTHER INFORMATION CONTACT: Theresa (Terry) Martin, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, rm. 6196, Silver Spring, MD 20993, 301–796–3448, FAX: 301–847–8753, or

Patrick Frey, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, rm. 6350, Silver Spring, MD 20993, 301–796–3844, FAX: 301–847–8443, e-mail: *OpioidREMS@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

On February 6, 2009, the Food and Drug Administration (FDA) sent letters to manufacturers of certain opioid drug products, indicating that these drugs will be required to have a Risk Evaluation and Mitigation Strategy (REMS) to ensure that the benefits of the drugs continue to outweigh the risks. A table of opioid products that will be required to have REMS is available on the agency's Web site at *http://www.fda.gov/Drugs/DrugSafety/InformationbyDrugClass/ucm163654.htm*. Copies of this document may be requested from Theresa (Terry) Martin (see **FOR FURTHER INFORMATION CONTACT**). The affected opioid drugs include brand name and generic products and are formulated with the active ingredients fentanyl, hydromorphone, methadone, morphine, oxycodone, and oxymorphone. The REMS would be intended to ensure that the benefits of these drugs continue to outweigh the risks associated with: (1) Use of high doses of long-acting opioids and extended-release opioid products in non-opioid-tolerant and inappropriately selected individuals; (2) abuse; (3) misuse; and (4) overdose, both accidental and intentional. REMS for these opioids would likely include elements to assure safe use to ensure that prescribers, dispensers, and patients are aware of, and understand, the risks and how these products should be used.

On March 3, 2009, FDA held a meeting with affected sponsors to discuss how the REMS could be designed to manage the risks while also minimizing burdens to the health care system. FDA presented a high-level overview, regulatory background, and the proposed elements of the REMS followed by questions and comments from the sponsors. At this meeting, FDA encouraged sponsors to work collectively to develop a proposed REMS. The FDA presentations and minutes from this meeting are available on the agency's Web site at *http://www.fda.gov/Drugs/DrugSafety/InformationbyDrugClass/ucm163660.htm*. In May, FDA held meetings with other affected stakeholders including health care professionals, patient advocates, and pharmacy groups. FDA then held a public meeting on May 27 and 28, 2009, where FDA heard from members of the public on what the REMS should look like for these products, how to minimize the burden on the health care community and patients, and how FDA should evaluate the REMS to determine whether it achieves its objectives. Nearly 100 members of the public spoke at the meeting, and many others have submitted written comments to the docket (Docket No. FDA–2009–N–0143). For additional background information about this issue see 74 FR 17967, April 20, 2009.

II. Purpose of Meeting

The purpose of this meeting is for FDA to hear from sponsors of long-acting opioids and extended-release opioid products on the development of the REMS for these products and their views about the specific features of the REMS. Other members of the public are invited to attend the meeting as observers. Because this is a meeting between FDA staff and the sponsors, only FDA staff will be permitted to question the sponsors at the meeting. However, interested persons who attend the public meeting will be given an opportunity to provide suggestions for questions for FDA staff to ask the sponsors, at FDA's sole discretion. Index cards will be provided for this purpose. There will be additional opportunities for public input before FDA finalizes the elements of the REMS.

III. Attendance and Registration

Registration: Register by e-mail to *OpioidREMS@fda.hhs.gov*. Provide complete contact information for each attendee, including name, title, affiliation, address, e-mail, and phone

number. Registration requests should be received by November 27, 2009. Registration is free and will be on a first-come, first-served basis. Early registration is recommended because seating is limited. FDA may limit the number of participants from each organization based on space limitations. Registrants will receive confirmation once they have been accepted. Onsite registration on the day of the meeting will be based on space availability on the day of the event starting at 8 a.m.

If you need special accommodations because of disability, please contact Theresa (Terry) Martin (see **FOR FURTHER INFORMATION CONTACT**) at least 7 days before the meeting.

In addition, a live webcast of this meeting will be viewable at *http://ConnectLive.com/events/fda120409* on the day of the meeting. A video record of the meeting will be available at the same Web address for 1 year.

IV. Comments

In addition, any person may submit written or electronic comments to the Division of Dockets Management (see **DATES** and **ADDRESSES**). Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

V. Transcripts

Transcripts of the meeting will be available for review at the Division of Dockets Management and on the Internet at *http://www.regulations.gov* approximately 30 days after the meeting. A transcript will also be made available in either hard copy or on CD–ROM, upon submission of a Freedom of Information request. Written requests are to be sent to Division of Freedom of Information (HFI–35), Office of Management Programs, Food and Drug Administration, 5600 Fishers Lane, rm. 6–30, Rockville, MD 20857.

Dated: November 12, 2009.

David Horowitz,

Assistant Commissioner for Policy.

[FR Doc. E9–27718 Filed 11–17–09; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Cancer Institute Initial Review Group; Subcommittee A—Cancer Centers.

Date: December 10–11, 2009.

Time: 8 a.m. to 12:10 p.m.

Agenda: To review and evaluate grant applications.

Place: Residence Inn Bethesda, 7335 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Gail J Bryant, MD, Scientific Review Officer, Resources and Training Review Branch, Division of Extramural Activities, National Cancer Institute, 6116 Executive Blvd., Room 8107, MSC 8328, Bethesda, MD 20892–8328, (301) 402–0801, *gb30t@nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: November 12, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–27715 Filed 11–17–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Addictions, Drugs, and Violence.

Date: November 24, 2009.

Time: 3 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Michael Micklin, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3136, MSC 7759, Bethesda, MD 20892, (301) 435–1258, *micklinm@csr.nih.gov*.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: November 12, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–27704 Filed 11–17–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which

would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel; Ancillary Studies in Clinical Trials.

Date: December 4, 2009.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Ritz Carlton Hotel, 1150 22nd Street, NW., Washington, DC 20037.

Contact Person: Chang Sook Kim, PhD, Scientific Review Officer, Review Branch, DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7190, Bethesda, MD 20892, 301–435–0287, *carolko@mail.nih.gov*.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel; Program Project in Respiratory Muscle Failure.

Date: December 10, 2009.

Time: 10 a.m. to 2 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: William J Johnson, PhD, Scientific Review Officer, Review Branch/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7178, Bethesda, MD 20892–7924, 301–435–0725, *johnsonwj@nhlbi.nih.gov*.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel; NHLBI Programs of Excellence in Nanotechology.

Date: December 11, 2009.

Time: 8:30 a.m. to 3 p.m.

Agenda: To review and evaluate contract proposals.

Place: Ritz Carlton Hotel, 1150 22nd Street, NW., Washington, DC 20037.

Contact Person: Youngsuk Oh, PhD, Scientific Review Officer, Review Branch/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7182, Bethesda, MD 20892–7924, 301–435–0277, *yoh@mail.nih.gov*.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel; Translational Programs in Lung Diseases.

Date: December 17, 2009.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Doubletree Hotel Bethesda (Formerly Holiday Inn Select), 8120 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Shelley S Sehnert, PhD, Scientific Review Officer, Review Branch/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7206, Bethesda, MD 20892–7924, 301–435–0303, *ssehnert@nhlbi.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: November 12, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–27703 Filed 11–17–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; ARRA AREA Special Emphasis Panel 08.

Date: December 4, 2009.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Ritz Carlton Hotel, 1150 22nd Street, NW., Washington, DC 20037.

Contact Person: Edwin C. Clayton, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5095C, MSC 7844, Bethesda, MD 20892, (301) 402–1304, *claytone@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; RFA–OD–09–007: ARRA AREA Grants Panel 05.

Date: December 7, 2009.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: The Fairmont Washington, DC, 2401 M Street, NW., Washington, DC 20037.

Contact Person: Dana Jeffrey Plude, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3176, MSC 7848, Bethesda, MD 20892, 301–435–2309, *pluded@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; RFA–OD–09–007: ARRA AREA Grants Panel 11.

Date: December 7, 2009.

Time: 8:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Jean D. Sipe, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4106, MSC 7814, Bethesda, MD 20892, 301/435–1743, *sipej@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: November 12, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–27696 Filed 11–17–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2009–N–0664]

Anti-Infective Drugs Advisory Committee; Amendment of Notice

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an amendment to the notice of meeting of the Anti-Infective Drugs Advisory Committee. This meeting was announced in the **Federal Register** of October 26, 2009 (74 FR 55057). The amendment is being made to reflect a change in the *Location* portion of the document. There are no other changes.

FOR FURTHER INFORMATION CONTACT: Minh Doan, Center for Drug Evaluation and Research (HFD–21), Food and Drug Administration, 5600 Fishers Lane, (for express delivery, 5630 Fishers Lane, rm. 1093), Rockville, MD 20857, 301–827–7001, FAX: 301–827–6776, e-mail: *minh.doan@fda.hhs.gov*, or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington DC area), code 3014512530. Please call the Information Line for up-to-date information on this meeting.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of October 26, 2009, FDA announced that a meeting of the Anti-Infective Drugs Advisory Committee would be held on December 9, 2009. On page 55057, in the second column, the *Location* portion of the document is changed to read as follows:

Location: Hilton Washington DC North/Gaithersburg, The Ballrooms, 620 Perry Pkwy., Gaithersburg, MD. The hotel telephone number is 301–977–8900.

This notice is issued under the Federal Advisory Committee Act (5 U.S.C. app. 2) and 21 CFR part 14, relating to the advisory committees.

Dated: November 12, 2009.

David Horowitz,

Assistant Commissioner for Policy.

[FR Doc. E9–27693 Filed 11–17–09; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Office of the Director, National Institutes of Health; Notice of Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the Advisory Committee to the Director, NIH.

The meeting will be open to the public, with attendance 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 Contact Person listed below in advance of the meeting.

Name of Committee: Advisory Committee to the Director, NIH.

Date: December 4, 2009.

Time: 8:30 a.m. to 5 p.m.

Agenda: Among the topics proposed for discussion are: (1) NIH Director's Report; (2) NIH Director's Council of Public Representatives Liaison Report; and (3) other business of the Committee.

Place: National Institutes of Health, Building 31, Conference Room 6, 9000 Rockville Pike, Bethesda, MD 20852.

Contact Person: Penny W. Burgoon, PhD, Senior Assistant to the Deputy Director, Office of the Director, National Institutes of Health, 1 Center Drive, Building 1, Room 109, Bethesda, MD 20892, 301–451–5870, *burgoonp@od.nih.gov*.

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page: *http://www.nih.gov/aboutldirector/acd.htm,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.14, Intramural Research Training Award; 93.22, Clinical Research Loan Repayment Program for Individuals from Disadvantaged Backgrounds; 93.232, Loan Repayment Program for Research Generally; 93.39, Academic Research Enhancement Award; 93.936, NIH Acquired Immunodeficiency Syndrome Research Loan Repayment Program; 93.187, Undergraduate Scholarship Program for Individuals from Disadvantaged Backgrounds, National Institutes of Health, HHS)

Dated: November 5, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–27411 Filed 11–17–09; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2009–N–0667]
[FDA 225–09–0013]

Memorandum of Understanding Between the Food and Drug Administration and Waterfront Media

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is providing notice of a memorandum of understanding (MOU) between FDA and Waterfront Media. The purpose of the MOU is to extend the reach of FDA Consumer Health Information and to provide consumers with better information and timely content concerning public health and safety topics, including alerts of emerging safety issues and product recalls.

DATES: The agreement became effective October 14, 2009.

FOR FURTHER INFORMATION CONTACT: Jason Brodsky, Consumer Health Information Staff, Office of External Relations (HFI–40), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–6251, e-mail: *Jason.Brodsky@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION: In accordance with 21 CFR 20.108(c), which states that all written agreements and MOUs between FDA and others shall be published in the **Federal Register**, the agency is publishing notice of this MOU.

Dated: November 12, 2009.

David Horowitz,

Assistant Commissioner for Policy.

BILLING CODE 4160–01–S

MOU Number: 225-09-0013

MEMORANDUM OF UNDERSTANDING
between
THE FOOD AND DRUG ADMINISTRATION
and
WATERFRONT MEDIA

I. PURPOSE, GOALS AND DEFINITIONS

This Memorandum of Understanding ("MOU") establishes a cooperative public education program between two entities (individually a Party -- collectively the Parties): The Food and Drug Administration (FDA), Office of External Relations (OER), Consumer Health Information Staff and Waterfront Media Inc., the operator of the Everyday Health Network of health, diet and fitness websites ("Everyday Health").

The purpose of the cooperative program is to:

- extend the reach of FDA Consumer Health Information; and
- provide consumers with better information and timely content concerning public health and safety topics, including emerging safety issues and product recalls.

The "**Program**" means a public health education program intended to provide practical wellness and prevention tips and the latest safety information on websites, mobile websites and other electronic means of distribution (including electronic newsletters) but solely to the extent that the FDA Materials are agreed upon by the parties (as provided in Section IV) and delivered to the public under the brands of the FDA and Everyday Health (as provided in Section III, co-branding). The Program includes promotional modules and banners used by Everyday Health to drive traffic to the Program Pages.

"**Program Pages**" mean electronic newsletters and any web pages that contain FDA and Everyday Health co-branding in the header. For the avoidance of doubt, the parties state that the following are specifically excluded from the definition of Program Pages: any page on which the only FDA Materials are promotional modules that contain an FDA logo.

The "**Everyday Health Network**" means each and every website that is publicly designated by Everyday Health as a member of the Everyday Health network, a portfolio of health, wellness, diet, fitness and pregnancy websites targeted to consumers. For the purposes of this Agreement only, the sites listed in Exhibit A shall not be considered part of the Everyday Health Network.

"**FDA Materials**" mean the audio and video files, photos or other editorial materials provided by FDA for publication as part of the Program.

II. AUTHORITY

This MOU is authorized pursuant to section 903 of the Food, Drug and Cosmetic Act (21 USC 393(d)(2)).

III. BACKGROUND

The Parties have entered into this Agreement in mutual recognition of the need to empower consumers with health information they can apply in everyday life.

The FDA Web site located at the URL www.fda.gov currently receives approximately 6 million visitors per month, most of which are representatives of regulated industry. Within the agency's site, FDA

Consumer Health Information receives approximately 250,000 page views per month. Waterfront Media is the largest privately held online health company and operates The Everyday Health Network, which attracts, as of the Effective Date, over 20 million unique users per month across 24 sites, generates 300 million monthly page views and delivers more than 15 million electronic newsletters daily.

This MOU also meets the requirements set forth in FDA's policy statement on co-branding of FDA Consumer Health Information, which is available online at http://www.fda.gov/ForConsumers/ucm126390.htm.

FDA and Waterfront Media recognize that this agreement is not intended, and may not be relied on, to create any right or benefit, substantive or procedural, enforceable by law by any party against the United States or against Everyday Health.

IV. PROGRAM COMPONENTS AND ACTIVITIES

The components and activities of the Program are expected to increase FDA's capacity to disseminate time-sensitive public health information and to engage the public. The cooperative public education program will include the following components:

- An FDA/Everyday Health joint online resource on the EverydayHealth.com site which will feature FDA Consumer Health Information including but not limited to articles, videos, photo slideshows and other editorial material. Except as provided in Editorial Control Section below regarding Direct from the FDA Alert modules, the parties will mutually agree to the type and exact items of content made available through the Program Pages. As a general matter, it is the current expectation of the parties that the Program will feature a minimum of 50 articles of FDA content and provide users with access to the agency's catalog of Consumer Updates. Each Program Page will include a link to a tagline to be agreed upon by the parties, that describes the relationship between the FDA and Everyday Health. For example, and for illustration purposes only, "This special section is published by Everyday Health in coordination with the U.S. Food and Drug Administration as part of a public health education program. Unless otherwise indicated, the content is created by the FDA and selected for publication by the Everyday Health editorial team. The FDA content is not edited by Everyday Health and is under the sole editorial control of the FDA. Content labeled DIRECT FROM THE FDA is both created and selected by the FDA without modification by Everyday Health."

- An FDA/Everyday Health co-branded weekly newsletter which will point to the latest FDA Consumer Health Information on Program Pages. Everyday Health will manage the newsletter subscriber list, creation and delivery of the co-branded newsletter. Each issue of the newsletter will include a tagline to be agreed upon by the parties, that describes the relationship between the FDA and Everyday Health. For example, and for illustration purposes only, "This newsletter is published by Everyday Health in coordination with the U.S. Food and Drug Administration as part of a public health education program. Unless otherwise indicated, the content in this newsletter is created by the FDA and selected for publication by the Everyday Health editorial team. The FDA content is not edited by Everyday Health and is under the sole editorial control of the FDA. Content labeled DIRECT FROM THE FDA is both created and selected by the FDA without modification by Everyday Health."

- In addition, FDA and Everyday Health will work together to extend the reach of FDA Consumer Health Information and to engage the public within the Everyday Health online community. A process for implementing community activities is to be mutually developed and agreed to by both parties.

- Editorial Control. Standard Process. It is the intent of the Parties that the Program will operate as follows: (a) the FDA will provide the FDA Materials to Everyday Health in a format and schedule to be agreed upon by the parties; (b) Everyday Health may, at its discretion, publish or not publish the FDA Materials within the Program after consultation with the FDA as part of a periodic editorial meeting; and (c) when Everyday Health publishes the FDA Materials, it will do so without editing the FDA Materials and will display the FDA Materials in conformance with the co-branding requirements set forth in Section III. Special Process. In the event that Everyday Health elects not to publish certain FDA Materials that the FDA believes are Critical to disseminate to the public, Everyday Health will publish such FDA Materials in a standard size module on the Program landing page. This special process will occur no more than eight times per month; the FDA Materials will consist of teasers that link back to the FDA Website and will meet the technical specifications agreed upon by the parties (e.g., character limitations). "Critical" means issues related to major product recalls or withdrawals, safety issues, a public health emergency/crisis or a major new policy initiative or regulation affecting consumers.

- The parties will make good faith efforts to ensure that the Program is consumer friendly and designed to maximize search engine optimization. The design, look and feel of the Program Pages was developed by Everyday Health and agreed to by the FDA prior to publishing as provided in the Review bullet below.

- Promotion. Everyday Health will promote the Program Pages and newsletter registrations on the Everyday Health Network through the use of banners and modules (both alert and promotional).

- Review. The parties have created and completed a process whereby the FDA has reviewed and approved all Program components, activities and program publishing templates (including landing pages, article pages, newsletters and modules). For the avoidance of doubt, the parties state that such review has included approval of the program pages publishing template for compliance with Section 508 (see Section V (5) below). Everyday Health will publish the Program Pages using only the approved templates in conformance with the process described in the Editorial Control section above. In the event that FDA reviews any Program Page on a post-publication basis and determines that any of the FDA Materials need to corrected or removed, FDA can request changes as provided in Section V(7).

- Everyday Health E-mail Alerts are not part of the Program, but may link back to Program Pages. The parties acknowledge that, based upon the FDA Materials, Everyday Health may deliver email alerts that inform the public of significant public health issues involving food, drug and medical product safety (e.g., major product recalls and public health emergencies). These alerts will be branded with Everyday Health logos and it will be clear to users that any alert is being sent by Everyday Health without association with the FDA (see Section V(1) below). These email alerts may, however, link to Program Pages.

V. TERMS OF THE MOU

1. FDA Materials must be easily distinguishable from non-FDA content within the Program. FDA Materials within the Program should be clearly identified as such. Examples of clearly identifying FDA Materials would be placing this information in a box and/or using a distinct color to distinguish it from non-FDA content, and/or otherwise clearly distinguishing the non-FDA content via an adequate disclaimer statement.

2. FDA Materials that are selected entirely by the FDA and published in modules labeled Direct from the FDA will be distinguished further from the FDA Materials selected by Everyday Health.

3. Printed and online Program Pages (including newsletters) must be free of advertisements to avoid implying FDA's endorsement or support for a particular product, service or Web site. For the avoidance of doubt, the parties state that any page which is not a Program Page may contain advertisements.

4. This MOU does not grant exclusivity to either party. Neither party is restricted from participating in similar initiatives with other public or private agencies, organizations or individuals.

5. All activities within the scope of this Agreement must comply with Section 508 of the Rehabilitation Act (29 U.S.C. 794d), as amended by the Workforce Investment Act of 1998 (P.L. 105-220), August 7, 1998 (see HHS policy on Section 508 compliance at http://www.hhs.gov/od/508policy/index.html); and Office of Management and Budget (OMB) policies for protecting private information (see www.usa.gov/webcontent/reqs_bestpractices/laws_regs/privacy.shtml). The parties will cooperate in ensuring compliance with Section 508. All FDA Materials will be provided by the FDA in a manner that is Section 508 ready (e.g., video and audio files will be supplied with closed captions).

6. FDA and Everyday Health will cooperate in the maintenance of each party's trademarks and logos. Neither party will permit use of its logo for marketing purposes other than to promote the Program. The use of the other party's names or logos shall not imply any exclusive arrangement. Any use of the other party's logos must be approved, in advance, by the trademark owner. Use of FDA's logo must be approved in advance by the FDA's Consumer Health Information Staff.

7. Both parties agree that the FDA Materials shall be public domain material. FDA shall have full rights to reuse the FDA Materials for all FDA purposes, and the right to share with other collaborators or requestors. Any materials created by Everyday Health based on the FDA Materials will be owned exclusively by Everyday Health. Nothing in this Agreement will prohibit Everyday Health from writing about the FDA or its activities on any page that is not a Program Page and any such writing will not be subject to the approval or review of the FDA.

8. Everyday Health will maintain current FDA Materials within the Program Pages. FDA Materials must be removed from the Program Pages in the following circumstances: (1) within 3 years of the date of its first publication; (2) upon FDA's request in circumstances in which the information becomes outdated; or (3) as soon as commercially practicable after a written request from the FDA for any reason with the expectation that the requested material will be removed within 72 hours after receipt of a written request from FDA, regardless of reason. Everyday Health's failure to display current FDA Consumer Health Information may result in the termination of this Agreement. In addition, no more than once each quarter, Everyday Health will adhere to any written FDA request to revise FDA Materials published within the Program Pages to the extent that FDA believes such information is now incorrect, inaccurate or misleading. Everyday Health will use reasonable commercial efforts to comply with FDA requests for modifications within five business days.

9. Except for the limited permission to use content and logos discussed herein, this Agreement does not and is not intended to transfer to either party any rights in any technology or intellectual property.

V. LINKS

The FDA website will contain links that transport visitors to the Program landing page. It is the intent of the parties that the links from the co-branded newsletters and modules will link to Program Pages. At its discretion, Everyday Health may link directly to relevant information on the FDA website.

FDA will not provide Everyday Health access to any document or information to the extent that providing such access would place either party in breach of the Trade Secrets Act, codified at 18 U.S.C. sec. 1905; the Privacy Act, codified at 5 U.S.C. sec. 552a; the Food, Drug, and Cosmetic Act, codified at 21 U.S.C. sec. 301, et seq (particularly 21 U.S.C. sec. 331(j)); FDA regulations (21 Code of Federal Regulations (CFR)); or any other Federal law or regulation.

VI. LIAISON OFFICERS

Jason Brodsky
Director, Consumer Health Information Staff
Office of External Relations
U.S. Food and Drug Administration
5600 Fishers Lane, Room 15A-29
Rockville, Maryland 20857
PHONE: 301-827-6251
E-mail: Jason.Brodsky@fda.hhs.gov

Kathleen Healy
Vice President, Content Development
Waterfront Media
Suite 600
1250 Connecticut Avenue, NW
Washington, D.C. 20036
PHONE: 202-481-6749
E-mail: khealy@waterfrontmedia.com

Each Party shall appoint a representative who shall act as the liaisons between such party and the other party's representative. A party may update its representative upon written notice to the other party.

VII. LENGTH OF THE AGREEMENT AND ASSESSMENT MECHANISMS

This MOU will be effective for three years from the date of signature by the later Party to sign it. At the end of each year, and annually thereafter, as long as the Agreement remains in force, the Parties will evaluate the effectiveness of the Agreement in meeting their goals and may amend the Agreement, continue it as written, or dissolve the Agreement by mutual consent. Either party may terminate the MOU with no less than thirty (30) days notice. Upon termination of this MOU for any reason, Everyday Health will remove the Program Pages and all modules with FDA logos from the Site as soon practicable, but in no event later than thirty (30) from the date of any notice of termination. For the avoidance of doubt, the parties state that this paragraph is intended to address use of the FDA Materials on Program Pages and is not intended to alter Everyday Health's rights to use public domain FDA Materials on any website, mobile website or other medium except for Program Pages.

Waterfront Media will provide gratuitously, and with no expectation of reimbursement, statistical information concerning the reach of the cooperative educational program's components and activities to FDA. This information will include metrics on the number of unique visitors to the Program Pages, the

total number of Program Pages viewed and other metrics agreed upon by the parties. This information will be jointly reviewed. The purpose of reviewing this information will be to evaluate the effectiveness of the collaboration and to make any necessary adjustments in approach, which may include termination of the MOU.

VIII. NO COMMITMENT OF FUNDS

This MOU sets forth principles and guidelines by which the parties intend to engage in a cooperative public education program. Nothing in this MOU shall be construed to obligate either party to make payments to the other. Each party will be responsible for the costs of its performance hereunder.

IX. LIMITATIONS ON LIABILITY

IN NO EVENT WILL EITHER PARTY BE LIABLE TO THE OTHER UNDER ANY THEORY OF LIABILITY, HOWEVER ARISING, FOR ANY COSTS OF COVER OR FOR DIRECT, INDIRECT, SPECIAL, INCIDENTAL, OR CONSEQUENTIAL DAMAGES OF ANY KIND ARISING OUT OF THIS AGREEMENT. The provisions of this Section IX shall survive termination, cancellation or expiration of this MOU for any reason whatsoever.

X. SIGNATURES OF RESPONSIBLE PARTIES

By signing this agreement, the responsible parties agree to the terms and conditions of this MOU, and they further agree to adhere to FDA's policy statement on co-branding of FDA Consumer Health Information.

WATERFRONT MEDIA INC.

BY: _____ 10/14/09
Signature of authorized representative Date

BENJAMIN WOLIN
Co-Founder and CEO
Waterfront Media Inc.

UNITED STATES FOOD AND DRUG ADMINISTRATION

BY: _____ 9/22/9
Signature of authorized representative Date

JOSHUA M. SHARFSTEIN, M.D.
Principal Deputy Commissioner of Food and Drugs
Department of Health and Human Services

Exhibit A

Drugstore.com

[FR Doc. E9–27630 Filed 11–17–09; 8:45 am]
BILLING CODE 4160–01–C

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2009–N–0393]

Acrylamide in Food; Request for Comments and for Scientific Data and Information; Extension of Comment Period

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; request for comments and scientific data and information; extension of comment period.

SUMMARY: The Food and Drug Administration (FDA) is extending to January 25, 2010, the comment period for the notice entitled ''Acrylamide in Food; Request for Comments and for Scientific Data and Information,'' that appeared in the **Federal Register** of August 26, 2009 (74 FR 43134). In the notice, FDA requested comments and scientific data and information on acrylamide in food. The agency is taking this action in response to a request for an extension to allow interested persons additional time to submit comments.

DATES: Submit written or electronic comments by January 25, 2010.

ADDRESSES: Submit electronic comments and scientific data and information to *http://www.regulations.gov*. Submit written comments and scientific data and information to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Lauren Posnick Robin, Center for Food Safety and Applied Nutrition (HFS–317), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740, 301–436–1639.

SUPPLEMENTARY INFORMATION:

I. Background

In the **Federal Register** of August 26, 2009 (74 FR 43134), FDA published a notice with a 90-day comment period to request comments and scientific data and information on acrylamide in food. Comments on practices that manufacturers have used to reduce acrylamide in food and the reductions they have been able to achieve in acrylamide levels will assist in FDA's development of guidance for industry on reduction of acrylamide levels in food products, should FDA decide to issue guidance on this topic.

The agency has received a request for a 60-day extension of the comment period for this notice. FDA has considered the request and is extending the comment period for the notice entitled ''Acrylamide in Food; Request for Comments and for Scientific Data and Information,'' until January 25, 2010. The agency believes that this extension allows adequate time for interested persons to submit comments without significantly delaying action by the agency.

II. Request for Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) electronic or written comments on this document. Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Dated: November 10, 2009.

David Horowitz,

Assistant Commissioner for Policy.

[FR Doc. E9–27692 Filed 11–17–09; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Agency Information Collection Activities: Application for Allowance in Duties

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: 30-Day notice and request for comments; Revision of an existing information collection: 1651–0007.

SUMMARY: U.S. Customs and Border Protection (CBP) of the Department of Homeland Security has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act: Application for Allowance in Duties. This is a proposed extension and revision of an information collection that was previously approved. CBP is proposing that this information collection be extended with no change to the burden hours. This document is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** (74 FR 45872) on September 4, 2009, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.10.

DATES: Written comments should be received on or before December 18, 2009.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the OMB Desk Officer for Customs and Border Protection, Department of Homeland Security, and sent via electronic mail to *oira_submission@omb.eop.gov* or faxed to (202) 395–5806.

SUPPLEMENTARY INFORMATION: U.S. Customs and Border Protection (CBP) encourages the general public and affected Federal agencies to submit written comments and suggestions on proposed and/or continuing information collection requests pursuant to the Paperwork Reduction Act (Pub. L. 104–13). Your comments should address one of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency/component, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies/components estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

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

(4) Minimize the burden of the collections of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological techniques or other forms of information.

Title: Application for Allowance in Duties.

OMB Number: 1651–0007.

Form Number: CBP Form 4315.

Abstract: Form 4315 is required by CBP in instances of claims of damaged or defective imported merchandise on which an allowance in duty is made in the liquidation of an entry. The information is used to substantiate an importer's claim for such duty allowances.

Current Actions: There are no changes to the information collection. This submission is being made to extend the expiration date.

Type of Review: Extension (without change).

Affected Public: Businesses.

Estimated Number of Respondents: 12,000.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Time per Respondent: 8 minutes.

Estimated Total Annual Burden Hours: 1,600.

If additional information is required contact: Tracey Denning, U.S. Customs and Border Protection, Office of Regulations and Rulings, 799 9th Street, NW., 7th Floor, Washington, DC 20229–1177, at 202–325–0265.

Dated: November 13, 2009.

Tracey Denning,

Agency Clearance Officer, Customs and Border Protection.

[FR Doc. E9–27652 Filed 11–17–09; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2009–0974]

Certificate of Alternative Compliance for the Offshore Supply Vessel TERREL TIDE

AGENCY: Coast Guard, DHS.

ACTION: Notice.

SUMMARY: The Coast Guard announces that a Certificate of Alternative Compliance was issued for the offshore supply vessel TERREL TIDE as required by 33 U.S.C. 1605(c) and 33 CFR 81.18.

DATES: The Certificate of Alternative Compliance was issued on October 15, 2009.

ADDRESSES: The docket for this notice is available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. You may also find this docket on the Internet by going to *http://www.regulations.gov,* inserting USCG–2009–0974 in the ''Keyword'' box, and then clicking ''Search.''

FOR FURTHER INFORMATION CONTACT: If you have questions on this notice, call CWO2 David Mauldin, District Eight, Prevention Branch, U.S. Coast Guard, telephone 504–671–2153. If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Background and Purpose

The offshore supply vessel TERREL TIDE will be used for offshore supply operations. The horizontal distance between the forward and aft masthead lights may be 25′–9″. Placing the aft masthead light at the horizontal distance from the forward masthead light as required by Annex I, paragraph 3(a) of the 72 COLREGS, and Annex I, Section 84.05(a) of the Inland Rules Act, would result in an aft masthead light location directly over the cargo deck, where it would interfere with loading and unloading operations.

The Certificate of Alternative Compliance allows for the horizontal separation of the forward and aft masthead lights to deviate from the requirements of Annex I, paragraph 3(a) of 72 COLREGS, and Annex I, Section 84.05(a) of the Inland Rules Act.

This notice is issued under authority of 33 U.S.C. 1605(c), and 33 CFR 81.18.

Dated: November 4, 2009.

J. W. Johnson,

Commander, U.S. Coast Guard, Chief, Inspections and Investigations Branch, by Direction of the Commander, Eighth Coast Guard District.

[FR Doc. E9–27637 Filed 11–17–09; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2009–0975]

Certificate of Alternative Compliance for the Offshore Supply Vessel GRANT CANDIES

AGENCY: Coast Guard, DHS.

ACTION: Notice.

SUMMARY: The Coast Guard announces that a Certificate of Alternative Compliance was issued for the offshore supply vessel GRANT CANDIES as required by 33 U.S.C. 1605(c) and 33 CFR 81.18.

DATES: The Certificate of Alternative Compliance was issued on October 28, 2009.

ADDRESSES: The docket for this notice is available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. You may also find this docket on the Internet by going to *http://www.regulations.gov,* inserting USCG–2009–0975 in the ''Keyword'' box, and then clicking ''Search.''

FOR FURTHER INFORMATION CONTACT: If you have questions on this notice, call CWO2 David Mauldin, District Eight, Prevention Branch, U.S. Coast Guard, telephone 504–671–2153. If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Background and Purpose

The offshore supply vessel GRANT CANDIES will be used for offshore supply operations. Full compliance with 72 COLREGS and Inland Rules Act will hinder the vessel's ability to maneuver within close proximity of offshore platforms and conduct helicopter operations. The forward masthead light may be located forward of the helideck 10.37 meters above the hull. Placing the forward masthead light at the height as required by Annex I, paragraph 2(a) of the 72 COLREGS would result in a masthead light location that would interfere with helideck operations.

In addition, the horizontal distance between the forward and aft masthead lights may be 32.845 meters. Placing the aft masthead light at the horizontal distance from the forward masthead light as required by Annex I, paragraph 3(a) of the 72 COLREGS would result in an aft masthead light location directly over the aft cargo deck where it would interfere with loading and unloading operations.

Furthermore, the sidelights may be placed 2.417 meters above the forward masthead light. Placing the sidelights lower than the forward masthead light as required by Annex I, paragraph 2(g) of 72 COLREGS and Annex I, paragraph 84.03(g) of the Inland Rules Act, would subject them to interference from the deck lights and obstruction by the helideck.

The Certificate of Alternative Compliance allows for the vertical placement of the forward masthead light to deviate from requirements set forth in Annex I, paragraph 2(a) of 72 COLREGS. In addition, the Certificate of Alternative Compliance allows for the horizontal separation of the forward and aft masthead lights to deviate from the requirements of Annex I, paragraph 3(a) of 72 COLREGS. Furthermore, the Certificate of Alternative Compliance allows for the placement of the sidelights to deviate from requirements set forth in Annex I, paragraph 2(g) of 72 COLREGS and Annex I, paragraph 84.03(g) of the Inland Rules Act.

This notice is issued under authority of 33 U.S.C. 1605(c), and 33 CFR 81.18.

Dated: November 4, 2009.

J. W. Johnson,

Commander, U.S. Coast Guard, Chief, Inspections and Investigations Branch, by Direction of the Commander, Eighth Coast Guard District.

[FR Doc. E9–27636 Filed 11–17–09; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Customs and Border Protection

Customs Brokers User Fee Payment for 2010

AGENCY: Customs and Border Protection, Department of Homeland Security.

ACTION: General notice.

SUMMARY: This document provides notice to customs brokers that the annual fee of $138 that is assessed for each permit held by a broker, whether it may be an individual, partnership, association, or corporation, is due by January 25, 2010. Customs and Border Protection (CBP) announces this date of payment for 2010 in accordance with the Tax Reform Act of 1986.

DATES: Payment of the 2010 Customs Broker User Fee is due Monday, January 25, 2010.

FOR FURTHER INFORMATION CONTACT: Russell Morris, Broker Compliance Branch, Trade Policy and Programs, Office of International Trade, (202) 863–6543.

SUPPLEMENTARY INFORMATION:

Background

CBP Dec. 07–01 amended section 111.96 of title 19 of the Code of Federal Regulations (19 CFR 111.96) pursuant to the amendment of section 13031 of the Consolidated Omnibus Budget Reconciliation Act (COBRA) of 1985 (19 U.S.C. 58c) by section 892 of the American Jobs Creation Act of 2004, to establish that effective April 1, 2007, an annual user fee of $138 is to be assessed for each customs broker permit and national permit held by an individual, partnership, association, or corporation.

Customs and Border Protection (CBP) regulations provide that this fee is payable for each calendar year in each broker district where the broker was issued a permit to do business by the due date which is published in the **Federal Register** annually. *See* 19 CFR 24.22(h) and (i)(9). Broker districts are defined in the General Notice entitled, ''Geographical Boundaries of Customs Brokerage, Cartage and Lighterage Districts'' published in the **Federal Register** as T.D. 00–18 on March 15, 2000 (65 FR 14011).

Section 1893 of the Tax Reform Act of 1986 (Pub. L. 99–514) provides that notices of the date on which the payment is due for each broker permit shall be published by the Secretary of the Treasury in the **Federal Register** by no later than 60 days before such due date. Please note that section 403 of the Homeland Security Act of 2002, 6 U.S.C. 101 *et seq.,* (Pub. L. 107–296) and Treasury Department Order No. 100–16 (see Appendix to 19 CFR Part 0) delegated general authority vested in the Secretary of the Treasury over customs revenue functions (with certain specified exceptions) to the Secretary of Homeland Security.

This document notifies customs brokers that for calendar year 2010, the due date for payment of the user fee is January 25, 2010.

Dated: November 3, 2009.

Daniel Baldwin,

Assistant Commissioner, Office of International Trade.

[FR Doc. E9–27598 Filed 11–17–09; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[USCG–2009–0992]

National Offshore Safety Advisory Committee

AGENCY: Coast Guard, DHS.

ACTION: Notice of open teleconference meeting.

SUMMARY: This notice announces a teleconference meeting of the National Offshore Safety Advisory Committee (NOSAC) to discuss items listed in the agenda as well as other items that NOSAC may consider. This meeting will be open to the public.

DATES: The teleconference call will take place on Thursday, December 8, 2009, from 2 p.m. to 4 p.m. EST. This meeting may close early if all business is finished. Written material and requests to make oral presentations should reach the Coast Guard on or before December 4, 2009. Requests to have a copy of your material distributed to each member of the committee should reach the Coast Guard on or before December 4, 2009.

ADDRESSES: The Committee will meet, via telephone conference, on December 8, 2009. Members of the public wishing to participate may contact CDR P.W. Clark at 202–372–1410 for call in information or they may participate in person by coming to Room 1303, U.S. Coast Guard Headquarters Building, 2100 Second Street, SW., Washington DC 20593. As there are a limited number of teleconference lines, public participation will be on a first come basis. Written comments should be sent to Commander P.W. Clark, Designated Federal Officer of NOSAC, Commandant (CG–5222), 2100 Second Street, SW., Washington, DC 20593–0001; or by fax to 202–372–1926. This notice is available on our online docket, USCG–2009-xxxx, at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Commander P.W. Clark, Designated Federal Officer of NOSAC, or Mr. Jim Magill, Assistant Designated Federal Officer, telephone 202–372–1414, fax 202–372–1926.

SUPPLEMENTARY INFORMATION: Public participation is welcome and the public may participate in person by coming to Room 1303, U.S. Coast Guard Headquarters Building, 2100 Second Street, SW., Washington DC 20593 or by contacting CDR P.W. Clark at 202–372–1410 for call in information. Notice of this meeting is given under the Federal Advisory Committee Act, 5 U.S.C. App. 2.

Agenda of Meeting

The agenda for the December 8, 2009 Committee meeting is as follows:

(1) Roll call of Committee members and the public participating in the teleconference.

(2) Approval of minutes from the November 5, 2009.

(3) Subcommittee's Final Report on proposals for MARPOL Annex II, A.673 standards for existing Offshore Supply Vessels (OSVs).

(4) Committee discussion and vote on Subcommittee's Final Report for MARPOL Annex II, A.673.

(5) Review of and possible NOSAC action to approve a recommendation to re-establish the Diving Subcommittee and discussion on a proposed task statement to study the matter of medical treatment of injured divers while working on the OCS.

(6) Review of background information and possible NOSAC action related to minimizing offshore lifts on the OCS.

(7) Period for Public Comment.

(8) Confirmation of the date/time for the next NOSAC Meeting (Thursday, April 8, 2009 in New Orleans).

Procedural

This meeting is open to the public. Please note that the meeting may close early if all business is finished. At the

Chair's discretion, members of the public may make oral presentations during the meeting. If you would like to make an oral presentation during the teleconference, please notify the DFO no later than December 4, 2009. Written material for distribution to Committee members should reach the Coast Guard no later than December 4, 2009.

Minutes

Minutes from the meeting will be available for the public review and copying 30 days following the teleconference meeting.

Information on Services for Individuals With Disabilities

For information on facilities or services for individuals with disabilities or to request special assistance at the meeting, contact Mr. Jim Magill at 202–372–1414 as soon as possible.

Dated: November 10, 2009.

J.G. Lantz,

Director of Commercial Regulations and Standards.

[FR Doc. E9–27634 Filed 11–17–09; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5300–N–24]

Notice of Availability: Notice of Funding Availability (NOFA) for HUD's Fiscal Year (FY) 2009 HOPE VI Main Street Grants Program

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Notice.

SUMMARY: HUD announces the availability on its website of the applicant information, submission deadlines, funding criteria and other requirements for HUD's HOPE VI Main Street Grants program NOFA for FY2009. Approximately $4 million is made available through this NOFA by the Department of Housing and Urban Development Appropriations Act, 2009 (Pub. L. 111–8, approved March 11, 2009) for HUD's HOPE VI Main Street Grants program. The notice providing information regarding the application process, funding criteria and eligibility requirements is available on the Grants.gov Web site at: *https://apply07.grants.gov/apply/forms_apps_idx.html.* A link to Grants.gov is also available on the HUD Web site at *http://www.hud.gov/offices/adm/grants/fundsavail.cfm.* The Catalogue of Federal Domestic Assistance (CFDA) number for the HOPE VI Main Street Grants program is 14.878. Applications must be submitted electronically through Grants.gov.

FOR FURTHER INFORMATION CONTACT: Questions regarding specific program requirements should be directed to the agency contact identified in the program NOFA. Questions regarding the 2009 General Section should be directed to the Office of Departmental Grants Management and Oversight at 202–708–0667 (this is not a toll-free number) or the NOFA Information Center at 1–800–HUD–8929 (toll-free). Persons with hearing or speech impairments may access these numbers via TTY by calling the Federal Information Relay Service at 1–800–877–8339.

Dated: November 6, 2009.

Sandra B. Henriquez,

Assistant Secretary for Public and Indian Housing.

[FR Doc. E9–27680 Filed 11–17–09; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5300–C–21]

HUD's Fiscal Year (FY) 2009 NOFA for Section 202 Supportive Housing for the Elderly; Technical Correction

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Notice; technical correction.

SUMMARY: On September 1, 2009, HUD posted its Notice of Funding Availability (NOFA) for Section 202 Supportive Housing for the Elderly for Fiscal Year 2009. The technical corrections to the NOFA are available on the Grants.gov Web site at *http://www.grants.gov*. The CFDA number for Section 202 Supportive Housing for the Elderly is 14.157. The technical correction contains program clarifications and a deadline change. The original deadline of November 13, 2009 for Section 202 Supportive Housing for the Elderly grant applications under this NOFA has been extended; the application deadline date is December 14, 2009.

FOR FURTHER INFORMATION CONTACT: For questions concerning these technical corrections, please contact Alicia Anderson, Project Manager, Office of Housing Assistance and Grants Administration, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone 202–402–5787 (this is not a toll-free number); e-mail *alicia.anderson@hud.gov*. Persons with hearing or speech impairments may access these numbers via TTY by calling the Federal Information Relay Service at 800–877–8339.

Dated: November 12, 2009.

David H. Stevens,

Assistant Secretary for Housing—Federal Housing Commissioner.

[FR Doc. E9–27673 Filed 11–17–09; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5300–C–19]

HUD's Fiscal Year (FY) 2009 NOFA for Section 811 Housing for Persons With Disabilities (Section 811 Program); Technical Correction

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Notice; technical correction.

SUMMARY: On September 1, 2009, HUD posted its Notice of Funding Availability (NOFA) for Section 811 Housing for Persons with Disabilities (Section 811 Program) for Fiscal Year 2009. The technical corrections to the NOFA are available on the Grants.gov Web site at *http://www.grants.gov*. The CFDA number for Section 811 Housing for Persons with Disabilities (Section 811 Program) is 14.181. The technical correction contains program clarifications and a deadline change. The original deadline of November 16, 2009 for Section 811 Housing for Persons with Disabilities grant applications under this NOFA has been extended; the application deadline date is December 17, 2009.

FOR FURTHER INFORMATION CONTACT: For questions concerning these technical corrections, please contact Marvis Hayward, Program Manager, Office of Housing Assistance and Grants Administration, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone 202–402–2255 (this is not a toll-free number); e-mail *marvis.s.hayward@hud.gov*. Persons with hearing or speech impairments may access these numbers via TTY by calling the Federal Information Relay Service at 800–877–8339.

Dated: November 12, 2009.

David H. Stevens,

Assistant Secretary for Housing—Federal Housing Commissioner.

[FR Doc. E9–27678 Filed 11–17–09; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

National Park Service

National Register of Historic Places; Weekly Listing of Historic Properties

Pursuant to (36 CFR 60.13(b,c)) and (36 CFR 63.5), this notice, through publication of the information included herein, is to apprise the public as well as governmental agencies, associations and all other organizations and individuals interested in historic preservation, of the properties added to, or determined eligible for listing in, the National Register of Historic Places from September 7 to September 11, 2009.

For further information, please contact Edson Beall via: United States Postal Service mail, at the National Register of Historic Places, 2280, National Park Service, 1849 C St., NW., Washington, DC 20240; in person (by appointment), 1201 Eye St., NW., 8th floor, Washington, DC 20005; by fax, 202–371–2229; by phone, 202–354–2255; or by e-mail, *Edson_Beall@nps.gov*.

Dated: November 10, 2009.

J. Paul Loether,

Chief, National Register of Historic Places/ National Historic Landmarks Program.

KEY: State, County, Property Name, Address/ Boundary, City, Vicinity, Reference Number, Action, Date, Multiple Name

ALABAMA

Covington County

J.W. Shreve Addition Historic District, 115–300 6th Ave, 302–425 College St., 403–505 E. Three Notch St., Andalusia, 09000692, LISTED, 9/09/09

Mobile County

Garrison, Charles Denby, Sr., House, Co. Rd. 55, approx. 1 mi. NW. of jct. AL 158, Prichard, 09000693, LISTED, 9/09/09

ARIZONA

Maricopa County

Town and Country Scottsdale Residential Historic District, Bounded by 72nd Place on the W., 74th St. on the E., Oak St. on the N., and Monte Vista on the S., Scottsdale, 09000694, LISTED, 9/08/09

CONNECTICUT

Windham County

Quinebaug River Prehistoric Archeological District, Between Rt. 169 and the Quinebaug River, Canterbury, 09000696, LISTED, 9/07/09

MASSACHUSETTS

Norfolk County

Canton Corner Historic District, Roughly Washington St. from Pecunit St. to SW. of Dedham St., and Pleasant St. from Washington St. to Reservoir Rd., Canton, 09000697, LISTED, 9/09/09

Plymouth County

Hatch Homestead and Mill Historic District, 385 Union St., Marshfield, 09000698, LISTED, 9/11/09

NEW YORK

Cayuga County

Hutchinson Homestead, 6080 Lake St., Cayuga, 09000478, LISTED, 9/09/09

Jefferson County

Hubbard, Hiram, House, 34237 NY 126, Champion, 09000699, LISTED, 9/09/09

Nassau County

Manhasset Monthly Meeting of the Society of Friends, 1421 Northern Boulevard, Manhasset, 09000700, LISTED, 9/09/09

NORTH CAROLINA

Harnett County

Dunn Commercial Historic District, Roughly Bounded by Harnett St., Cumberland St., Clinton Ave. & Fayetteville Ave., Dunn, 09000702, LISTED, 9/09/09

Rowan County

Griffith-Sowers House, 5050 Statesville Boulevard, Salisbury vicinity, 09000703, LISTED, 9/09/09

NORTH DAKOTA

Grant County

Evangelisch Lutheraner Dreieinigkeit Gemeinde (Evangelical Lutheran Trinity Church), 63rd St., SW section 15 Township 135 Range 90, New Leipzig vicinity, 09000530, LISTED, 9/09/09

OREGON

Clackamas County

Upper Sandy Guard Station Cabin, 4.5 mi. E. of jct. FS Rds. 18 and 1825, Mt. Hood National Forest, Government Camp vicinity, 09000705, LISTED, 9/09/09

Multnomah County

Hotel Alma, 1201–1217 SW Stark St., Portland, 09000706, LISTED, 9/09/09

(Downtown Portland, Oregon MPS)

Memorial Coliseum, 1401 N. Wheeler Ave./ 300 N. Winning St., Portland, 09000707, LISTED, 9/10/09

[FR Doc. E9–27620 Filed 11–17–09; 8:45 am]

BILLING CODE P

DEPARTMENT OF THE INTERIOR

National Park Service

National Register of Historic Places; Notification of Pending Nominations and Related Actions

Nominations for the following properties being considered for listing or related actions in the National Register were received by the National Park Service before October 31, 2009. Pursuant to § 60.13 of 36 CFR part 60 written comments concerning the significance of these properties under the National Register criteria for evaluation may be forwarded by United States Postal Service, to the National Register of Historic Places, National Park Service, 1849 C St., NW., 2280, Washington, DC 20240; by all other carriers, National Register of Historic Places, National Park Service, 1201 Eye St. NW., 8th floor, Washington, DC 20005; or by fax, 202–371–6447. Written or faxed comments should be submitted by December 3, 2009.

J. Paul Loether,

Chief, National Register of Historic Places/ National Historic Landmarks Program.

CALIFORNIA

Amador County

Kirkwood Lake Tract, 1/2 mile N. of CA 88 on the Eldorado National Forest, Pioneer, 09001054

FLORIDA

Citrus County

Etna Turpentine Camp Archaeological Site, Address Restricted, Inverness, 09001055

GEORGIA

Carroll County

Bowdon Historic District, Roughly centered along GA 166 and GA 100, Bowdon, 09001056

Cherokee County

Ball Ground Historic District, Old Canton Rd. and GA 372, Ball Ground, 09001057

ILLINOIS

Jo Daviess County

Chapman, John, Village Site, Address Restricted, Hanover, 09001058

LOUISIANA

Washington Parish

Moore, Bouey, Homestead, 19068 Moore Rd., Franklinton, 09001059

MARYLAND

Anne Arundel County

Queenstown Rosenwald School, (Rosenwald Schools of Anne Arundel County, Maryland MPS) 430 Queenstown Rd., Severn, 09001060

Baltimore County

East Monument Historic District, N. Washington St. on the W; Amtrak rail line on the N. to E. St.; S. to Monument and E. to Highland Ave.; Baltimore, 09001061

MICHIGAN

Baraga County

Dodd Ford Bridge, (Iron and Steel Bridges in Minnesota MPS) Co. Rd. 147 over Blue Earth River, Shelby, 09001070

Lake County

Idlewild Historic District (Boundary Increase), Bounded generally by US 10 on the N.; 72nd St. on the S.; Nelson Rd. on the E.; and extending W. of Forman Rd., Yates, 09001062

Macomb County

Wolcott Mill, 63841 Wolcott Rd., Ray, 09001063

Manistee County

Orchard Beach State Park, 2064 N. Lakeshore Rd., Manistee, 09001064

Presque Isle County

Hoeft, P.H., State Park, 5001 US 23 N., Rogers, 09001065
Onaway State Park, 3622 MI 211 N., North Allis, 09001066

Washtenaw County

Detroit Financial District, Bounded by Woodward & Jefferson and Lafayette & Washington Blvd., Detroit, 09001067

Wayne County

Koebel, Charles J. and Ingrid V. (Frendberg), House, 203 Cloverly Rd., Grosse Pointe Farms, 09001068
Michigan Bell and Western Electric Warehouse, 882 Oakman Blvd., Detroit, 09001069

NEBRASKA

Wayne County

Wayne Commercial Historic District, S. Main, N. Main and 2nd St., Wayne, 09001071

NEW JERSEY

Bergen County

New York, Susquehanna & Western Railroad ALCO Type S–2 Locomotive #206, Maywood Station Museum, 271 Maywood Ave., Maywood Borough, 09001072

Essex County

Anderson Park, SE. corner of Bellevue and North Mountain Ave., Montclair, 09001073

Hunterdon County

Case-Dvoor Farmstead, 111 Mine St., Raritan, 09001074

Morris County

Montville Schoolhouse, 6 Taylortown, Montville, 09001075
Vreeland, Nicholas, Outkitchen, (Dutch Stone Houses in Montville MPS) 52 Jacksonville Rd., Towaco, Montville, 09001076
Whippany Burying Yard, NJ 10, Hanover, 09001077

Union County

All Souls Church, 724 Park Ave., Plainfield City, 09001078

NEW YORK

Albany County

Norman Vale, (Mexico MPS) 6030 Nott Rd., Guilderland, 09001079

Cortland County

Stage Coach Inn, 2548 Clarks Corners Rd., Lapeer, 09001080

Kings County

Congregational Church of the Evangel, 1950 Bedford Ave., Brooklyn, 09001081
Ocean Parkway Jewish Center, 550 Ocean Pkwy., Brooklyn, 09001082

Madison County

Chittenango Pottery, 11–13 Pottery St., Chittenango, 09001083

Nassau County

DuPont-Guest Estate, S. side of Northern Blvd. between Cotillion Ct. & DuPont Ct., Brookville, 09001084

New York County

Westbeth, 55 Bethune St., New York, 09001085

Queens County

Church-in-the-Gardens, The, 50 Ascan Ave., Forest Hills, 09001086

Sullivan County

Jewish Center of Lake Huntington, 13 Co. Rd. 116, Lake Huntington, 09001087

Wayne County

Preston-Gaylord Cobblestone Farmhouse, (Cobblestone Architecture of New York State MPS) 7563 Lake Rd., Sodus, 09001088

Request for REMOVAL has been made for the following resources:

KENTUCKY

Jefferson County

Meier, William G., Warehouse, (West Louisville MRA) 2100 Rowan St., Louisville, 83002704
National Tobacco Works Warehouse, (West Louisville MRA) 101–113 S. 24th St., Louisville, 83002712

[FR Doc. E9–27621 Filed 11–17–09; 8:45 am]

BILLING CODE P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–621]

In the Matter of Certain Probe Card Assemblies, Components Thereof and Certain Tested Dram and Nand Flash Memory Devices and Products Containing Same; Notice of Commission Final Determination of No Violation of Section 337; Termination of Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined that there is no violation of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), in the above-captioned investigation. The Commission has terminated the investigation.

FOR FURTHER INFORMATION CONTACT: Michael Liberman, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205–3116. 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: This investigation was instituted on December 19, 2007, based on a complaint filed by FormFactor, Inc. (''FormFactor'') of Livermore, California. The complaint alleged 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 probe card assemblies, components thereof, and certain tested DRAM and NAND flash memory devices and products containing same by reason of infringement of certain claims of U.S. Patent Nos. 5,994,152 (''the '152 patent''); 6,509,751 (''the '751 patent'');

6,615,485; 6,624,648 (''the '648 patent''); 7,168,162 (''the '162 patent''); and 7,225,538. The complaint named Micronics Japan Co., Ltd.; MJC Electronics Corp.; Phicom Corporation; and Phiam Corporation as respondents (collectively, ''Respondents''). Subsequently, the '162 patent was terminated from the investigation.

On December 5, 2008, respondents Phicom Corp. and Phiam Corp., (collectively, ''Phicom'') jointly filed a motion for partial summary determination that claims 20 and 34 of the '648 patent are invalid as indefinite under 35 U.S.C. 112. On February 11, 2009, the ALJ granted the motion in an ID (Order No. 46). The ID determined that claims 20 and 34, and any asserted claims depending therefrom, are invalid. Complainant FormFactor filed a petition for review of Order No. 46, which Respondents and the Commission Investigative Attorney (''IA'') opposed. On March 11, 2009, the Commission determined to review Order No.46.

The evidentiary hearing in this investigation was held from February 24, 2009, through March 6, 2009. On June 29, 2009, the ALJ issued an Initial Determination on Violation of Section 337 and Recommended Determination on Remedy and Bond, finding no violation of section 337. All parties to this investigation, including the IA, filed timely petitions for review of various portions of the final ID, as well as timely responses to the petitions.

On September 17, 2009, the Commission determined to review the final ID in part, and issued a Notice to that effect. 74 FR 47822 (September 17, 2009). In the Notice, the Commission set a schedule for the filing of written submissions on the issues under review, including certain questions posed by the Commission, and on remedy, the public interest, and bonding. The parties have briefed, with initial and reply submissions, the issues under review and the issues of remedy, the public interest, and bonding.

On review, the Commission has determined as follows.

(1) With respect to the '751 patent:

(a) to reverse the ALJ's determination that Japanese Patent Application Publication H10–31034 to Amamiya *et al.* (RX–166) does not anticipate the asserted claims of the '751 patent under 35 U.S.C. 102;

(b) to reverse in part the ID's conclusion that, *inter alia,* Phicom's accused products do not infringe claims 1–3, 12, 24, and 25 of U.S. Patent No. 6,509,751, *see* ID at 197, and, accordingly, to modify the ID's conclusion of law at issue by substituting the following: ''Respondent Micronics' accused products do not infringe claims 1–3, 12, 24, and 25 of U.S. Patent No. 6,509,751 in violation of 35 U.S.C. 271(a). Respondent Phicom's (old) Type B and Type C accused products infringe claims 1–3, 12, 24, and 25 of U.S. Patent No. 6,509,751 in violation of 35 U.S.C. 271(a); Phicom's new Type B and Type C accused products do not infringe.''

(2) With respect to the '152 patent:

(a) to strike the ID's statement ''Since three bases for no violation of claim 21 have been determined, no analysis of the invalidity arguments related to anticipation and obviousness of the dependent claims will be made,'' *see* ID at 191, and to take no position with respect to the validity of the dependent claims of the '152 patent.

(3) To affirm and adopt the ALJ's other findings contained in the final ID under review except insofar as they are inconsistent with the Commission Opinion to be issued later.

The Commission also determined to affirm ALJ Order No. 46 with certain modifications as will be detailed in the Commission's Opinion.

The Commission has determined that there is no violation of section 337 in this investigation, and has terminated the investigation.

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 sections 210.41–.42, 210.50 of the Commission's Rules of Practice and Procedure (19 CFR 210.41–.42, 210.50).

Issued: November 12, 2009.

By order of the Commission.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. E9–27612 Filed 11–17–09; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF LABOR

Office of the Secretary

Submission for OMB Emergency Review: Comment Request

November 12, 2009.

The Department of Labor has submitted the following information collection request (ICR), utilizing emergency review procedures, to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. Chapter 35) and 5 CFR 1320.13. OMB approval has been requested by November 23, 2009. A copy of this ICR, with applicable supporting documentation; including among other things a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained from the RegInfo.gov Web site at *http://www.reginfo.gov/public/do/PRAMain* or by contacting Darrin King on 202–693–4129 (this is not a toll-free number)/e-mail: *DOL_PRA_PUBLIC@dol.gov.* Interested parties are encouraged to send comments to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for the Department of Labor—ETA, Office of Management and Budget, Room 10235, Washington, DC 20503, Telephone: 202–395–7316/Fax: 202–395–5806 (these are not toll-free numbers), E-mail: *OIRA_submission@omb.eop.gov.* Comments and questions about the ICR listed below should be received 5 days prior to the requested OMB approval date.

The OMB is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarify of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

Agency: Employment and Training Administration.

Title of Collection: Jobs for America's Job Seekers Challenge.

OMB Control Number: Pending.

Frequency of Collection: This is a one-time data collection.

Affected Public: State Workforce Agencies, businesses, non-profit organizations, other State government entities, workforce investment boards, One Stop Career Center staff, and the public.

Estimated Time per Respondent: A maximum of 10 minutes per Phase One respondent, of whom 1,000 are estimated to respond. For Phase Two, a maximum of 10,000 respondents are estimated (crowdsourcing portion) at 10

minutes total for an estimated rating of two tools each.

Total Estimated Number of Respondents: A maximum of 11,000 respondents are expected.

Total Estimated Annualized Burden Hours: 1,833 hours.

Total Estimated Annualized Cost Burden: $0.

Description:

The U.S. Department of Labor's (DOL) Employment and Training Administration (ETA), in conjunction with the White House and IdeaScale, is launching the Jobs for America's Job Seekers Challenge. Using an online platform designed by IdeaScale, the Challenge will allow toolmakers and developers to present their free online job tools to workforce development experts and jobseekers for discussion, rating, and voting. The tools that receive the most votes will be shared broadly with the workforce investment system and jobseekers, and listed on government Web sites like *http://www.CareerOneStop.org, http://www.Workforce3One.org,* and *http://www.DOLETA.gov.* This is not an opportunity to apply for government funding and ETA will not make any funds available to any party pursuant to this announcement.

The Challenge will consist of three phases. Phase 1 will run from November 30, 2009 to December 18, 2009. In this phase, toolmakers and developers will submit information on their free online job search and job matching tools. These tools must be free to the job seeker, but can be licensed by the workforce system at the State or local level provided the companies offer a short-term demo or other platform that allows the tools to be reviewed free of charge. Submissions will be accepted from businesses, nonprofits organizations, entrepreneurs, and State and local workforce agencies. The tools will be organized into one or more of the following categories:

- General job boards, listing sites, and aggregators
- Niche job boards
- Career advancement tools
- Web based career exploration sites
- Web 2.0/social media sites specializing in job searches or job postings
- Other job tools

Phase 2 will run from January 4 to January 15, 2010. During this phase, workforce development experts and job seekers will review and vote on the submitted job search and matching tools. Reviewers will be encouraged to consider a tool's usability based on how effective the tool is in providing accurate results, how efficient it is in completing job search and matching tasks in a reasonable amount of time, and the level of satisfaction the user felt.

Phase 3 will begin on January 18, 2010. In this final phase, DOL, ETA, and the White House will communicate the top tools in each category with the entire workforce development community and job seekers through a variety of mediums, including:

(1) Posting an announcement of the top ranking tools on key Web sites including;

a. DOL.gov
b. Doleta.gov
c. White House OSTP blog
d. Workforce3one.org
e. Other sites

(2) Highlighting free tools on ETA's *http://www.CareerOneStop.org* portal, which already houses a variety of tools for the workforce system;

(3) Hosting Webinars featuring the top ranking tools on Workforce3one.org;

(4) Utilizing other communication outlets such as national associations and Intergovernmental organizations like the National Association of State Workforce Agencies, the National Association of Workforce Boards, the National Governor's Association, the National Association of Counties, and the Association of Community Colleges.

As a result of the Challenge, the workforce development system will quickly boost its capacity to meet the job information needs of the significantly increased number of customers requiring service in the current economic recovery effort.

Why Are We Requesting Emergency Processing?

In today's tight employment market that has experienced a 10.2 percent unemployment rate that is the highest in 26 years, the publicly funded workforce investment system has a major responsibility to maximize unemployed workers' opportunities for rapid reemployment by quickly connecting them to the full scope of available jobs. We know the workforce system is working hard to connect workforce system customers to the best job search resources available. However, as a result of technological innovations, new job search tools have been launched and new tools are emerging daily that help job seekers find jobs and target their search to the most relevant employment opportunities.

Expedited or Emergency approval of this data collection will enable the Department of Labor (DOL), Employment and Training Administration (ETA), and the White House to respond aggressively to the record unemployment rates. Failure to start the Challenge and do the collection by November 30, 2009 would waste federal Recovery Act and State resources. Many States and local areas are individually searching for job matching and job search solutions to meet the significantly increased number of job seekers in need of assistance in One Stop Career Centers nationwide as a result of the historic downturn in the nation's economy.

Darrin A. King,

Departmental Clearance Officer.

[FR Doc. E9–27697 Filed 11–17–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

Request for Certification of Compliance—Rural Industrialization Loan and Grant Program

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice.

SUMMARY: The Employment and Training Administration is issuing this notice to announce the receipt of a ''Certification of Non-Relocation and Market and Capacity Information Report'' (Form 4279–2) for the following:

Applicant/Location: Custom Poultry Processing, LLC/West Union, Iowa.

Principal Product/Purpose: The loan, guarantee, or grant application is to enable a new business venture to acquire and alter an existing building for poultry processing and also purchase and install poultry processing equipment. The NAICS industry code for this enterprise is: 311615 Poultry Processing.

DATES: All interested parties may submit comments in writing no later than December 2, 2009. Copies of adverse comments received will be forwarded to the applicant noted above.

ADDRESSES: Address all comments concerning this notice to Anthony D. Dais, U.S. Department of Labor, Employment and Training Administration, 200 Constitution Avenue, NW., Room S–4231, Washington, DC 20210; or e-mail *Dais.Anthony@dol.gov;* or transmit via fax (202) 693–3015 (this is not a toll-free number).

FOR FURTHER INFORMATION CONTACT: Anthony D. Dais, at telephone number (202) 693–2784 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: Section 188 of the Consolidated Farm and Rural

Development Act of 1972, as established under 29 CFR Part 75, authorizes the United States Department of Agriculture to make or guarantee loans or grants to finance industrial and business activities in rural areas. The Secretary of Labor must review the application for financial assistance for the purpose of certifying to the Secretary of Agriculture that the assistance is not calculated, or likely, to result in: (a) A transfer of any employment or business activity from one area to another by the loan applicant's business operation; or, (b) An increase in the production of goods, materials, services, or facilities in an area where there is not sufficient demand to employ the efficient capacity of existing competitive enterprises unless the financial assistance will not have an adverse impact on existing competitive enterprises in the area. The Employment and Training Administration within the Department of Labor is responsible for the review and certification process. Comments should address the two bases for certification and, if possible, provide data to assist in the analysis of these issues.

Signed at Washington, DC, this 10th of November 2009.

Jane Oates,

Assistant Secretary for Employment and Training.

[FR Doc. E9–27610 Filed 11–17–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

Request for Certification of Compliance—Rural Industrialization Loan and Grant Program

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice.

SUMMARY: The Employment and Training Administration is issuing this notice to announce the receipt of a ''Certification of Non-Relocation and Market and Capacity Information Report'' (Form 4279–2) for the following:

Applicant/Location: Dave's Place, LLC/Keokuk, Iowa.

Principal Product/Purpose: The loan, guarantee, or grant application is to enable a new business venture to renovate and convert a former nursing care facility into one that provides intermediate care and rehabilitation for persons with mental illness. The NAICS industry code for this enterprise is: 623220 Residential Mental Health and Substance Abuse Facilities.

DATES: All interested parties may submit comments in writing no later than December 2, 2009. Copies of adverse comments received will be forwarded to the applicant noted above.

ADDRESSES: Address all comments concerning this notice to Anthony D. Dais, U.S. Department of Labor, Employment and Training Administration, 200 Constitution Avenue, NW., Room S–4231, Washington, DC 20210; or e-mail *Dais.Anthony@dol.gov;* or transmit via fax (202) 693–3015 (this is not a toll-free number).

FOR FURTHER INFORMATION CONTACT: Anthony D. Dais, at telephone number (202) 693–2784 (this is not a toll-free number).

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Signed at Washington, DC, this 10th of November 2009.

Jane Oates,

Assistant Secretary for Employment and Training.

[FR Doc. E9–27611 Filed 11–17–09; 8:45 am]

BILLING CODE 4510–FN–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (09–097)]

NASA Advisory Council; Science Committee; Planetary Science Subcommittee; Meeting.

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: The National Aeronautics and Space Administration (NASA) announces a meeting of the Planetary Science Subcommittee of the NASA Advisory Council (NAC). This Subcommittee reports to the Science Committee of the NAC. The Meeting will be held for the purpose of soliciting from the scientific community and other person's scientific and technical information relevant to program planning.

DATES: Thursday, December 3, 2009, 8:30 a.m. to 5:30 p.m., and Friday, December 4, 2009, 8:30 a.m. to 12:30 p.m. MST.

ADDRESSES: University of Colorado, Laboratory for Atmospheric and Space Physics, Conference Room A200, 1234 Innovation Drive, Boulder, CO 80303.

FOR FURTHER INFORMATION CONTACT: Ms. Marian Norris, Science Mission Directorate, NASA Headquarters, Washington, DC 20546, (202) 358–4452, fax (202) 358–4118, or *mnorris@nasa.gov.*

SUPPLEMENTARY INFORMATION: The meeting will be open to the public up to the capacity of the room. The agenda for the meeting includes the following topics:

—Planetary Science Division Update
—Mars Exploration Program Update
—Analysis Group Reports
—Review and Assessment of Current Process for Adding Co-Investigators and Interdisciplinary Scientists to Long-Duration Missions
—Status and Future of the Planetary Data System

It is imperative that the meeting be held on these dates to accommodate the scheduling priorities of the key participants. Attendees will be requested to sign a register.

Dated: November 12, 2009.

P. Diane Rausch,

Advisory Committee Management Officer, National Aeronautics and Space Administration and Space Administration.

[FR Doc. E9–27626 Filed 11–17–09; 8:45 am]

BILLING CODE P

NUCLEAR REGULATORY COMMISSION

[NRC–2009–0504; Docket No. 030–29462]

Notice of Availability of Environmental Assessment and Finding of No Significant Impact Related to the Approval for the Department of the Navy To Issue an Amendment to a Materials Permit for the Unrestricted Release of Building 150 at the Naval Medical Research Center in Bethesda, Maryland, Under Byproduct Materials License No. 45–23645–01NA

AGENCY: Nuclear Regulatory Commission.

ACTION: Issuance of Environmental Assessment and Finding of No Significant Impact for Permit Amendment.

FOR FURTHER INFORMATION CONTACT: Orysia Masnyk Bailey, Health Physicist, Decommissioning Branch, Division of Nuclear Materials Safety, Region I, 475 Allendale Road, King of Prussia, Pennsylvania 19406; telephone (864) 427–1032; fax number (610) 680–3497; or by e-mail: *Orysia.MasnykBailey@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

The U.S. Nuclear Regulatory Commission (NRC) is considering allowing the Department of the Navy (Navy) to issue an amendment to a materials permit in accordance with NRC Byproduct Materials License No. 45–23645–01NA. The NRC approval would authorize the Navy to release, for unrestricted use, Building 150 at the Naval Medical Research Center in Bethesda, Maryland. The Navy requested this action by letter July 11, 2008. The NRC has prepared an Environmental Assessment (EA) in support of this proposed action in accordance with the requirements of Title 10, *Code of Federal Regulations* (CFR), Part 51 (10 CFR part 51). Based on the EA, the NRC has concluded that a Finding of No Significant Impact (FONSI) is appropriate with respect to the proposed action. The proposed action will be taken following the publication of this FONSI and EA in the **Federal Register.**

II. Environmental Assessment

Identification of Proposed Action

The proposed action would approve the Navy's July 11, 2008, request to release Building 150 at the Naval Medical Research Center (NMRC) in Bethesda, Maryland (the Facility) for unrestricted release. The Navy completed initial decommissioning of the Facility (excluding Building 150) in Bethesda, Maryland, in 2000. The NMRC was authorized to use licensed materials under Naval Radioactive Materials Permit 19–32398–41NP in accordance with the Navy's Master Materials License No. 45–23645–01NA. In the conduct of that initial decommissioning action the Navy requested authorization to postpone decommissioning activities at Building 150. Additionally, two underground storage tanks (USTs) were discovered during the decommissioning of the NMRC, and remediation of the USTs were added to the Navy's decommissioning work plan for Building 150.

Building 150 was constructed in the early 1950s as a facility for the irradiation of animals to determine the effects of ionizing radiation on the organ and cellular systems. The radiation source used for these studies consisted of 2,500 curies of cobalt-60 in ceramic slugs arranged in circles. AEC License No. 19–02891–03 was issued on October 2, 1957, authorizing the use of cobalt-60 for this research. License No. 19–02891–03 expired on March 31, 1963.

Building 150 is located on the grounds of the NMRC. The Facility consists of a 1,100 square foot building, with approximately one foot thick reinforced concrete walls. The building was divided into two radiation exposure rooms and a control room. The building is covered with a 10 inch thick overhead reinforced concrete slab. The control room is separated from the two radiation rooms by a 3 feet 10 inch thick radiation shield, constructed of reinforced barite concrete which is 45 pounds heavier per cubic foot then regular reinforced concrete. Radiation room 1, where the sources were stored, was further shielded by a 3 foot thick barite concrete wall.

Several minor contamination incidents occurred during routine maintenance between 1951 and 1962, probably caused by cracks in the ceramic slugs. In April 1962, one of the NMRC employees was found to be internally contaminated with cobalt-60 during routine internal personnel monitoring. Investigation disclosed that widespread contamination was present on the ground surrounding the building. The cause of the contamination was determined to be a failure of the source capsule seals. Building 150 and surrounding grounds were originally decommissioned in 1963. The sources were transferred by Atlantic Research Corporation, under AEC License No. 45–02808–02, to Oak Ridge National Laboratory. Building 150 internals, roof, ventilation equipment, and 4 to 6 inches of soil adjacent to the building were removed by Navy personnel and disposed of as radioactive waste. In 2002, following the initial decommissioning of the NMRC, the Navy initiated additional decommissioning of Building 150 and the underground storage tanks (UST). Remediation activities included removal of the USTs, removal of contaminated soil adjacent to Building 150, scabbling of concrete surfaces within Building 150, and removal of rubble and drain lines within the Facility.

Need for the Proposed Action

The Navy is requesting approval of this permitting action because it has ceased conducting licensed activities at the Facility, and seeks the unrestricted use of its Facility and the termination of the permit. NRC is fulfilling its responsibilities under the Atomic Energy Act to make a timely decision on a proposed license amendment for decommissioning that ensures protection of the public health and safety.

Environmental Impacts of the Proposed Action

The historical review of licensed activities conducted at the Facility shows that such activities involved use of the following radionuclides with half-lives greater than 120 days in unsealed form: cobalt-60. The Navy conducted a final status survey in January 2004. This survey covered the areas of use at the Facility. The Navy elected to demonstrate compliance with the radiological criteria for unrestricted release as specified in 10 CFR 20.1402 by using the screening approach described in NUREG–1757, ''Consolidated NMSS Decommissioning Guidance,'' Volume 2. The Licensee used the radionuclide-specific derived concentration guideline levels (DCGLs), developed there by the NRC, which comply with the dose criterion in 10 CFR 20.1402. These DCGLs define the maximum amount of residual radioactivity on building surfaces, equipment, and materials, and in soils, that will satisfy the NRC requirements in subpart E of 10 CFR part 20 for unrestricted release. The Navy's final status survey results were below these DCGLs and are in compliance with the As Low As Reasonably Achievable (ALARA) requirement of 10 CFR 20.1402. The NRC thus finds that the Navy's final status survey results are acceptable.

Based on its review the staff has determined that the affected environment and any environmental

impacts associated with the proposed action are bounded by the impacts evaluated by the ''Generic Environmental Impact Statement in Support of Rulemaking on Radiological Criteria for License Termination of NRC–Licensed Nuclear Facilities'' (NUREG–1496) Volumes 1–3 (ML042310492, ML042320379, and ML042330385). The staff finds there were no significant environmental impacts from the use of radioactive material at the Facility. The NRC staff reviewed the docket file records and the final status survey report to identify any non-radiological hazards that may have impacted the environment surrounding the Facility. No such hazards or impacts to the environment were identified. The NRC has identified no other radiological or non-radiological activities in the area that could result in cumulative environmental impacts.

The NRC staff finds that the proposed release of the Facility for unrestricted use and the termination of the Navy's materials permit is in compliance with 10 CFR 20.1402. Based on its review, the staff considered the impact of the residual radioactivity at the Facility and concluded that the proposed action will not have a significant effect on the quality of the human environment.

Environmental Impacts of the Alternatives to the Proposed Action

Due to the largely administrative nature of the proposed action, its environmental impacts are small. Therefore, the only alternative the staff considered is the no-action alternative, under which the staff would leave things as they are by simply denying the amendment request. This no-action alternative is not feasible because it conflicts with 10 CFR 30.36(d), requiring that decommissioning of byproduct material facilities be completed and approved by the NRC after licensed activities cease. The NRC's analysis of the Navy's final status survey data confirmed that the Facility meets the requirements of 10 CFR 20.1402 for unrestricted release and for permit termination. Additionally, denying the Navy's request to terminate its permit would result in no change in current environmental impacts. The environmental impacts of the proposed action and the no-action alternative are therefore similar, and the no-action alternative is accordingly not further considered.

Conclusion

The NRC staff has concluded that the proposed action is consistent with the NRC's unrestricted release criteria specified in 10 CFR 20.1402. Because the proposed action will not significantly impact the quality of the human environment, the NRC staff concludes that the proposed action is the preferred alternative.

Agencies and Persons Consulted

NRC provided a draft of this Environmental Assessment to the Radiological Health Program in the Air and Radiation Management Administration of the Maryland Department of the Environment for review on August 13, 2009. On September 14, the State of Maryland responded by email. The State agreed with the conclusions of the EA, and otherwise had no comments.

The NRC staff has determined that the proposed action is of a procedural nature, and will not affect listed species or critical habitat. Therefore, no further consultation is required under Section 7 of the Endangered Species Act. The NRC staff has also determined that the proposed action is not the type of activity that has the potential to cause effects on historic properties. Therefore, no further consultation is required under Section 106 of the National Historic Preservation Act.

III. Finding of No Significant Impact

The NRC staff has prepared this EA in support of the proposed action. On the basis of this EA, the NRC finds that there are no significant environmental impacts from the proposed action, and that preparation of an environmental impact statement is not warranted. Accordingly, the NRC has determined that a Finding of No Significant Impact is appropriate.

IV. Further Information

Documents related to this action, including the application for license 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 documents related to this action are listed below, along with their ADAMS accession numbers.

1. NUREG–1757, ''consolidated NMSS Decommissioning Guidance;''

2. Title 10, *Code of Federal Regulations,* Part 20, Subpart E, ''Radiological Criteria for License Termination;''

3. Title 10, *Code of Federal Regulations,* Part 51, ''Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions;''

4. NUREG–1496, ''Generic Environmental Impact Statement in Support of Rulemaking on Radiological Criteria for License Termination of NRC-Licensed Nuclear Facilities;''

5. NRC License No. 45–23645–01NA inspection and licensing records;

6. NMRC Historical Site Assessment (HAS) Volume I of II, dated June 15, 1999 (ML082280739);

7. NMRC Historical Site Assessment (HAS) Volume II of II, dated June 15, 1999 (ML082280809);

8. NMRC Radiological Decontamination and Decommissioning (D&D) Plan, Revision 1, dated August 17,1999 (ML082280784 and ML082280814);

9. Radiological Decontamination and Decommissioning (D&D) Final Status Survey Report, dated April 2000 (ML082280117 and ML082280147);

10. Radiological Decontamination and Decommissioning (D&D) Final Status Survey Report, dated June 16, 2000 (ML082280738 and ML082280755);

11. Radiological Decontamination and Decommissioning (D&D) Final Status Survey Report, dated August 2000 (ML082280309, ML082280317, ML082280334, and ML082280287);

12. NRC letter dated February 29, 2000, ''Decommissioning Plans for Naval Medical Research Center'' (ML003687082);

13. Department of the Navy Letter dated July 6, 2005, ''Decommissioning of the Former Naval Medical Research Center (NMRC), Bethesda, MD'' (ML051940414);

14. Department of the Navy letter dated October 22, 2007, ''Building 150 and Underground Storage Tank Decommissioning Project, National Naval Medical Center, Bethesda, MD'' (ML073060430); and

15. Department of the Navy Letter dated July 11, 2008, ''Naval Medical Research Center (NMRC), Bethesda Decommissioning Documentation'' (ML082270292).

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.resource@nrc.gov.* These documents may also be viewed electronically on the public computers located at the NRC's 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 Region I, 475 Allendale PA, King of Prussia, PA this 10th day of November 2009.

For the Nuclear Regulatory Commission.

James P. Dwyer,

Chief, Commercial & R&D Branch, Division of Nuclear Materials Safety, Region I.

[FR Doc. E9–27651 Filed 11–17–09; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60975; File No. SR–NYSEArca–2009–83]

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Granting Approval of a Proposed Rule Change To List and Trade Shares of the Grail American Beacon International Equity ETF

November 10, 2009.

On September 18, 2009, NYSE Arca, Inc. (''NYSE Arca'' or ''Exchange''), through its wholly owned subsidiary, NYSE Arca Equities, Inc. (''NYSE Arca Equities''), filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to list and trade shares (''Shares'') of the Grail American Beacon International Equity ETF (''Fund'') under NYSE Arca Equities Rule 8.600. The proposed rule change was published in the **Federal Register** on October 9, 2009.[3] The Commission received no comments on the proposal. This order grants approval of the proposed rule change.

I. Description of the Proposal

The Exchange proposes to list and trade the Shares of the Fund pursuant to NYSE Arca Equities Rule 8.600, which governs the listing of Managed Fund Shares.[4] The Shares will be offered by Grail Advisors' ETF Trust (''Trust''), a statutory trust organized under the laws of the State of Delaware and registered with the Commission as an open-end management investment company.[5] Grail Advisors, LLC (''Manager''), a majority owned subsidiary of Grail Partners, LLC, is the Fund's investment manager, and American Beacon Advisors, Inc. (''ABA'') is the Fund's sub-adviser.[6] In addition, Lazard Asset Management LLC, Templeton Investment Counsel, LLC, and The Boston Company Asset Management, LLC (collectively, ''Other Sub-Advisers'') each is a sub-adviser to the Fund and each is affiliated with a broker-dealer. The Exchange states that the Shares will conform to the initial and continued listing criteria under NYSE Arca Equities Rule 8.600 and that the Fund will be in compliance with Rule 10A–3 under the Act.[7]

The Fund's investment objective is long-term capital appreciation. It seeks to achieve its investment objective by investing at least 80% of its net assets (plus the amount of any borrowings for investment purposes) in common stocks and securities convertible into common stocks of issuers based in at least three different countries located outside the United States. The Fund will primarily hold securities of large capitalization companies[8] that have last sale reporting in the countries in which it invests and will primarily invest in countries in the Morgan Stanley Capital International Europe Australasia Far East Index.

Creations and redemptions of Fund Shares will generally be in-kind, with a specified cash component. Authorized Participants or the investors on whose behalf the Authorized Participants are acting (''Investors''), however, may deliver in connection with creations or receive in connection with redemptions cash in lieu of one or more in-kind securities. Specifically, in connection with creations or redemptions, an Authorized Participant or Investor may transact in cash, in whole or in part, at the sole discretion of the Fund; provided, however, that the cash amount delivered or received shall not exceed 10% of the value of the in-kind creation or redemption basket, unless the Authorized Participant or Investor is subject to legal restrictions with respect to delivery or receipt of one or more securities in the in-kind creation or redemption basket, or the Fund is in a temporary defensive position. The creation unit size for the Fund will be 50,000 Shares.

Additional information regarding the Fund, the Shares, the Fund's investment objective (including other non-primary investments and investments permitted for temporary defensive purposes), investment strategies, policies, and restrictions, risks, fees and expenses, creations and redemptions of Shares, availability of information, trading rules and halts, and surveillance procedures, among other things, can be found in the Registration Statement and in the Notice, as applicable.[9]

II. Discussion and Commission's Findings

The Commission has carefully reviewed the proposed rule change and finds that it is consistent with the requirements of Section 6 of the Act[10] and the rules and regulations thereunder applicable to a national securities exchange.[11] In particular, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act,[12] which requires, among other things, that the Exchange's rules be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The Commission finds that the proposal to list and trade the Shares on the Exchange is consistent with Section 11A(a)(1)(C)(iii) of the Act, which sets forth Congress' finding that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure the availability to brokers, dealers and investors of information with respect to quotations for and transactions in securities. Quotation and last sale information for the Shares will be available via the Consolidated Tape Association (''CTA'') high-speed line, and the Exchange will disseminate the Portfolio Indicative Value (''PIV'') at least every 15 seconds during the Core Trading Session through the facilities of the CTA. In addition, the Fund will make available on its Web site on each business day before commencement of trading of the Core Trading Session the Disclosed Portfolio[13] that will form the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 60773 (October 2, 2009), 74 FR 52288 (''Notice'').

[4] *See* NYSE Arca Equities Rule 8.600.

[5] The Exchange states that the Trust is registered under the Investment Company Act of 1940 (''1940 Act'') and that, on April 29, 2009, the Trust filed with the Commission pre-effective Amendment No. 3 to its registration statement on Form N–1A under the Securities Act of 1933 (15 U.S.C. 77a) and under the 1940 Act relating to the Fund (File Nos. 333–148082 and 811–22154) (''Registration Statement'').

[6] The Exchange represents that, while ABA is not affiliated with a broker-dealer, the Manager is affiliated with a broker-dealer, Grail Securities, LLC.

[7] 17 CFR 240.10A–3.

[8] The Fund considers companies with market capitalizations of more than $1 billion to be large capitalization companies. Thus, at least 50% of the Fund's assets invested in securities of companies will be in companies with market capitalizations of more than $1 billion.

[9] *See supra* notes 3 and 5.

[10] 15 U.S.C. 78f.

[11] In approving this proposed rule change the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[12] 17 U.S.C. 78f(b)(5).

[13] The Exchange represents that the Fund will disclose on the Fund's Web site for each portfolio security or other financial instrument of the Fund the following information: Ticker symbol (if

basis for its calculation of the net asset value (''NAV''), which will be determined as of the close of the regular trading session on the New York Stock Exchange (ordinarily 4 p.m. Eastern Time) on each business day. In addition, a basket composition file, which includes the security names and share quantities required to be delivered in exchange for Fund Shares, together with estimates and actual cash components, will be publicly disseminated daily prior to the opening of the New York Stock Exchange via the National Securities Clearing Corporation. The Fund's Web site will also include additional quantitative information updated on a daily basis relating to trading volume, prices, and NAV. Information regarding the market price and trading volume of the Shares will be continually available on a real-time basis throughout the day via electronic services, and the previous day's closing price and trading volume information for the Shares will be published daily in the financial sections of newspapers.

The Commission further believes that the proposal to list and trade the Shares is reasonably designed to promote fair disclosure of information that may be necessary to price the Shares appropriately and to prevent trading when a reasonable degree of transparency cannot be assured. The Commission notes that the Exchange will obtain a representation from the issuer of the Shares that the NAV per Share will be calculated daily and that the NAV and the Disclosed Portfolio will be made available to all market participants at the same time. Additionally, if it becomes aware that the NAV or the Disclosed Portfolio is not disseminated daily to all market participants at the same time, the Exchange will halt trading in the Shares until such information is available to all market participants. Further, if the PIV is not being disseminated as required, the Exchange may halt trading during the day in which the disruption occurs; if the interruption persists past the day in which it occurred, the Exchange will halt trading no later than the beginning of the trading day following the interruption.[14] The Exchange states that each sub-adviser to the Fund has represented that they have implemented a ''fire wall'' between it and its respective broker-dealer affiliate(s) with respect to access to information concerning the composition and/or changes to the Fund's portfolio.[15] Finally, the Commission notes that the Reporting Authority that provides the Disclosed Portfolio must implement and maintain, or be subject to, procedures designed to prevent the use and dissemination of material non-public information regarding the actual components of the portfolio.[16]

The Exchange has represented that the Shares are equity securities subject to the Exchange's rules governing the trading of equity securities and will trade on the NYSE Arca Marketplace from 4 a.m. to 8 p.m. Eastern Time in accordance with NYSE Arca Equities Rule 7.34 (Opening, Core, and Late Trading Sessions). In support of this proposal, the Exchange has made representations, including:

(1) The Shares will conform to the initial and continued listing criteria under NYSE Arca Equities Rule 8.600.

(2) The Exchange intends to utilize its existing surveillance procedures applicable to derivative products (which include Managed Fund Shares) to monitor trading in the Shares. The Exchange's surveillance procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws. The Exchange's current trading surveillance focuses on detecting securities trading outside their normal patterns. When such situations are detected, surveillance analysis follows and investigations are opened, where appropriate, to review the behavior of all relevant parties for all relevant trading violations. The Exchange may obtain information via the Intermarket Surveillance Group (''ISG'') from other exchanges that are members of ISG.[17] In addition, the Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

(3) Prior to the commencement of trading, the Exchange will inform its ETP Holders in an Information Bulletin of the special characteristics and risks associated with trading the Shares. Specifically, the Information Circular will discuss the following: (a) The procedures for purchases and redemptions of Shares and that Shares are not individually redeemable; (b) NYSE Arca Equities Rule 9.2(a), which imposes a duty of due diligence on its ETP Holders to learn the essential facts relating to every customer prior to trading the Shares; (c) the risks involved in trading the Shares during the Opening and Late Trading Sessions when an updated PIV will not be calculated or publicly disseminated; (d) how information regarding the PIV is disseminated; (e) the requirement that ETP Holders deliver a prospectus to

applicable), name of security or financial instrument, number of shares or dollar value of financial instruments held in the portfolio, and percentage weighting of the security or financial instrument in the portfolio.

[14] *See* NYSE Arca Equities Rule 8.600(d)(2)(D). The Exchange states that trading in the Shares may also be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. These may include: (1) The extent to which trading is not occurring in the securities comprising the Disclosed Portfolio and/or the financial instruments of the Fund; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present.

[15] *See supra* note 6 and accompanying text. Commentary .07 to NYSE Arca Equities Rule 8.600 requires that, if an investment adviser to the investment company issuing Managed Fund Shares is affiliated with a broker-dealer, such investment adviser erect a ''fire wall'' between the investment adviser and the broker-dealer with respect to access to information concerning the composition and/or changes to the investment company portfolio. Commentary .07 also requires personnel, who make decisions on the investment company's portfolio composition, must be subject to procedures designed to prevent the use and dissemination of material nonpublic information regarding the open-end fund's portfolio. *See* Commentary .07 to NYSE Arca Equities Rule 8.600. The Exchange represents that Grail Advisors, LLC is affiliated with a broker-dealer, Grail Securities, LLC, and has implemented a fire wall with respect to such broker-dealer regarding access to information concerning the composition and/or changes to the portfolio. The Exchange further represents that Grail Advisors, LLC, as the investment adviser of the Fund, and each of the sub-advisers of the Fund, and their respective personnel, are subject to Investment Advisers Act Rule 204A–1.

[16] *See* NYSE Arca Equities Rule 8.600(d)(2)(B)(ii).

[17] The Exchange represents that not all components of the Disclosed Portfolio for the Fund may trade on markets that are members of ISG, and the Exchange may not have in place comprehensive surveillance sharing agreements with such markets. The Commission notes that the Fund will be investing primarily in securities of foreign large capitalization companies with market capitalizations of more than $1 billion and that are subject to last-sale reporting. In addition, the Commission notes that though, an Authorized Participant may transact in cash, in whole or in part, with the Fund in connection with creations or redemptions, the cash amount delivered or received may not exceed 10% of the value of the in-kind creation or redemption basket, subject to certain limited conditions.

The Commission further notes that the Fund, as an investment company registered under the 1940 Act, is subject to the diversification standards included in Section 5(b)(1) of the 1940 Act. The Exchange represents that the Fund's fundamental policies, which may be changed only by a vote of the holders of a majority of the Fund's outstanding voting securities, are as follows: (1) Regarding diversification, the Fund may not invest more than 5% of its total assets (taken at market value) in securities of any one issuer, other than obligations issued by the U.S. Government, its agencies and instrumentalities, or purchase more than 10% of the voting securities of any one issuer, with respect to 75% of the Fund's total assets; and (2) regarding concentration, the Fund may not invest more than 25% of its total assets in the securities of companies primarily engaged in any one industry or group of industries provided that (a) this limitation does not apply to obligations issued or guaranteed by the U.S. Government, its agencies and instrumentalities, and (b) municipalities and their agencies and authorities are not deemed to be industries.

investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (f) trading information.

(4) The Fund will be in compliance with Rule 10A–3 under the Act.[18] This approval order is based on the Exchange's representations.

For the foregoing reasons, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act [19] and the rules and regulations thereunder applicable to a national securities exchange.

III. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[20] that the proposed rule change (SR–NYSEArca–2009–83) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[21]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–27604 Filed 11–17–09; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60977; File No. SR–CBOE–2009–086]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposal To Permit $1 Strikes for RMN Options

November 10, 2009.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the ''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on November 6, 2009, the Chicago Board Options Exchange, Incorporated (''Exchange'' or ''CBOE'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act [4] and Rule 19b–4(f)(6) thereunder.[5] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

CBOE proposes to amend certain of its rules to allow the Exchange to list options on the Mini-Russell 2000 Index (''RMN'' or ''Mini-RUT''), which is based on 1/10th the value of the Russell 2000 Index, at $1 strike intervals. The text of the rule proposal is available on the Exchange's Web site (*http://www.cboe.org/legal*), at the Exchange's Office of the Secretary and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

This proposed rule change is based on a filing previously submitted by NASDAQ OMX PHLX, Inc. (''Phlx'') that was recently approved by the Commission.[6]

The purpose of the proposed rule change is to amend Rule 24.9, *Terms of Index Option Contracts,* by adding a new interpretation that would allow the Exchange to list options on the RMN, which is based on 1/10th the value of the Russell 2000 Index, at $1 or greater strike price intervals, if the strike price is less than $200.[7]

Strike price intervals for index options are set forth in Rules 5.5 and 24.9 at three levels: (1) Not less than $5.00 generally, (2) not less than $2.50 for index classes specifically listed in Rule 24.9.01(a), and (3) not less than $1 for certain other index classes set forth in Rule 24.9.01 (*e.g.,* 24.9.01(b) provides for $0.50 strike price intervals for options based on one-one hundredth the value of the DJIA, 24.9.01(h) provides for $1 strike price intervals for Mini-Nasdaq 100 Index (''MNX'' or ''Mini-NDX'') options).

The Exchange now proposes that the minimum strike price interval for RMN options will be $1 or greater, if the strike price is less than $200. The Exchange believes that $1 strike price intervals in this option series will provide investors with greater flexibility by allowing them to establish positions that are better tailored to meet their investment objectives.

For initial series, the Exchange would list at least two strike prices above and two strike prices below the current value of the RMN at or about the time a series is opened for trading on the Exchange. As part of this initial listing, the Exchange would list strike prices that are within 5 points from the closing value of the RMN on the preceding day.

As for additional series, the Exchange would be permitted to add additional series when the Exchange deems it necessary to maintain an orderly market, to meet customer demand or when the underlying RMN moves substantially from the initial exercise price or prices. To the extent that any additional strike prices are listed by the Exchange, such additional strike prices shall be within thirty percent (30%) above or below the closing value of the RMN. The Exchange would also be permitted to open additional strike prices that are more than 30% above or below the current RMN value provided that demonstrated customer interest exists for such series, as expressed by institutional, corporate or individual customers or their brokers. Market-Makers trading for their own account would not be considered when determining customer interest. In addition to the initial listed series, the Exchange may list up to sixty (60) additional series per expiration month for each series in Mini-RUT options. However, $1 strike price intervals may be listed on Mini-RUT options only where the strike price is below $200. In addition, the Exchange proposes that it shall not list LEAPS on Mini-RUT options at intervals less than $2.50.

The Exchange is also proposing to set forth a delisting policy with respect to Mini-RUT options. Specifically, the Exchange would, on a monthly basis, review series that are outside a range of five (5) strikes above and five (5) strikes

[18] *See supra* note 7.

[19] 15 U.S.C. 78f(b)(5).

[20] 15 U.S.C. 78s(b)(2).

[21] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C.78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] 15 U.S.C. 78s(b)(3)(A)(iii).

[5] 17 CFR 240.19b–4(f)(6).

[6] *See* Exchange Act Release No. 60840 (October 20, 2009), 74 FR 55593 (October 28, 2009) (SR–Phlx–2009–77) (order approving proposal to permit the listing of certain option series at $1 and $2.50 strike price intervals for strike prices below $200). CBOE's current filing is solely concerned with $1 strike intervals for Mini-RUT options, which was the only multiply-listed option class addressed in SR–Phlx–2009–77.

[7] Currently, under Interpretation and Policy .01(a)(xlix) to Rule 24.9, the Exchange has authority to list Mini-RUT options at $2.50 strike price intervals, if the strike price is less than $200.

below the current value of the RMN and delist series with no open interest in both the put and the call series having a: (i) Strike higher than the highest strike price with open interest in the put and/or call series for a given expiration month; and (ii) strike lower than the lowest strike price with open interest in the put and/or call series for a given expiration month.

Notwithstanding the proposed delisting policy, customer requests to add strikes and/or maintain strikes in Mini-RUT options in series eligible for delisting shall be granted.

Further, in connection with the proposed delisting policy, if the Exchange identifies series for delisting, the Exchange shall notify other options exchanges with similar delisting policies regarding eligible series for listing, and shall work with such other exchanges to develop a uniform list of series to be delisted, so as to ensure uniform series delisting of multiply listed Mini-RUT options.

It is expected that the proposed delisting policy for Mini-RUT options will be adopted by other options exchanges that list and trade Mini-RUT options.

The Exchange also proposes to add new Interpretation and Policy .16 to Rule 5.5, *Series of Option Contracts Open for Trading,* which would be an internal cross reference stating that the intervals between strike prices for Mini-RUT option series would be determined in accordance with proposed new Interpretation and Policy .01(k) to Rule 24.9.

Technical Changes

The Exchange is proposing to make some lettering and numbering changes to the Interpretations and Policies to Rules 5.5 and 24.9, which are being amended substantively by this filing. Specifically, the Exchange is proposing to re-number existing Interpretation and Policy .13 to Rule 5.5 as new Interpretation and Policy .15. The Exchange is proposing to make this change because the Exchange has two pending filings that have been formally submitted which overlap with the existing and proposed numbering to Rule 5.5.[8] Similarly, the Exchange is proposing to re-letter existing Interpretation and Policy .01(h) to Rule 24.9 as new Interpretations and Policy .01(j). The Exchange is proposing to make this change because the previously referenced pending filings also overlap with the existing and proposed lettering to Rule 24.9.01.

Finally, the Exchange is proposing to reduce the minimum strike price intervals for LEAPS on Mini-NDX options from $5 to $2.50 in order to conform CBOE's listing ability with Phlx's.[9]

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'')[10] and the rules and regulations thereunder and, in particular, the requirements of Section 6(b) of the Act.[11] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[12] requirements that the rules of an exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts, to remove impediments to and to perfect the mechanism for a free and open market and a national market system, and, in general, to protect investors and the public interest by allowing the Exchange to list Mini-RUT options at $1 strike price intervals.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change: (i) Does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) by its terms, does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, it has become effective pursuant to Section 19(b)(3)(A) of the Act[13] and Rule 19b–4(f)(6) thereunder.[14]

The Exchange has requested that the Commission waive the 30-day operative delay and designate the proposed rule change immediately operative, so that the Exchange may, for competitive reasons, list Mini-RUT options at the same $1 strike price intervals currently listed by Phlx. The Commission believes such waiver is consistent with the protection of investors and the public interest.[15] Accordingly, the Commission designates the proposed rule change operative upon filing with the Commission.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form *(http://www.sec.gov/rules/sro.shtml);* or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–CBOE–2009–086 on the subject line.

Paper Comments

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

All submissions should refer to File Number SR–CBOE–2009–086. This file

[8] *See* SR–CBOE–2009–022 (proposal to list and trade S&P 500 Dividend Index options and proposing to add new paragraph .13 to Rule 5.5 and new paragraph (h) to Rule 24.9.01 for S&P 500 Dividend Index options), and SR–CBOE–2009–080 (proposal to list and trade options on Equity-Based Volatility Index options and proposing to add new paragraph .14 to Rule 5.5 and new paragraph (i) to Rule 24.9.01 for Equity-Based Volatility Index options).

[9] *See* Commentary .02(c) to Phlx Rule 1101A, Terms of Option Contracts, providing that LEAPS on Mini-NDX options shall be listed at intervals not less then $2.50.

[10] 15 U.S.C. 78s(b)(1).

[11] 15 U.S.C. 78f(b).

[12] 15 U.S.C. 78f(b)(5).

[13] 15 U.S.C. 78s(b)(3)(A).

[14] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires the self-regulatory organization to submit to the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[15] For purposes only of waiving the 30-day operative delay of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

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 Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2009–086 and should be submitted on or before December 9, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–27606 Filed 11–17–09; 8:45 am]

BILLING CODE 8011–01–P

[16] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60981; File No. SR–NYSEArca–2009–79]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1 Thereto, Relating to Listing of Five Fixed Income Funds of the PIMCO ETF Trust

November 10, 2009.

On August 27, 2009, NYSE Arca, Inc. (''NYSE Arca'' or ''Exchange''), through its wholly owned subsidiary, NYSE Arca Equities, Inc. (''NYSE Arca Equities''), filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to list and trade shares (''Shares'') of the following funds of the PIMCO ETF Trust (''Trust'') under NYSE Arca Equities Rule 8.600 (Managed Fund Shares): PIMCO Enhanced Short Maturity Strategy Fund; PIMCO Government Limited Maturity Strategy Fund; PIMCO Intermediate Municipal Bond Strategy Fund; PIMCO Prime Limited Maturity Strategy Fund; and PIMCO Short Term Municipal Bond Strategy Fund (each a ''Fund'' and, collectively, the ''Funds''). The proposed rule change was published in the **Federal Register** on September 11, 2009.[3] The Commission received no comments on the proposal. On November 10, 2009, the Exchange filed Amendment No. 1 to the proposed rule change.[4] This order provides notice of the filing of Amendment No. 1, and approves the proposed rule change, as modified by Amendment No. 1 thereto, on an accelerated basis.

I. Description of the Proposal

The Exchange proposes to list and trade the Shares pursuant to NYSE Arca Equities Rule 8.600, which governs the listing of Managed Fund Shares. Each of the Funds will be an actively managed exchange-traded fund. The Shares will be offered by the Trust.[5] Pacific Investment Management Company LLC (''PIMCO'' or ''Adviser'') is the investment adviser to each Fund.[6] State Street Bank & Trust Co. is the custodian and transfer agent for the Funds. The Trust's Distributor is Allianz Global Investors Distributors LLC (''Distributor''), an indirect subsidiary of Allianz Global Investors of America L.P., PIMCO's parent company. The Distributor is a registered broker-dealer.[7]

The Exchange states that the Shares will be subject to the initial and continued listing criteria under NYSE Arca Equities Rule 8.600 applicable to Managed Fund Shares[8] and that the Shares will comply with Rule 10A–3

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 60619 (September 3, 2009), 74 FR 46820 (''Notice'').

[4] Amendment No. 1 reflects the following changes to the proposed rule change: (a) On November 3, 2009, the Trust filed a Registration Statement on Form N–1A with the Commission (File Nos. 333–155395 and 811–22250); (b) with respect to the PIMCO Enhanced Short Maturity Strategy Fund, such Fund will be restricted from investing in derivative instruments such as options contracts, futures contracts, options on futures contracts, and swap agreements (including, but not limited to, credit default swaps and swaps on exchange-traded funds); and (c) the respective creation unit sizes for the following Funds will be changed:

(i) PIMCO Enhanced Short Maturity Strategy Fund creation unit size will be reduced to 70,000 shares from 100,000 shares;

(ii) PIMCO Government Limited Maturity Strategy Fund creation unit size will be reduced to 90,000 shares from 100,000 shares; and

(iii) PIMCO Prime Limited Maturity Strategy Fund creation unit size will be reduced to 90,000 shares from 100,000 shares.

The creation unit sizes for each of the PIMCO Intermediate Municipal Bond Strategy Fund and the PIMCO Short Term Municipal Bond Strategy Fund will not change and will be 100,000 shares, respectively.

[5] The Trust is a Delaware statutory trust that is registered under the Investment Company Act of 1940 (15 U.S.C. 80a) (''1940 Act''). *See* Registration Statement on Form N–1A for the Trust filed with the Commission on November 3, 2009 (File Nos. 333–155395 and 811–22250) (''Registration Statement'').

[6] The Exchange represents that the Adviser, as the investment adviser of the Funds, and its related personnel, are subject to Investment Advisers Act Rule 204A–1. This Rule specifically requires the adoption of a code of ethics by an investment adviser to include, at a minimum: (i) Standards of business conduct that reflect the firm's/personnel fiduciary obligations; (ii) provisions requiring supervised persons to comply with applicable federal securities laws; (iii) provisions that require all access persons to report, and the firm to review, their personal securities transactions and holdings periodically as specifically set forth in Rule 204A–1; (iv) provisions requiring supervised persons to report any violations of the code of ethics promptly to the chief compliance officer (''CCO'') or, provided the CCO also receives reports of all violations, to other persons designated in the code of ethics; and (v) provisions requiring the investment adviser to provide each of the supervised persons with a copy of the code of ethics with an acknowledgement by said supervised persons. In addition, Rule 206(4)–7 under the Advisers Act makes it unlawful for an investment adviser to provide investment advice to clients unless such investment adviser has (i) adopted and implemented written policies and procedures reasonably designed to prevent violation, by the investment adviser and its supervised persons, of the Advisers Act and the Commission rules adopted thereunder; (ii) implemented, at a minimum, an annual review regarding the adequacy of the policies and procedures established pursuant to subparagraph (i) above and the effectiveness of their implementation; and (iii) designated an individual (who is a supervised person) responsible for administering the policies and procedures adopted under subparagraph (i) above.

[7] The Funds have made application for an order granting certain exemptive relief to the Trust under the 1940 Act. In compliance with Commentary .05 to NYSE Arca Equities Rule 8.600, which applies to Managed Fund Shares based on an international or global portfolio, the Trust's application for exemptive relief under the 1940 Act states that the Funds will comply with the federal securities laws in accepting securities for deposits and satisfying redemptions with redemption securities, including that the securities accepted for deposits and the securities used to satisfy redemption requests are sold in transactions that would be exempt from registration under the Securities Act of 1933 (15 U.S.C. 77a).

[8] The Exchange states that a minimum of 100,000 Shares will be outstanding at the commencement of trading on the Exchange, and the Exchange will obtain a representation from the issuer of the Shares that the net asset value (''NAV'') per Share will be calculated daily and that the NAV and the Disclosed Portfolio will be made available to all market participants at the same time. *See* Notice, *supra* note 3.

under the Act,[9] as provided by NYSE Arca Equities Rule 5.3. Additional information regarding the Trust, each of the Funds, the Shares, the Funds' investment objectives, strategies, policies, and restrictions, risks, fees and expenses, creation and redemption procedures, portfolio holdings and policies, distributions and taxes, availability of information, trading rules and halts, and surveillance procedures, among other things, can be found in the Registration Statement and in the Notice, as applicable.[10]

II. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning whether Amendment No. 1 to the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NYSEArca–2009–79 on the subject line.

Paper Comments

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

All submissions should refer to File Number SR–NYSEArca–2009–79. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2009–79 and should be submitted on or before December 9, 2009.

III. Discussion and Commission's Findings

The Commission has carefully reviewed the proposed rule change and finds that it is consistent with the requirements of Section 6 of the Act[11] and the rules and regulations thereunder applicable to a national securities exchange.[12] In particular, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act,[13] which requires, among other things, that the Exchange's rules be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Commission notes that the Shares must comply with the requirements of NYSE Arca Equities Rule 8.600 to be listed and traded on the Exchange.

The Commission finds that the proposal to list and trade the Shares on the Exchange is consistent with Section 11A(a)(1)(C)(iii) of the Act,[14] which sets forth Congress' finding that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure the availability to brokers, dealers, and investors of information with respect to quotations for and transactions in securities. Quotation and last-sale information for the Shares will be available via the Consolidated Tape Association (''CTA'') high-speed line, and the Exchange will disseminate the Portfolio Indicative Value (''PIV'') at least every 15 seconds during the Core Trading Session through the facilities of the CTA. In addition, the Funds will make available on a Web site on each business day the Disclosed Portfolio that will form the basis for the calculation of the NAV, which will be determined as of the close of the regular trading session on the New York Stock Exchange (ordinarily 4 p.m. Eastern Time) on each business day. The Funds' Web site will also include additional quantitative information updated on a daily basis relating to trading volume, prices, and NAV. Information regarding the market price and volume of the Shares will be continually available on a real-time basis throughout the day via electronic services, and the previous day's closing price and trading volume information for the Shares will be published daily in the financial sections of newspapers.

The Commission further believes that the proposal is reasonably designed to promote fair disclosure of information that may be necessary to price the Shares appropriately and to prevent trading when a reasonable degree of transparency cannot be assured. The Commission notes that the Exchange will obtain a representation from the issuer that the NAV per Share will be calculated daily and that the NAV and the Disclosed Portfolio will be made available to all market participants at the same time.[15] Additionally, if it becomes aware that the NAV or the Disclosed Portfolio is not disseminated daily to all market participants at the same time, the Exchange will halt trading in the Shares until such information is available to all market participants.[16] Further, if the PIV is not being disseminated as required, the Exchange may halt trading during the day in which the disruption occurs; if the interruption persists past the day in which it occurred, the Exchange will halt trading no later than the beginning of the trading day following the interruption.[17] The Exchange represents that the Adviser is affiliated with a broker-dealer, Allianz Global Investors Distributors LLC, and has implemented a ''fire wall'' between it and its broker-dealer affiliate with respect to access to information concerning the composition and/or changes to each of the Funds' portfolios. Further, the Commission notes that the Reporting Authority that provides the Disclosed Portfolio must implement and maintain, or be subject to, procedures designed to prevent the use and dissemination of material non-

[9] 17 CFR 240.10A–3.

[10] *See supra* notes 3 and 5.

[11] 15 U.S.C. 78f.

[12] In approving this proposed rule change the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[13] 17 U.S.C. 78f(b)(5).

[14] 15 U.S.C. 78k–1(a)(1)(C)(iii).

[15] *See* NYSE Arca Equities Rule 8.600(d)(1)(B).

[16] *See* NYSE Arca Equities Rule 8.600(d)(2)(D).

[17] *Id.* Trading in the Shares may also be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. These may include: (1) The extent to which trading is not occurring in the securities comprising the Disclosed Portfolio and/or the financial instruments of the Funds; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present.

public information regarding the actual components of each of the portfolios.[18]

The Exchange has represented that the Shares are equity securities subject to the Exchange's rules governing the trading of equity securities. In support of this proposal, the Exchange has made representations, including:

(1) The Shares will conform to the initial and continued listing criteria under NYSE Arca Equities Rule 8.600.

(2) The Exchange's surveillance procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws.

(3) Prior to the commencement of trading, the Exchange will inform its ETP Holders in an Information Bulletin of the special characteristics and risks associated with trading the Shares. Specifically, the Information Bulletin will discuss the following: (a) The procedures for purchases and redemptions of Shares and that Shares are not individually redeemable; (b) NYSE Arca Equities Rule 9.2(a), which imposes a duty of due diligence on its ETP Holders to learn the essential facts relating to every customer prior to trading the Shares; (c) the risks involved in trading the Shares during the Opening and Late Trading Sessions when an updated PIV will not be calculated or publicly disseminated; (d) how information regarding the PIV is disseminated; (e) the requirement that ETP Holders deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (f) trading information.

(4) The Funds will be in compliance with Rule 10A–3 under the Act.

(5) The Funds will not invest in non-U.S. equity securities.

This approval order is based on the Exchange's representations.

For the foregoing reasons, the Commission finds that the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange.

IV. Accelerated Approval

The Commission finds good cause, pursuant to Section 19(b)(2) of the Act,[19] for approving the proposal prior to the thirtieth day after the date of publication of the Notice in the **Federal Register**. The Commission notes that it has approved the listing and trading on the Exchange of shares of other actively managed exchange-traded funds based on a portfolio of securities, the characteristics of which are similar to those to be invested by the Funds.[20] The Commission also notes that it has received no comments regarding the proposed rule change. Further, the Commission believes that the additional investment restrictions with respect to the PIMCO Enhanced Short Maturity Strategy Fund and the decreased creation and redemption unit sizes for certain of the Funds, as described in Amendment No. 1 to the proposed rule change,[21] do not raise any novel regulatory concerns. The Commission believes that accelerating approval of this proposal should benefit investors by creating, without undue delay, additional competition in the market for Managed Fund Shares.

V. Conclusion

It is therfore ordered, pursuant to Section 19(b)(2) of the Act,[22] that the proposed rule change (SR–NYSEArca–2009–79), as modified by Amendment No. 1 thereto, be, and it hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[23]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–27607 Filed 11–17–09; 8:45 am]

BILLING CODE 8011–01–P

[18] *See* NYSE Arca Equities Rule 8.600(d)(2)(B)(ii).

[19] 15 U.S.C. 78s(b)(2).

[20] *See, e.g.,* Securities Exchange Act Release Nos. 57514 (March 17, 2008), 73 FR 15230 (March 21, 2008) (SR–Amex–2008–02) (approving the listing and trading of shares of the Bear Stearns Current Yield Fund); 57626 (April 4, 2008), 73 FR 19923 (April 11, 2008) (SR–NYSEArca–2008–28) (approving the trading of shares of the Bear Stearns Current Yield Fund on the Exchange pursuant to UTP); and 57801 (May 8, 2008), 73 FR 27878 (May 14, 2008) (SR–NYSEArca–2008–31) (approving the listing and trading of shares of twelve actively-managed funds of the WisdomTree Trust).

[21] *See supra* note 4.

[22] 15 U.S.C. 78s(b)(2).

[23] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60983; File No. SR–NYSE–2009–84]

Self-Regulatory Organizations; New York Stock Exchange LLC; Order Approving a Proposed Rule Change, as Modified by Amendment No. 1, Amending NYSE Rule 36 To Permit the Use of Personal Portable or Wireless Communication Devices Off the Exchange Trading Floor and Outside Other Restricted Access Areas

November 10, 2009.

I. Introduction

On August 27, 2009, the New York Stock Exchange LLC (''NYSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the ''Act'')[2] and Rule 19b–4 thereunder,[3] a proposed rule change, as modified by Amendment No. 1,[4] to amend NYSE Rule 36 to permit the use of personal portable or wireless communication devices off the Exchange Trading Floor and outside other restricted access areas, and make corresponding technical changes. The proposed rule change was published for comment in the **Federal Register** on September 28, 2009.[5] The Commission received no comments regarding the proposal. This order approves the proposed rule change.

II. Background

Currently, NYSE Rule 36 (Communications Between Exchange and Members' Offices) prohibits members and member organizations from establishing or maintaining any telephonic or electronic communication, including the usage of any portable or wireless communication devices (*i.e.* cellular phone, wireless pager, BlackBerry™, etc.), between the Floor, as defined in NYSE Rule 6, and any other location without prior Exchange approval.

Notwithstanding the rule's general prohibition on the use of portable or wireless communication devices, current Rule 36 permits Floor brokers to use Exchange authorized and issued portable phones on the Floor to

[1] 15 U.S.C.78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] Amendment No. 1, which the Exchange filed on September 17, 2009, superseded and replaced the original filing in its entirety.

[5] *See* Securities Exchange Act Release No. 60691 (September 18, 2009), 74 FR 49431 FR 34609 (''Notice'').

communicate with both member firms and non-members off the Floor, subject to certain restrictions.[6] Floor brokers may not, however, use Exchange authorized and issued devices on the NYSE Amex Options Trading Floor (as defined in NYSE Rule 6A).[7] In addition, current Rule 36 permits Designated Market Makers (''DMMs''), subject to restriction, to maintain at their posts telephone lines to the off-Floor offices of the DMM unit or the unit's clearing firm.[8] Such telephone lines may only be used to enter options or futures hedging orders through the DMM unit's off-Floor office or the unit's clearing firm, or through a member (on the Floor) of an options or futures exchange. These lines may not, however, be used for the purpose of transmitting to the Floor orders for the purchase or sale of securities. DMMs are also permitted to use at their posts wired or wireless devices, including computer terminals or laptops, that are registered with the Exchange to communicate with their system algorithms.[9] Under current Rule 36, the use of all other portable or wireless communication devices on the Floor is prohibited.

As noted in the foregoing paragraph, the restrictions on the use of portable or wireless communication devices in current Rule 36 relate to what is and is not permissible on the Exchange Floor. Under NYSE Rule 6, the term Floor is defined as ''the trading Floor of the Exchange and the premises immediately adjacent thereto, such as the various entrances and lobbies of the 11 Wall Street, 18 New Street, 8 Broad Street, 12 Broad Street and 18 Broad Street Buildings, and also means the telephone facilities available in these locations.'' [10]

Recently, the Exchange adopted Rule 6A, setting forth a definition of Trading Floor that is distinct from the definition of Floor. Specifically, the Trading Floor is an area within the area of the ''Floor'' that is defined as ''the restricted-access physical areas designated by the Exchange for the trading of securities, commonly known as the 'Main Room' and the 'Garage.' '' [11] As such, the Trading Floor's restricted access physical area also includes the areas outside the Blue Line that include the member and member organization booths and/or trading desks.

III. Description of the Proposal

The Exchange proposes to amend NYSE Rule 36 to permit the use of personal portable or wireless communication devices outside of the Exchange's Trading Floor and other restricted access areas, provided such usage is consistent with all other Exchange Rules and federal securities laws and rules thereunder. Floor brokers would still be limited to using only Exchange authorized and issued portable phones on the Exchange Trading Floor and DMMs would still only be permitted to use registered telephone lines and/or wired or wireless devices at their posts, and all such devices and communications would continue to be regulated by the Exchange.

The proposal would permit Exchange members and member firm employees to use personal portable or wireless communications devices in designated areas of the Exchange's buildings and facilities that fall within the technical definition of the Floor under Rule 6, but that are outside the Trading Floor, and other restricted access points (*i.e.* where there are turnstiles or card swipe pads that electronically release locked doors to permit authorized entry).[12] Because the lobby and other corridor areas where usage of personal portable or wireless communications will now be permitted still fall within the broader definition of ''Floor'' under Exchange rules, the Exchange will retain jurisdiction over its members in these areas. As such, in its filing, the Exchange noted that it would retain jurisdiction over its members and member firm employees to regulate conduct that is inconsistent with Exchange Rules and the federal securities laws and rules thereunder (*e.g.,* trading ahead, insider trading, market manipulation).[13]

The proposal would thus permit members and member firm employees to use their personal communications devices in the hallways, stairwells, lobbies or members-only areas of the Exchange premises that are adjacent to the Trading Floors of the Exchange, NYSE Amex Options and/or NYSE Amex Equities.[14] The Exchange stated specifically that such usage would be permitted in the lobby areas of the Exchange's facilities at 11 Wall Street, 6 and 18 New Street, and 2, 12, 18 and 20 Broad Street, as well as in the corridor in front of the interior elevator bank inside of 18 Broad Street.[15]

In its filing, the Exchange stated that the purpose of the proposal is to provide Exchange members and member firm employees with a reasonable and comfortable space inside the physical confines of the Exchange's buildings and facilities within which they may use their personal portable or wireless communication devices, without diminishing the ability to monitor and regulate their conduct.[16] According to the Exchange, the current prohibitions of Rule 36 and the broad definition of ''Floor'' under Rule 6 together effectively require members and member firm employees to exit the Exchange premises in order to use their personal portable or wireless communications devices.[17] In the Exchange's view, the distance afforded by allowing a DMM, for example, to use a personal portable or wireless communication device outside the turnstiles is, in essence, equivalent to requiring a DMM to leave the

[6] All members and member firm employees who use an Exchange authorized and issued portable phone must execute a written acknowledgement as to the usage of the phone and authorizing the Exchange to receive data and records related to incoming and outgoing calls. *See* NYSE Information Memos 08–40 (August 14, 2008) *and* 08–41 (August 14, 2008) (concerning the use of Exchange authorized and issued portable phones on the Floor). *See also* NYSE/NYSE Amex Information Memo 08–66 (December 22, 2008).

[7] *See* Rule 36, Supplementary Material .20—.23.

[8] The role of DMMs and their obligations on the Exchange are described in Securities Exchange Act Release No. 58845 (October 24, 2008), 73 FR 64379 (October 29, 2008) (SR–NYSE–2008–46). Notably, pursuant to this Release, the Exchange phased out the specialist system and adopted a Designated Market Maker (''DMM'') structure.

[9] *See* NYSE Rule 36.30.

[10] The Exchange also has issued interpretive guidance that the ''Floor'' also includes the areas outside the ''Blue Line'' (member and member organization booths adjacent to the trading Floor) and ''any area reserved primarily for members, including members' lounges and bathrooms.'' *See* NYSE/NYSE Amex Information Memo 08–66 (December 22, 2008).

[11] In its filing, the Exchange noted that the NYSE Amex Options Trading Floor is within the restricted access perimeter that encompasses the NYSE Trading Floor and thus member and member firm employees would not be permitted to use such devices in that space under the terms of the proposed Rule defining where such devices are permissible. In addition, pursuant to the definitions of ''Floor'' and ''Trading Floor'' in NYSE Rules 6 and 6A, and corresponding Rules 6 and 6A—NYSE Amex Equities, the NYSE and NYSE Amex Equities Trading Floors overlap and thus references to Exchange's Trading Floor includes the NYSE Amex Equities Trading Floor. *See* Securities Exchange Act Release No. 59479 (March 2, 2009), 74 FR 10325 (March 10, 2009) (SR–NYSE–2009–23).

[12] In the filing, the Exchange represented that the majority of the doors that require card swipe for entry are opaque. *See also* note 19 *infra.*

[13] *See* Notice, *supra* note 5.

[14] *See supra* note 11. In addition, while the NYSE Amex Options Rules permit NYSE Amex Options members to use personal communications devices on the NYSE Amex Options Trading Floor, those rules prohibit NYSE Amex Options members from using those devices on the Trading Floor of the Exchange. *See* NYSE Amex Options Rule 902NY.

[15] *See* Notice, *supra* note 5.

[16] *See* Notice, *supra* note 5.

[17] *See* Notice, *supra* note 5. In the filing, the Exchange acknowledged that there are other areas on the Exchange's premises where personal communications devices may be used by members and member firm employees (*e.g.,* the cafeteria in 11 Wall Street), but represented that these areas are either too far from the Trading Floor to be practical or do not have adequate reception for such devices.

Exchange's premises to do the same.[18] Further, the Exchange represented that any time or place advantage to using such devices outside restricted access areas is significantly reduced by the fact that a DMM has no line of sight [19] and no ability to hear trading activity on the Floor and the speed of electronic trading would likely render stale any information a DMM had prior to leaving his or her post on the Trading Floor.[20]

In addition, noting that the proposed rule amendments specifically provide that the use of personal portable or wireless communication devices by Exchange members and member firm employees is subject to compliance with all other Exchange Rules and federal securities laws and rules thereunder, the Exchange represented that it will issue a Notice to Members that will, among other things, remind Exchange members and member firm employees of their obligations under the requirements of Securities Exchange Act Release Nos. 33–7288 and 34–37182, concerning the ''Use of Electronic Media by Broker-Dealers, Transfer Agents, and Investment Advisers for Delivery of Information.'' [21]

The Exchange also proposed corresponding technical amendments to Rule 36.20.

IV. Discussion

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange. Specifically, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,[22] which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of, a free and open market and a national market system, and in general, to protect investors and the public interest.[23]

The Exchange has proposed that members and member firm employees be permitted to use personal portable or wireless communication devices off the Exchange Trading Floor and outside of restricted access areas (*i.e.* restricted access areas are areas where there are turnstiles or card swipe pads that electronically release locked doors to permit authorized entry),[24] subject to compliance with all other Exchange Rules and the federal securities laws and rules thereunder. The proposal marks a departure from the Exchange's current prohibition on the use of such devices in areas that are in close proximity to the Trading Floor of the Exchange, and its stated policy that ''best practice'' is for ''personal contacts made using portable communication devices, whether Exchange issued or not, [to] be made outside the building.'' [25]

The Commission finds, however, that the proposal strikes a reasonable balance between the Exchange's interest in providing a convenient and comfortable space for Exchange members and member firm employees to use their personal portable communications devices inside Exchange buildings and its interest in minimizing the risk of misuse of such devices, which are not subject to the same surveillance as Exchange authorized and issued devices. In particular, the Commission notes the Exchange's representation that any time or place advantage to using personal portable communication devices outside restricted points of access to the Trading Floor is ''significantly reduced by the fact that a Floor Broker or DMM has no line of sight and no ability to hear trading activity on the [Trading] Floor and the speed of electronic trading would likely render stale any information a DMM had prior to leaving his or her post on the Trading Floor.'' [26]

As noted above, the Commission expects that the Exchange will, in the exercise of its regulatory responsibilities, work to ensure that any line of sight to the Trading Floor that may exist does not allow access to Trading Floor information that may raise concerns.[27]

The Commission notes that the Exchange retains jurisdiction over its members for their conduct in the new areas where the use of personal communication devices will now be permitted because these areas are still within the broader definition of Floor under NYSE Rule 6.[28] The Commission further notes the Exchange's representation that it will issue a Notice to Members reminding members of their obligations under Securities Exchange Act Release Nos. 33–7288 and 34–37182, concerning the ''Use of Electronic Media by Broker-Dealers, Transfer Agents, and Investment Advisers for Delivery of Information.'' [29] In these releases, among other things, the Commission noted that the substantive and liability provisions of the federal securities laws, as well as the recordkeeping requirements of the Act apply equally to electronic and paper based media.[30]

Based on the foregoing, the Commission therefore finds the proposal to be consistent with the Act. The Commission believes that the proposal to permit the use of personal communication devices in certain specified areas adjacent to the Trading Floor, while not without any risk, is tempered by the speed of electronic trading, the existence of access barriers between the Trading Floor and the areas where use of personal communication devices will now be permitted, and the fact that the Exchange retains jurisdiction over its members while they are in these areas. The Commission expects, however, that the Exchange will monitor compliance with the new rule and inform the Commission if it encounters difficulties in implementing and enforcing it or otherwise finds that the new rule raises regulatory concerns.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[31] that the

[18] *See* Notice, *supra* note 5.

[19] The Commission notes that in at least one lobby area there is a line of sight to the Trading Floor and a trading post, unlike other lobby areas where the doors to the Trading Floor are opaque. *See supra* note 12. The Commission acknowledges, however, that it would be difficult to see any specific information on the post screens from this lobby area. The Commission expects the Exchange to monitor this to ensure that this remains the case and that such line of sight to the Trading Floor is not misused.

[20] *See* Notice, *supra* note 5.

[21] *See* Securities Exchange Act Release Nos. 33–7288 and 34–37182 (May 9, 1996), 61 FR 24643 (May 15, 1996) (S7–13–96). *See also* FINRA Regulatory Notice 2007–59 (December 7, 2007), concerning the supervision of electronic communications.

[22] 15 U.S.C. 78f(b)(5).

[23] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition and capital formation. *See* 15 U.S.C. 78c(f).

[24] As noted above, restricted access areas include the areas outside the Blue Line that include member and member organization booths and/or trading desks.

[25] *See* NYSE/NYSE Amex Information Memo 08–66 (December 22, 2008).

[26] *See* Notice, *supra* note 5.

[27] *See supra* note 19.

[28] *See* note 13 and accompanying text *supra.*

[29] *See* Securities Act Release No 7288 and Securities Exchange Act Release No. 37182 (May 9, 1996), 61 FR 24643 (May 15, 1996) (S7–13–96).

[30] *Id. See also* FINRA Regulatory Notice 2007–59 (December 7, 2007), concerning the supervision of electronic communications, which among other things, reminds member firms of their obligation to (1) have supervisory policies and procedures to monitor all electronic communications technology used by the firm and its associated persons to conduct the firm's business; and (2) ensure that their use of electronic communications media enables them to make and keep records, as required by Commission and Exchange rules (*e.g.,* Rules 17a–3 and 17a–4 under the Act and NYSE Rule 440).

[31] 15 U.S.C. 78s(b)(2).

proposed rule change (SR–NYSE–2009–84), as amended, be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[32]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–27608 Filed 11–17–09; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60984; File No. SR–NYSEAmex–2009–57]

Self-Regulatory Organizations; NYSE Amex LLC; Order Approving a Proposed Rule Change, as Modified by Amendment No. 1, Amending Rule 36—NYSE Amex Equities To Conform With Proposed Amendments to Corresponding NYSE Rule 36 To Permit the Use of Personal Portable or Wireless Communication Devices Off the Exchange Trading Floor and Outside Other Restricted Access Areas

November 10, 2009.

I. Introduction

On August 27, 2009, NYSE Amex LLC (''NYSE Amex'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the ''Act'')[2] and Rule 19b–4 thereunder,[3] a proposed rule change, as modified by Amendment No. 1,[4] to amend Rule 36—NYSE Amex Equities to permit the use of personal portable or wireless communication devices off the Exchange Trading Floor and outside other restricted access areas, and to make corresponding technical changes. The proposed rule change was published for comment in the **Federal Register** on September 28, 2009.[5] The Commission received no comments regarding the proposal. This order approves the proposed rule change.

II. Background

Currently, Rule 36—NYSE Amex Equities prohibits members and member organizations from establishing or maintaining any telephonic or electronic communication, including the usage of any portable or wireless communication devices (*i.e.* cellular phone, wireless pager, BlackBerry™, etc.), between the Floor, as defined in Rule 6—NYSE Amex Equities, and any other location without prior Exchange approval.

Notwithstanding the general prohibition on the use of portable or wireless communication devices, current Rule 36—NYSE Amex Equities permits Floor brokers to use Exchange authorized and issued portable phones on the Floor to communicate with both member firms and non-members off the Floor, subject to certain restrictions.[6] Floor brokers may not, however, use Exchange authorized and issued devices on the NYSE Amex Options Trading Floor (as defined in Rule 6A—NYSE Amex Equities).[7] In addition, current Rule 36—NYSE Amex Equities permits Designated Market Makers (''DMMs''), subject to restriction, to maintain at their posts telephone lines to the off-Floor offices of the DMM unit or the unit's clearing firm.[8] Such telephone lines may only be used to enter options or futures hedging orders through the DMM unit's off-Floor office or the unit's clearing firm, or through a member (on the Floor) of an options or futures exchange. These lines may not, however, be used for the purpose of transmitting to the Floor orders for the purchase or sale of securities. DMMs are also permitted to use at their posts wired or wireless devices, including computer terminals or laptops, that are registered with the Exchange to communicate with their system algorithms.[9] Under Rule 36—NYSE Amex Equities, the use of all other portable or wireless communication devices on the Floor is prohibited.

As noted in the foregoing paragraph, the restrictions on the use of portable or wireless communication devices in current Rule 36—NYSE Amex Equities relate to what is and is not permissible on the Exchange Floor. Under Rule 6—NYSE Amex Equities, the term ''Floor'' is defined as having the same meaning given that term ''under the Act.'' The Exchange has issued interpretive guidance that the ''Floor'' includes the trading Floor of the Exchange and the premises immediately adjacent thereto, such as the various entrances and lobbies of the 11 Wall Street, 18 New Street, 8 Broad Street, 12 Broad Street and 18 Broad Street Buildings, the telephone facilities available in these locations, the areas outside the ''Blue Line'' (member and member organization booths adjacent to the trading Floor), and any area reserved primarily for members, including members' lounges and bathrooms.[10]

Recently, the Exchange adopted Rule 6A—NYSE Amex Equities, setting forth a definition of ''Trading Floor'' that is distinct from the definition of Floor. Specifically, the Equities Trading Floor is an area within the area of the ''Floor'' and defined as ''the restricted-access physical areas designated by the Exchange for the trading of securities, commonly known as the 'Main Room' and the 'Garage.'" As such, the Trading Floor's restricted access physical areas include the areas outside the Blue Line that include the member and member organization booths and/or trading desks. In accordance with Rule 6A—NYSE Amex Equities, the Equities Trading Floor does not, however, include the areas where NYSE Amex-listed options are traded, commonly known as the ''Blue Room'' and the ''Extended Blue Room'' (the ''NYSE Amex Options Trading Floor'').[11]

[32] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C.78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] Amendment No. 1, which the Exchange filed on September 17, 2009, superseded and replaced the original filing in its entirety.

[5] *See* Securities Exchange Act Release No. 60692 (September 18, 2009), 74 FR 49428 (''Notice'').

[6] All members and member firm employees who use an Exchange authorized and issued portable phone must execute a written acknowledgement as to the usage of the phone and authorizing the Exchange to receive data and records related to incoming and outgoing calls. *See* NYSE Information Memos 08–40 (August 14, 2008) *and* 08–41 (August 14, 2008) (concerning the use of Exchange authorized and issued portable phones on the Floor, incorporated by reference in joint NYSE/NYSE Amex Information Memo 08–66 (December 22, 2008)).

[7] *See* Rule 36—NYSE Amex Equities, Supplementary Material .20—.23

[8] The role of DMMs and their obligations on the Exchange adopted pursuant to the merger of the Exchange with the New York Stock Exchange are described in Securities Exchange Act Release No. 58845 (October 24, 2008), 73 FR 64379 (October 29, 2008) (SR–NYSE–2008–46). *See also* Securities Exchange Act Release No. 59022 (November 26, 2008), 73 FR 73683 (December 3, 2008) (SR–NYSEALTR–2008–10). Notably, pursuant to these releases, the Exchange phased out the specialist system and adopted a Designated Market Maker (''DMM'') structure.

[9] *See* Rule 36.30—NYSE Amex Equities.

[10] *See* NYSE/NYSE Amex Information Memo 08–66 (December 22, 2008).

[11] In the filing, the Exchange noted that the NYSE Amex Options Trading Floor is within the restricted access perimeter that encompasses the NYSE and NYSE Amex Equities Trading Floors and thus member and member firm employees would not be permitted to use such devices in that space under the terms of the proposal. In addition, while the Exchange's Options Rules permit NYSE Amex Options members to use personal communications devices on the NYSE Amex Options Trading Floor, those rules prohibit NYSE Amex Options members from using those devices on the Equities Trading Floor of the Exchange. *See* NYSE Amex Options Rule 902NY. In addition, pursuant to the definitions of ''Floor'' and ''Trading Floor'' in Rules 6 and 6A—NYSE Amex Equities, and corresponding NYSE Rules 6 and 6A, the NYSE Amex Equities and NYSE Trading Floors overlap and thus references to the NYSE Amex ''Equities Trading Floor'' include the NYSE Trading Floor. *See* Securities Exchange Act Release No. 59480 (March 2, 2009), 74 FR 10109 (March 9, 2009) (SR–

Continued

III. Description of the Proposal

The Exchange proposes to amend Rule 36—NYSE Amex Equities to conform with proposed amendments to corresponding New York Stock Exchange (''NYSE'') Rule 36.[12] The proposed amendments to Rule 36—NYSE Amex Equities would permit the use of personal portable or wireless communication devices outside of the Exchange's Trading Floor and other restricted access areas, provided such usage is consistent with all other Exchange Rules and federal securities laws and rules thereunder. Floor brokers would still be limited to using only Exchange authorized and issued portable phones on the Exchange Trading Floor and DMMs would still only be permitted to use registered telephone lines and/or wired or wireless devices at their posts, and all such devices and communications would continue to be regulated by the Exchange.

The proposal would permit members and member firm employees to use personal portable or wireless communications devices in designated areas of the Exchange's buildings and facilities that fall within the technical definition of the Floor under Rule 6, but that are outside the Trading Floor, and other restricted access points (*i.e.,* where there are turnstiles or card swipe pads that electronically release locked doors to permit authorized entry).[13] Because the lobby and other corridor areas where usage of personal portable or wireless communications devices will now be permitted still fall within the broader definition of ''Floor'' under Exchange rules, the Exchange will retain jurisdiction over its members in these areas. As such, in its filing, the Exchange noted that it would retain jurisdiction over its members and member firm employees to regulate conduct that is inconsistent with Exchange Rules and/or federal securities laws (*e.g.,* trading ahead, insider trading, market manipulation).[14]

The proposal would thus permit members and member firm employees to use their personal communications devices in the in the hallways, stairwells, lobbies or members-only areas of the Exchange premises that are adjacent to the Equities and Options Trading Floors of the Exchange and the NYSE.[15] The Exchange stated specifically that such usage would be permitted in the lobby areas of the Exchange's facilities at 11 Wall Street, 6 and 18 New Street, and 2, 12, 18 and 20 Broad Street, as well as in the corridor in front of the interior elevator bank inside of 18 Broad Street.[16]

In its filing, the Exchange stated that the purpose of the proposal is to provide Exchange members and member firm employees with a reasonable and comfortable space inside the physical confines of the Exchange's buildings and facilities within which they may use their personal portable or wireless communication devices, without diminishing the ability to monitor and regulate their conduct.[17] According to the Exchange, the current prohibitions of Rule 36—NYSE Amex Equities and the broad definition of ''Floor'' under Rule 6—NYSE Amex Equities together effectively require members and member firm employees to exit the Exchange premises in order to use their personal portable or wireless communications devices.[18] In the Exchange's view, the distance afforded by allowing a DMM, for example, to use a personal portable or wireless communication device outside the turnstiles is, in essence, equivalent to requiring a DMM to leave the Exchange's premises to do the same.[19] Further, the Exchange represented that any time or place advantage to using such devices outside restricted access areas is significantly reduced by the fact that a DMM has no line of sight[20] and no ability to hear trading activity on the Floor and the speed of electronic trading would likely render stale any information a DMM had prior to leaving his or her post on the Trading Floor.[21]

In addition, noting that the proposed rule amendments specifically provide that the use of personal portable or wireless communication devices by Exchange members and member firm employees is subject to compliance with all other Exchange Rules and/or federal securities laws, the Exchange represented that it will issue a Notice to Members that will, among other things, remind Exchange members and member firm employees of their obligations under the requirements of Securities Exchange Act Release Nos. 33–7288 and 34–37182, concerning the ''Use of Electronic Media by Broker-Dealers, Transfer Agents, and Investment Advisers for Delivery of Information.''[22]

The Exchange also proposed to change Rule 36.23—NYSE Amex Equities to refer to NYSE Amex Options Rule 902NY to clarify that the Exchange's Options Rules permit NYSE Amex Options members to use personal communications devices on the NYSE Amex Options Trading Floor, but that such rule prohibits NYSE Amex Options members from using those devices on the Equities Trading Floor of the Exchange. The Exchange also proposed corresponding technical amendments to Rule 36.20—NYSE Amex Equities.

IV. Discussion

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange. Specifically, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,[23] which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of, a free and

NYSEALTR–2009–21) (adopting Rule 6A—NYSE Amex Equities.)

[12] *See* Securities Exchange Act Release No. 60691 (September 18, 2009), 74 FR 49431 (September 28, 2009) (SR–NYSE–2009–84). As more fully explained in the Notice, NYSE Amex Equities Rules, are substantially identical to NYSE Rules 1–1004.

[13] In the filing, the Exchange represented that the majority of the doors that require card swipe for entry are opaque. *See also* note 20 *infra.*

[14] *See* Notice, *supra* note 5.

[15] It is important to note that the NYSE Amex Options Trading Floor is within the restricted access perimeter that encompasses the NYSE and NYSE Amex Equities Trading Floors and thus member and member firm employees would not be permitted to use such devices in that space under the terms of the proposed Rule defining where such devices are permissible. *See* proposed Rule 36.23—NYSE Amex Equities. In addition, while the Exchange's Options Rules permit NYSE Amex Options members to use personal communications devices on the NYSE Amex Options Trading Floor, those rules prohibit NYSE Amex Options members from using those devices on the Equities Trading Floor of the Exchange. *See* NYSE Amex Options Rule 902NY.

[16] *See* Notice, *supra* note 5.

[17] *See* Notice, *supra* note 5.

[18] *See* Notice, *supra* note 5. In the filing, the Exchange acknowledged that there are other areas on the Exchange's premises where personal communications devices may be used by members and member firm employees (*e.g.,* the cafeteria in 11 Wall Street), but represented that these areas are either too far from the Trading Floor to be practical or do not have adequate reception for such devices.

[19] *See* Notice, *supra* note 5.

[20] The Commission notes that in at least one lobby area there is a line of sight to the Trading Floor and a trading post, unlike other lobby areas where the doors to the Trading Floor are opaque. *See supra* note 13. The Commission acknowledges, however, that it would be difficult to see any specific information on the post screens from this lobby area. The Commission expects the Exchange to monitor this to ensure that this remains the case and that such line of sight to the Trading Floor is not misused.

[21] *See* Notice, *supra* note 5.

[22] *See* Securities Exchange Act Release Nos. 33–7288 and 34–37182 (May 9, 1996), 61 FR 24643 (May 15, 1996) (S7–13–96). *See also* FINRA Regulatory Notice 2007–59 (December 7, 2007), concerning the supervision of electronic communications.

[23] 15 U.S.C. 78f(b)(5).

open market and a national market system, and in general, to protect investors and the public interest.[24]

The Exchange has proposed that members and member firm employees be permitted to use personal portable or wireless communication devices off the Exchange Trading Floor and outside of restricted access areas (*i.e.* restricted access areas are areas where there are turnstiles or card swipe pads that electronically release locked doors to permit authorized entry),[25] subject to compliance with all other Exchange Rules and the federal securities laws and rules thereunder. The proposal marks a departure from the Exchange's current prohibition on the use of such devices in areas that are in close proximity to the Trading Floor of the Exchange, and its stated policy that ''best practice'' is for ''personal contacts made using portable communication devices, whether Exchange issued or not, [to] be made outside the building.'' [26]

The Commission finds, however, that the proposal strikes a reasonable balance between the Exchange's interest in providing a convenient and comfortable space for Exchange members and member firm employees to use their personal portable communications devices inside Exchange buildings and its interest in minimizing the risk of misuse of such devices, which are not subject to the same surveillance as Exchange authorized and issued devices. In particular, the Commission notes the Exchange's representation that any time or place advantage to using personal portable communication devices outside restricted points of access to the Trading Floor is ''significantly reduced by the fact that a Floor Broker or DMM has no line of sight and no ability to hear trading activity on the [Trading] Floor and the speed of electronic trading would likely render stale any information a DMM had prior to leaving his or her post on the Trading Floor.'' [27] As noted above, the Commission expects that the Exchange will, in the exercise of its regulatory responsibilities, work to ensure that any line of sight to the Trading Floor that may exist does not allow access to Trading Floor information that may raise concerns.[28]

The Commission notes that the Exchange retains jurisdiction over its members for their conduct in the new areas where the use of personal communication devices will now be permitted because these areas are still within the broader definition of Floor under Rule 6—NYSE Amex Equities.[29] The Commission further notes the Exchange's representation that it will issue a Notice to Members reminding members of their obligations under Securities Exchange Act Release Nos. 33–7288 and 34–37182, concerning the ''Use of Electronic Media by Broker-Dealers, Transfer Agents, and Investment Advisers for Delivery of Information.'' [30] In these releases, among other things, the Commission noted that the substantive and liability provisions of the federal securities laws, as well as the recordkeeping requirements of the Act apply equally to electronic and paper based media.[31]

The Commission further finds that the added reference in Rule 36.23 to NYSE Amex Options Rule 902NY is consistent with the Act because it ensures that Rule 36.23 references a rule that clarifies members' obligations. The Commission also finds the proposed technical changes to Rules 36.20 to be consistent with the Act.

Based on the foregoing, the Commission therefore finds the proposal to be consistent with the Act. The Commission believes that the proposal to permit the use of personal communication devices in certain specified areas adjacent to the Exchange's Equities Trading Floor, the NYSE Amex Options Trading Floor, and the NYSE Trading Floor, while not without any risk, is tempered by the speed of electronic trading, the existence of access barriers between such Trading Floors and the areas where use of personal communication devices will now be permitted, and the fact that the Exchange retains jurisdiction over its members while they are in these areas. The Commission expects, however, that the Exchange will monitor compliance with the new rule and inform the Commission if it encounters difficulties in implementing and enforcing it or otherwise finds that that the new rule raises regulatory concerns.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[32] that the proposed rule change (SR–NYSEAmex–2009–57), as amended, be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[33]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–27609 Filed 11–17–09; 8:45 am]

BILLING CODE 8011–01–P

[24] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition and capital formation. *See* 15 U.S.C. 78c(f).

[25] As noted above, restricted access areas include the areas outside the Blue Line that include member and member organization booths and/or trading desks.

[26] *See* NYSE/NYSE Amex Information Memo 08–66 (December 22, 2008).

[27] *See* Notice, *supra* note 5.

[28] *See* supra note 20.

[29] *See* note 14 and accompanying text *supra.*

[30] *See* Securities Act Release No 7288 and Securities Exchange Act Release No. 37182 (May 9, 1996), 61 FR 24643 (May 15, 1996) (S7–13–96).

[31] *Id. See also* FINRA Regulatory Notice 2007–59 (December 7, 2007), concerning the supervision of electronic communications, which among other things, reminds member firms of their obligation to (1) have supervisory policies and procedures to monitor all electronic communications technology used by the firm and its associated persons to conduct the firm's business; and (2) ensure that their use of electronic communications media enables them to make and keep records, as required by Commission and Exchange rules (*e.g.,* Rules 17a–3 and 17a–4 under the Act and Rule 440—NYSE Amex Equities).

[32] 15 U.S.C. 78s(b)(2).

[33] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

19th Meeting: RTCA Special Committee 206/EUROCAE WG 76 Plenary: AIS and MET Data Link Services

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of RTCA Special Committee 206/EUROCAE WG 76 Plenary: AIS and MET Data Link Services meeting.

SUMMARY: The FAA is issuing this notice to advise the public of a meeting of RTCA Special Committee 206/EUROCAE WG 76 Plenary: AIS and MET Data Link Services.

DATES: The meeting will be held December 7–11, 2009 from 9 a.m. to 5 p.m.

ADDRESSES: The meeting will be held at Gilruth Center, Brazos Room, Space Center Blvd, Gate 5, Building 207, Houston, TX 77058, 281–483–0304; Contact Person: Tom Evans, (P) 757–864–2499, (C) 757–268–4852, (E) *e.t.evans@nasa.gov.*

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.*

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 RTCA Special

Committee 206/EUROCAE WG 76 Plenary: AIS and MET Data Link Services meeting. The agenda will include:

7 December—Monday

9 a.m. Opening Plenary

- Chairmen's remarks and Host's comments
- Introductions, review and approve meeting agenda and approval of previous meeting minutes
- Schedule for this week
- Action Item Review
- Schedule for next meetings

1 a.m. Presentations

- Proposal for a MASPS/MOPS for AIS/MET Data Link Services—Gary Livack & Mark Mutchler
- To be determined

1 p.m. SPR

8 December—Tuesday

9 a.m. Joint AIS and MET Subgroup Meetings

9 December—Wednesday

9 a.m. Joint AIS and MET Subgroup Meetings

10 December—Thursday

9 a.m. Joint AIS and MET Subgroup Meetings

11 December—Friday

9 a.m. Joint AIS and MET Subgroup Meetings

10:30 a.m. Plenary Session

- Other Business
- Meeting Plans and Dates

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 12, 2009.

Francisco Estrada C.,

RTCA Advisory Committee.

[FR Doc. E9–27662 Filed 11–17–09; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Noise Compatibility Program (NCP); 14 CFR Part 150; Notice of Record of Approval (ROA) the Louisville International Airport, Louisville, KY (SDF)

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice.

SUMMARY: The Federal Aviation Administration (FAA) announces its findings on the noise compatibility program update submitted by the Louisville Regional Airport Authority (LRAA).

On October 29, 2008, the LRAA submitted to the FAA Air Traffic Organization (ATO) a request with supporting documentation for an offset approach to Runway 17R at Louisville International Airport (SDF). This request was for a re-evaluation of noise abatement measure NA–7, and associated measures NA–2 and NA–3, submitted to the FAA for action in its 2003 NCP but were deferred.

The FAA ATO evaluated the offset approach procedure provided by LRAA. After considerable review and evaluation, the procedure was disapproved. The FAA ATO notified LRAA of its determination on April 3, 2009. Subsequent to ATO's determination, the FAA issued its Record of Approval (ROA) concerning the LRAA's NCP update on August 4, 2009, and disapproved noise abatement measures NA–2, NA–3, and NA–7.

In its evaluation, the FAA reviewed the proposal under 14 CFR part 150 and the Aviation Safety and Noise Abatement Act of 1979. Section 150.35 of Part 150 includes language stating that programs will be approved under this part if program measures relating to the use of flight procedures for noise control can be implemented within the period covered by the program and without reducing the level of aviation safety provided or adversely affecting the efficient use and management of the navigable airspace and air traffic control systems.

DATES: *Effective Date:* The effective date of the FAA's disapproval of the request for an offset approach to Runway 17R at Louisville International Airport is April 3, 2009. The effective date of FAA's ROA of LRAA's NCP update is August 4, 2009.

FOR FURTHER INFORMATION CONTACT: Stephen Wilson, Community Planner, Federal Aviation Administration, Memphis Airports District Office, 2862 Business Park Drive, Building G, Memphis, TN 38118. Documents reflecting this FAA action can be reviewed in person at this same location.

SUPPLEMENTARY INFORMATION: The FAA has reviewed Noise Abatement Measures (NA–2), (NA–3) and (NA–7) in accordance with 14 CFR Part 150. The ROA contains the FAA's decisions for 3 of the 7 NCP measures that were previously deferred under LRAA's 2003 NCP. The FAA has given its disapproval to the Runway 17R offset approach request at LRAA. All other portions of the previously issued ROA remain in effect.

The following is a brief overview of the request:

On October 29, 2008, the LRAA provided the FAA Air Traffic Organization with a letter and supporting documentation requesting an offset approach to Runway 17R at Louisville International Airport (SDF). This was additional information submitted for re-evaluation of previously submitted but deferred noise abatement measures NA–2, NA–3, and NA–7 in LRAA's 2003 NCP

Issued in Memphis, TN on November 3, 2009.

Tommy L Dupree,

Acting Manager, Memphis Airports District Office, Southern Region.

[FR Doc. E9–27684 Filed 11–17–09; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 35311]

BNSF Railway Company—Trackage Rights Exemption—Union Pacific Railroad Company

Pursuant to a written supplemental trackage rights agreement dated January 1, 2009, BNSF Railway Company (BNSF) has agreed to amend the existing overhead trackage rights previously granted to Union Pacific Railroad Company (UP) over BNSF's Bieber line at Keddie, CA.[1]

According to BNSF, the purpose of the proposed transaction is to amend the parties' existing agreement to accurately reflect the trackage rights received by UP under that agreement.

[1] This decision embraces Finance Docket No. 32760 (Sub-No. 1) in which the original trackage rights were granted to UP in connection with UP's acquisition of control of Southern Pacific Transportation Company and were exempted by the Board. *Union Pacific/Southern Pacific Merger,* 1 S.T.B. 233 (1996).

Specifically, BNSF states that the amendment deletes the existing agreement's Exhibit A and replaces it with a new Exhibit A (map). BNSF also states that the amendment provides that UP will perform signal maintenance on all signal facilities between BNSF's Bieber line (milepost 202.72) and wye connections with UP's Canyon Subdivision.

The transaction is scheduled to be consummated on December 2, 2009, the effective date of the exemption (30 days after the exemption was filed).

As a condition to this exemption, any employees affected by the trackage rights will be protected by the conditions imposed in *Norfolk and Western Ry. Co.—Trackage Rights—BN,* 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Ry., Inc.—Lease and Operate,* 360 I.C.C. 653 (1980).

Pursuant to the Consolidated Appropriations Act, 2008, Public Law 110–161, section 193, 121 Stat. 1844 (2007), nothing in this decision authorizes the following activities at any solid waste rail transfer facility: collecting, storing, or transferring solid waste outside of its original shipping container; or separating or processing solid waste (including baling, crushing, compacting, and shredding). The term ''solid waste'' is defined in section 1004 of the Solid Waste Disposal Act, 42 U.S.C. 6903.

This notice is filed under 49 CFR 1180.2(d)(7). If the notice contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Stay petitions must be filed by November 25, 2009 (at least 7 days before the exemption becomes effective).

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 35311, must be filed with the Surface Transportation Board, 395 E Street, SW., Washington, DC 20423–0001. In addition, a copy of each pleading must be served on Adrian L. Steel, Jr., Mayer Brown LLP, 1999 K Street, NW., Washington, DC 20006–1101.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov.*

Decided: November 13, 2009.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. E9–27698 Filed 11–17–09; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF THE TREASURY

Notice of Request for Public Comment on the Accessibility to Department of the Treasury Conducted Programs and Activities by Individuals With Disabilities

AGENCY: Departmental Offices, Treasury.

ACTION: Notice of request for public comment.

SUMMARY: Section 504 of the Rehabilitation Act of 1973 requires that programs and activities conducted by federal agencies be accessible to individuals with disabilities. The Department of the Treasury invites the public to comment on any barriers to the accessibility of its conducted programs and activities by individuals with disabilities.

DATES: Comments should be received on or before December 30, 2009 to be assured of consideration.

ADDRESSES: Comments may be submitted via electronic mail at *OCRD.comments@do.treas.gov*, or via mail addressed to the Director, Office of Civil Rights and Diversity, 1500 Pennsylvania Avenue, NW., Washington, DC 20220.

FOR FURTHER INFORMATION CONTACT: Lydia E. Aponte at (202) 622–8335 (not a toll-free-call), or by e-mail to the above address.

SUPPLEMENTARY INFORMATION: *Request for Comments:* Comments are requested concerning: (1) Any existing barriers to the access by individuals with disabilities, and how they impede access to the program or activity; (2) Any existing resources that may be used to address these barriers, and how they could be employed; (3) The best ways to improve accessibility to Department of the Treasury programs and activities by individuals with disabilities. Members of the public providing comments are urged to keep comments succinct and responsive to these subjects.

The Department of the Treasury: The Department of the Treasury is an Executive Department composed of the following bureaus: Departmental Offices; Internal Revenue Service; Office of the Comptroller of the Currency; Office of Thrift Supervision; Bureau of Engraving and Printing; United States Mint; Bureau of Public Debt; Financial Management Service; Alcohol and Tobacco, Tax and Trade Bureau; Financial Crimes Enforcement Network; Office of Inspector General; Special Inspector General for the Troubled Assets Relief Program; and the Treasury Inspector General for Tax Administration.

Department of the Treasury.

Dan Tangherlini,

Assistant Secretary for Management and Chief Financial Officer.

[FR Doc. E9–27622 Filed 11–17–09; 8:45 am]

BILLING CODE 4810–25–P

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

Privacy of Consumer Financial Information

AGENCY: Office of Thrift Supervision (OTS), Treasury.

ACTION: Notice and request for comment.

SUMMARY: The proposed information collection request (ICR) described below has been submitted to the Office of Management and Budget (OMB) for review and approval, as required by the Paperwork Reduction Act of 1995. OTS is soliciting public comments on the proposal.

DATES: Submit written comments on or before December 18, 2009. A copy of this ICR, with applicable supporting documentation, can be obtained from RegInfo.gov at: *http://www.reginfo.gov/public/do/PRAMain.*

ADDRESSES: Send comments, referring to the collection by title of the proposal or by OMB approval number, to OMB and OTS at these addresses: Office of Information and Regulatory Affairs, Attention: Desk Officer for OTS, U.S. Office of Management and Budget, 725—17th Street, NW., Room 10235, Washington, DC 20503, or by fax to (202) 395–6974; and Information Collection Comments, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552, by fax to (202) 906–6518, or by e-mail to *infocollection.comments@ots.treas.gov.* OTS will post comments and the related index on the OTS Internet Site at *http://www.ots.treas.gov.* In addition, interested persons may inspect comments at the Public Reading Room, 1700 G Street, NW., by appointment. To make an appointment, call (202) 906–5922, send an e-mail to *public.info@ots.treas.gov*, or send a facsimile transmission to (202) 906–7755.

FOR FURTHER INFORMATION CONTACT: For further information or to obtain a copy of the submission to OMB, please contact Ira L. Mills at, *ira.mills@ots.treas.gov* (202) 906–6531, or facsimile number (202) 906–6518, Regulations and Legislation Division, Chief Counsel's Office, Office of Thrift

Supervision, 1700 G Street, NW., Washington, DC 20552.

SUPPLEMENTARY INFORMATION: OTS may not conduct or sponsor an information collection, and respondents are not required to respond to an information collection, unless the information collection displays a currently valid OMB control number. As part of the approval process, we invite comments on the following information collection.

Title of Proposal: Privacy of Consumer Financial Information.

OMB Number: 1550–0103.

Form Number: N/A.

Regulation requirement: 12 CFR part 573.

Description: These information collections are required under section 504 of the Gramm-Leach-Bliley Act (Act), Public Law 106–102. Section 502 of the Act prohibits a financial institution from disclosing nonpublic personal information about a consumer to nonaffiliated third parties unless the institution satisfies various disclosure requirements (*i.e.*, provides a privacy notice and opt out notice) and the consumer has not elected to opt out of the disclosure. Section 504 requires the Office of Thrift Supervision, as well as the Office of the Comptroller of the Currency, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, National Credit Union Administration, Federal Trade Commission, and Securities and Exchange Commission to issue regulations as necessary to implement the notice requirements and restrictions.

Consumers use the privacy notice information to determine whether they want personal information disclosed to third parties that are not affiliated with the institution. Further, consumers use the opt-out notice mechanism to advise the institution of their wishes regarding disclosure of their personal information. Institutions use the opt-out information to determine the wishes of their consumers and to act appropriately.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit.

Estimated Number of Respondents: 68,378.

Estimated Burden Hours per Response: 80 hours for de novos and acquisitions: 8 hours for institutions; and .5 hours for customers.

Estimated Frequency of Response: On occasion.

Estimated Total Burden: 44,543 hours.

Clearance Officer: Ira L. Mills, (202) 906–6531, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

Dated: November 12, 2009.

Ira L. Mills,

Paperwork Clearance Officer, Office of Thrift Supervision.

[FR Doc. E9–27672 Filed 11–17–09; 8:45 am]

BILLING CODE 6720–01–P

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

[AC–30: OTS No. H–4648]

Northwest Bancshares, Inc., Warren, PA; Approval of Conversion Application

Notice is hereby given that on November 9, 2009, the Office of Thrift Supervision approved the application of Northwest Savings Bank, Warren, Pennsylvania, to convert to the stock form of organization. Copies of the application are available for inspection by appointment (phone number: 202–906–5922 or e-mail *Public.Info@OTS.Treas.gov*) at the Public Reading Room, 1700 G Street, NW., Washington, DC 20552, and the OTS Northeast Regional Office, Harborside Financial Center Plaza Five, Suite 1600, Jersey City, New Jersey 07311.

Dated: November 10, 2009.

By the Office of Thrift Supervision.

Sandra E. Evans,

Federal Register Liaison.

[FR Doc. E9–27545 Filed 11–17–09; 8:45 am]

BILLING CODE M

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

Home Federal Savings Bank, Detroit, MI; Notice of Appointment of Receiver

Notice is hereby given that, pursuant to the authority contained in section 5(d)(2) of the Home Owners' Loan Act, the Office of Thrift Supervision (OTS) has duly appointed the Federal Deposit Insurance Corporation as sole Receiver for Home Federal Savings Bank, Detroit, Michigan (OTS No. 05171), on November 6, 2009.

Dated: November 10, 2009.

By the Office of Thrift Supervision.

Sandra E. Evans,

Federal Register Liaison.

[FR Doc. E9–27547 Filed 11–17–09; 8:45 am]

BILLING CODE M

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0377]

Proposed Information Collection (Claim for Repurchase of Loan) Activity: Comment Request

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection, and allow 60 days for public comment in response to the notice. This notice solicits comments on information needed to repurchase a default loan.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before January 19, 2010.

ADDRESSES: Submit written comments on the collection of information through the Federal Docket Management System (FDMS) at *http://www.Regulations.gov* or to Nancy J. Kessinger, Veterans Benefits Administration (20M35), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail to *nancy.kessinger@va.gov*. Please refer to ''OMB Control No. 2900–0377'' in any correspondence. During the comment period, comments may be viewed online at FDMS.

FOR FURTHER INFORMATION CONTACT: Nancy J. Kessinger at (202) 461–9769 or FAX (202) 275–5947.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of

information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Title: Claim for Repurchase of Loan, VA Form 26–8084.

OMB Control Number: 2900–0377.

Type of Review: Extension of a currently approved collection.

Abstract: Holders of delinquent vendee accounts guaranteed by VA complete VA Form 26–8084 to request a repurchase of a loan that has been in default for three months and the amount of the delinquency equals or exceeds the sum of two monthly installments. VA notifies the obligor(s) in writing of the loan repurchased, and that the vendee account will be serviced and maintained by VA.

Affected Public: Business or other for-profit.

Estimated Annual Burden: 30 hours.

Estimated Average Burden per Respondent: 30 minutes.

Frequency of Response: One-time.

Estimated Number of Respondents: 60.

Dated: November 13, 2009.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. E9–27714 Filed 11–17–09; 8:45 am]

BILLING CODE P

Federal Register

Wednesday,
November 18, 2009

Part II

Environmental Protection Agency

40 CFR Part 180

Carbofuran; Order Denying FMC's Objections and Requests for Hearing; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2005–0162; FRL–8797–6]

Carbofuran; Order Denying FMC's Objections and Requests for Hearing

AGENCY: Environmental Protection Agency (EPA).

ACTION: Order.

SUMMARY: In this order, EPA denies objections to, and requests for hearing on, a final rule revoking all pesticide tolerances for carbofuran under section 408(d) of the Federal Food, Drug, and Cosmetic Act (FFDCA). The objections and hearing requests were filed on June 30, 2009, by the National Corn Growers Association, National Sunflower Association, National Potato Council, and FMC Corporation (''Petitioners'').

DATES: This final order is effective November 18, 2009.

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2005–0162. To access the electronic docket, go to *http://www.regulations.gov,* and search for the docket number. Follow the instructions on the regulations.gov Web site 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: Jude Andreasen, Pesticide Re-evaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–9342; e-mail address: *andreasen.jude@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

In this document EPA denies objections and hearing requests by the National Corn Growers Association, National Sunflower Association, National Potato Council, and FMC Corporation (''Petitioners'') concerning EPA's final rule revoking all pesticide tolerances for carbofuran. This action may also be of interest to agricultural producers, food manufacturers, or pesticide manufacturers. Potentially affected entities may include, but are not limited to:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

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

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

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. Acronyms

The following is a list of acronyms used in this order:

AChE—Acetylcholinesterase
aPAD—Acute Population Adjusted Dose
BMD—Bench Mark Dose
BMDL—Bench Mark Dose Level
CCA—Comparative Cholinesterase Assay
CNS—Central Nervous System
CRA—Cumulative Risk Assessment
CSFII—Continuing Survey of Food Intakes by Individuals
CWA—Clean Water Act
CWS—Community Water System
DEEM–FCID—Dietary Exposure Evaluation Model-Food Commodity Intake Database
ECG—Electrocardiogram
EDWC—Estimated Drinking Water Concentration
EPA—Environmental Protection Agency
FACA—Federal Advisory Committee Act
FDA—Food and Drug Administration
FIFRA—Federal Insecticide, Fungicide, and Rodenticide Act
FFDCA—Federal Food, Drug, and Cosmetic Act
FQPA—Food Quality Protection Act of 1996
HSRB—Human Studies Review Board
HUC–8—8-digit hydrologic unit code
IRED—Interim Reregistration Eligibility Decision
LD_{50}—Lethal Dose for 50% of a population
LOAEL—Lowest Observable Adverse Effect Level
NAWQA—National Water Quality Assessment Program
NHEERL—National Health and Environmental Effects Laboratory
NMC CRA—N-Methyl Carbamate Cumulative Risk Assessment
NOAEL—No Observable Adverse Effect Level
NOIC—Notice of Intent to Cancel
NRDC—National Resources Defense Council
OP—Organophosphate
ORD—Office of Research and Development
PAD—Population Adjusted Dose
PCA—Percent Cropped Area
PCT—Percent Crop Treated
PDP—Pesticide Data Program
PND—Post-Natal Day
PNS—Peripheral Nervous System
PoD—Point of Departure
ppb—parts per billion
ppm—parts per million
PRZM–EXAMS—Pesticide Root Zone Model-Exposure Analysis Model System
RBC—red blood cell
RED—Reregistration Eligibility Decision
RfD—Reference Dose
SAP—Scientific Advisory Panel
SDWA—Safe Drinking Water Act
USDA—United States Department of Agriculture
USGS—United States Geological Survey
WARP—Watershed Regression for Pesticides

II. Introduction

A. What Action Is the Agency Taking?

Exposure to the pesticide carbofuran resulting from existing legal uses is unsafe—unsafe for the general

population, and particularly unsafe for infants and children. EPA reached this conclusion in 2006 after an exhaustive multi-year review of the data on carbofuran as part of its effort to determine whether carbofuran should be reregistered under the Federal Insecticide, Fungicide, and Rodenticide Act (''FIFRA''), and whether the tolerances allowing carbofuran residues on certain foods met the revised safety standard in section 408 of the FFDCA. This multi-year review included multiple opportunities for public participation, including no less than four formal public comment periods. Following EPA review of yet more carbofuran data submitted by FMC, the carbofuran registrant, and the review of EPA's science findings by the FIFRA Scientific Advisory Panel (SAP)—an independent scientific peer review panel—EPA again reached the same conclusion in its July 31, 2008 proposal to revoke the carbofuran tolerances (73 FR 44864 (July 31, 2008)). In response to this proposed revocation, FMC submitted comments challenging many of EPA's science findings and also requesting the cancellation of the registration of carbofuran on several crops and the restriction of where, and the manner in which, carbofuran could be used in the United States on its remaining registered crop sites. Finding FMC's science arguments to be flawed and its proposed amendments to the carbofuran registration to be insufficient, EPA finalized the rule revoking carbofuran tolerances on May 15, 2009 (74 FR 23046 (May 15, 2009)).

Pursuant to the procedures of the FFDCA, on June 29, 2009 objections to the final revocation rule were filed by the National Corn Growers Association, National Sunflower Association, National Potato Council, and FMC Corporation (''Petitioners''). The Petitioners also requested a hearing on their objections. Coupled with these objections, FMC filed on the same day yet another series of proposed amendments to its carbofuran registration. These proposed modifications contained new application and geographic restrictions as well as an unprecedented non-governmental scheme for preventing the use of carbofuran in any one area of the country above a small percentage of that area's agricultural acreage. The Petitioners relied on these proposed carbofuran registration amendments as central to, and inextricably intertwined with, their objection to EPA's prior determination in the final rule that carbofuran tolerances are unsafe. Specific challenges raised by the Petitioners involved EPA's decision on the appropriate level of the additional safety factor to protect infants and children, EPA's estimate of carbofuran levels in drinking water, EPA's consideration of the time needed to recover from exposure to carbofuran, and EPA's refusal to consider a human toxicity study conducted with carbofuran.

Today's order denies all of the Petitioners' objections and requests for hearing. A principal flaw in the Petitioners' objections is that they have objected to EPA's determination in the final rule on the safety of carbofuran based on the FIFRA registration amendments that FMC filed with EPA 45 days after the safety determination was made. As such, the Petitioners' objections are irrelevant, and thus immaterial, to the determination EPA made in the final rule. FMC has the statutory right under FIFRA to request amendment of its carbofuran registration. What Petitioners may not do is prolong the FFDCA tolerance revocation process by challenging EPA's safety determination based on proposed FIFRA registration changes not before EPA at the time of its final revocation decision.

It should be noted that EPA's decision on the carbofuran tolerances is not a determination on FMC's proposed registration amendments. FMC may continue to pursue these amendments and also the re-establishment of carbofuran tolerances in light of the amendments. Further, FMC may seek administrative review, and potentially an administrative hearing, with regard to any adverse decision issued by EPA on its proposed amendments. But that process must be played out in the future, a future in which any decision about the safety of carbofuran is made prior to the re-introduction of carbofuran residues in food and water, rather than concurrent with the continued exposure of infants and children to levels of carbofuran residues that EPA has found to be unsafe.

Despite the fact that a central aspect of the Petitioners' objections is based on a flawed conception of the objection process (*i.e.,* the notion that the objection process presents the opportunity for a complete reformulation of the matter in dispute, rather than a chance for a review of the accuracy of EPA's earlier determination), EPA has undertaken a comprehensive analysis of the merits of each of the Petitioners' objections and hearing requests. That analysis shows, as is exhaustively set out in Unit VI, that none of the Petitioners' requests for hearing meets the regulatory standard for granting a hearing and none of the Petitioners' objections has merit. There are numerous reasons for these conclusions, but two related themes running throughout EPA's analysis are the Petitioners' failure to timely raise issues or submit supporting documents during the public comment process on the proposed rule and the Petitioners' failure to object to how EPA, in the final rule, resolved the issues the Petitioners did raise in the comment process. EPA considers issues untimely raised to be waived—as EPA clearly warned at the proposal stage—and finds recycled comments on the proposed rule to be irrelevant to the detailed determinations made in the final rule. The rulemaking phase of the revocation process has a purpose, and parties treat it lightly at their peril. Finally, EPA notes that an additional problem with the Petitioners' objections is that once the newly proposed registration amendments are stripped from the objections, it is not at all clear that any remaining issues, even if concluded in the Petitioners' favor, would result in lowering carbofuran's estimated risks—which EPA has estimated as far exceeding the safety standard—to an acceptable level. For all of these reasons, the Petitioners' objections and hearing requests are denied.

B. What Is the Agency's Authority for Taking This Action?

EPA is taking this action pursuant to the authority in FFDCA section 408(g)(2)(C), which requires the Agency to issue a final order resolving the objections to its final rule, issued pursuant to 408(b)(1)(b), 408(b)(2)(A), and 408(e)(1)(A). 21 U.S.C. 346a(b)(1)(b), (b)(2)(A), (e)(1)(A), (g)(2)(C).)

III. Statutory and Regulatory Background

In this Unit, EPA provides background on the relevant statutes and regulations governing the Petitioners' objections and requests for hearing as well as on pertinent Agency policies and practices.

A. FFDCA/FIFRA and Applicable Regulations

1. *In general.* EPA establishes maximum residue limits, or ''tolerances,'' for pesticide residues in food under section 408 of the FFDCA (21 U.S.C. 346a). Without such a tolerance or an exemption from the requirement of a tolerance, a food containing a pesticide residue is ''adulterated'' under section 402 of the FFDCA and may not be legally moved in interstate commerce (21 U.S.C. 331,

342). Monitoring and enforcement of pesticide tolerances are carried out by the U.S. Food and Drug Administration (''FDA'') and the U.S. Department of Agriculture (''USDA''). Section 408 was substantially rewritten by the Food Quality Protection Act of 1996 (''FQPA''), which added the provisions discussed below establishing a detailed safety standard for pesticides, additional protections for infants and children, and the process for establishing or revoking tolerances (Pub. L. 104–170, 110 Stat. 1489 (1996)).

EPA also regulates pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act (''FIFRA'') (7 U.S.C. 136 *et seq.*). While the FFDCA authorizes the establishment of legal limits for pesticide residues in food, FIFRA requires the approval of pesticides prior to their sale and distribution (7 U.S.C. 136a(a)), and establishes a registration regime for regulating the use of pesticides. FIFRA regulates pesticide use in conjunction with its registration scheme by requiring EPA review and approval of pesticide labels and specifying that use of a pesticide inconsistent with its label is a violation of federal law (7 U.S.C. 136j(a)(2)(G)). In the FQPA, Congress integrated action under the two statutes by requiring that the safety standard under the FFDCA be used as a criterion in FIFRA registration actions as to pesticide uses that result in dietary risk from residues in or on food (7 U.S.C. 136(bb)), and directing that EPA coordinate, to the extent practicable, revocations of tolerances with pesticide cancellations under FIFRA. (21 U.S.C. 346a(l)(1)).

2. *Safety standard for pesticide tolerances.* Section 408(b)(2)(A)(i) of the FFDCA requires EPA to modify or revoke a tolerance if EPA determines that the tolerance is not ''safe'' (21 U.S.C. 346a(b)(2)(A)(ii)). Section 408(b)(2)(A)(ii) of the 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)(D) directs EPA, in making a safety determination, to:

Consider, among other relevant factors—* * *

(vi) Available information concerning the aggregate exposure levels of consumers (and major identifiable subgroups of consumers) to the pesticide chemical residue and to other related substances, including dietary exposure under the tolerance and all other tolerances in effect for the pesticide chemical residue, and exposure from other non-occupational sources;

EPA must also consider, in evaluating the safety of tolerances, ''safety factors which * * * are generally recognized as appropriate for the use of animal experimentation data.'' (21 U.S.C. 346a(b)(2)(D)(ix).)

Risks to infants and children are given special consideration. Specifically, section 408(b)(2)(C) states that EPA:

> Shall assess the risk of the pesticide chemical based on—* * *
>
> (II) Available information concerning the special susceptibility of infants and children to the pesticide chemical residues, including neurological differences between infants and children and adults, and effects of in utero exposure to pesticide chemicals;

(21 U.S.C. 346a(b)(2)(C)(i)(II) and (III)). This provision also creates a presumptive additional safety factor for the protection of infants and children. Specifically, it directs that ''[i]n the case of threshold effects, * * * an additional tenfold margin of safety for the pesticide chemical residue and other sources of exposure shall be applied for infants and children to take into account potential pre- and post-natal toxicity and completeness of the data with respect to exposure and toxicity to infants and children'' (21 U.S.C. 346a(b)(2)(C)). EPA is permitted to ''use a different margin of safety for the pesticide chemical residue only if, on the basis of reliable data, such margin will be safe for infants and children'' (Id.). The additional safety margin for infants and children is referred to throughout this order as the ''children's safety factor.''

3. *Procedures for establishing, amending, or revoking tolerances.* Tolerances are revoked by rulemaking under the unique procedural framework set forth in the FFDCA. Section 408(e) of the FFDCA, 21 U.S.C. 346a(e), authorizes EPA to modify or revoke tolerances on its own initiative.

In issuing a regulation on its own initiative, EPA must first publish a notice of proposed rulemaking, and must generally provide at least 60 days to allow the public to comment on the proposed regulation. After considering comments submitted during this comment period, EPA issues a final rule.

Once EPA issues a final rule, any person may file objections with EPA and, if desired, request an evidentiary hearing on those objections (21 U.S.C. 346a(g)(2)). Objections must specify ''with particularity the provisions of the regulation * * * deemed objectionable and stating reasonable grounds therefore'' (21 U.S.C. 346a(g)(2)(A); 40 CFR 178.25(a)). Objections and hearing requests must be filed within 60 days (Id.). The statute provides that EPA shall ''hold a public evidentiary hearing if and to the extent the Administrator determines that such a public hearing is necessary to receive factual evidence relevant to material issues of fact raised by the objections'' (21 U.S.C. 346a(g)(2)(B)). EPA regulations make clear that hearings will only be granted where it is shown that there is ''a genuine and substantial issue of fact;'' the requestor has identified evidence ''which, if established, will resolve one or more of such issues in favor of the requestor,'' and the issue is ''determinative'' with regard to the relief requested (40 CFR 178.32(b)). After consideration of any objections, EPA must issue a final order stating the action taken in response to each objection, including a determination as to whether any hearing is appropriate (21 U.S.C. 346a(g)(2)(C)). The final order also establishes any revisions to the final regulation EPA deems to be warranted based on the objections. Id. EPA's final order on the objections is subject to judicial review in the Court of Appeals, within 60 days of the publication of the order (21 U.S.C. 346a(h)(1)).

4. *Tolerance reassessment and FIFRA reregistration.* EPA revoked the carbfuran tolerances to implement the Agency's findings made during the reregistration and tolerance reassessment processes.

The FQPA required that EPA reassess the safety of all pesticide tolerances existing at the time of its enactment. (21 U.S.C. 346a(q)). EPA was given 10 years to reassess the approximately 10,000 tolerances in existence in 1996. In this reassessment, EPA was required to review existing pesticide tolerances under the new ''reasonable certainty that no harm will result'' standard set forth in section 408(b)(2)(A)(i). (21 U.S.C. 346a(b)(2)(A)(i)). This reassessment was substantially completed by the August 3, 2006 deadline. Tolerance reassessment was generally handled in conjunction with a similar program involving reregistration of pesticides under FIFRA. (7 U.S.C. 136a–1). Reassessment and reregistration decisions were generally combined in a document labeled a Reregistration Eligibility Decision (RED).

B. EPA's Human Research Rule

EPA decisions regarding the use of human studies in pesticide regulatory decisions are governed by the Protection for Subjects in Human Research final rule (''Human Research rule''), which significantly strengthened and expanded protections for subjects of human research (71 FR 6138 (February 6, 2006)). The framework of the Human Research rule rests on the basic principle that EPA will not, in its actions, rely on data derived from unethical research. The rule divides studies involving intentional dosing of human subjects into two groups: ''new'' studies—those initiated after April 7, 2006 (the effective date of the rule)—and ''old'' studies—those initiated before April 7, 2006. The Human Research Rule forbids EPA from relying on data from any ''new'' study, unless EPA has adequate information to determine that the research was conducted in substantial compliance with the ethical requirements contained therein (40 CFR 26.1705). These ethical rules are derived primarily from the ''Common Rule,'' (40 CFR part 26), a rule setting ethical parameters for studies conducted or supported by the federal government. In addition to requiring informed consent and protection of the safety of the subjects, among other things, the rule specifies that ''[r]isks to subjects [must be] reasonable in relation to * * * the importance of the knowledge that may reasonably be expected to result [from the study].'' (40 CFR 26.1111(a)(2)). In other words, a study would be judged unethical if it did not have scientific value outweighing any risks to the test subjects.

As to ''old'' studies, the Human Research Rule forbids EPA from relying on such data if there is clear and convincing evidence that the conduct of the research was fundamentally unethical or significantly deficient with respect to the ethical standards prevailing at the time the research was conducted (40 CFR 26.1704). EPA has indicated that in evaluating ''the ethical standards prevailing at the time the research was conducted'' it will consider the Nuremburg Code, various editions of the Declaration of Helsinki, the Belmont Report, and the Common Rule, as among the standards that may be applicable to any particular study (71 FR at 6161). Further, reflecting the concern that scientifically invalid data are ''always unethical,'' (71 FR at 6160), the rule limits the human research that can be relied upon by EPA to ''scientifically valid and relevant data'' (40 CFR 26.1701).

Whether the data are ''new'' or ''old,'' the Human Research rule forbids EPA from relying on data from any study involving intentional exposure of pregnant women, fetuses, or children subject to a very limited exception (40 CFR 26.1703, 1706).

To aid EPA in making scientific and ethical determinations under the Human Research rule, the rule established an independent Human Studies Review Board (HSRB) to review both proposals for new research (new studies) and reports of completed human research (old studies) on which EPA proposes to rely (40 CFR 26.1603). The rule directs that the HSRB shall be comprised of non-EPA employees ''who have expertise in fields appropriate for the scientific and ethical review of human research, including research ethics, biostatistics, and human toxicology'' (40 CFR 26.1603(a)). If EPA decides to rely on the results from ''old'' research conducted to identify or measure a toxic effect, EPA must submit the results of its assessment to the HSRB for evaluation of the ethical and scientific merit of the research (40 CFR 26.1602(b)(2)).

EPA has established the HSRB as a federal advisory committee under the Federal Advisory Committee Act (FACA) to take advantage of ''the benefits of the transparency and opportunities for public participation'' that accompany a FACA committee (71 FR at 6156). The HSRB, as appointed by EPA, contains approximately 16 distinguished experts in the fields of bioethics, biostatistics, human health risk assessment and human toxicology, primarily from academia (Ref. 10).

IV. EPA's Approach to Dietary Risk Assessment

EPA performs a number of analyses to determine the risks from aggregate exposure to pesticide residues. A short summary is provided below to aid the reader. For further discussion of the regulatory requirements of section 408 of the FFDCA and a complete description of the risk assessment process, see *http://www.epa.gov/fedrgstr/EPA-PEST/1999/January/Day-04/p34736.htm*.

To assess the risk of a pesticide tolerance, EPA combines information on pesticide toxicity with information regarding the route, magnitude, and duration of exposure to the pesticide. The risk assessment process involves four distinct steps: (1) Identification of the toxicological hazards posed by a pesticide; (2) determination of the exposure ''level of concern'' for humans; (3) estimation of human exposure; and (4) characterization of human risk based on comparison of human exposure to the level of concern.

A. Hazard Identification and Selection of Toxicological Endpoint

1. In General. Any risk assessment begins with an evaluation of a chemical's inherent properties, and whether those properties have the potential to cause adverse effects (*i.e.,* hazard identification). EPA then evaluates the hazards to determine the most sensitive and appropriate adverse effect of concern, based on factors such as the effect's relevance to humans and the likely routes of exposure.

Once a pesticide's potential hazards are identified, EPA determines a toxicological level of concern for evaluating the risk posed by human exposure to the pesticide. In this step of the risk assessment process, EPA essentially evaluates the levels of exposure to the pesticide at which effects might occur. An important aspect of this determination is assessing the relationship between exposure (dose) and response (often referred to as the dose-response analysis). In evaluating a chemical's dietary risks EPA uses a reference dose (RfD) approach, which involves a number of considerations including:

- A 'point of departure' (PoD)—the value from a dose-response curve that is at the low end of the observable data and that is the dose that serves as the 'starting point' in extrapolating a risk to the human population;
- An uncertainty factor to address the potential for a difference in toxic response between humans and animals used in toxicity tests (*i.e.*, interspecies extrapolation);
- An uncertainty factor to address the potential for differences in sensitivity in the toxic response across the human population (*i.e.*, intraspecies variability); and
- The need for an additional safety factor to protect infants and children, as specified in FFDCA section 408(b)(2)(C).

EPA uses the chosen PoD to calculate a safe dose or RfD. The RfD is calculated by dividing the chosen PoD by all applicable safety or uncertainty factors. Typically in EPA risk assessments, a combination of safety or uncertainty factors providing at least a hundredfold (100X) margin of safety is used: 10X to account for interspecies extrapolation and 10X to account for intraspecies variability. Further, as required by FFDCA section 408(b)(2)(C), in evaluating the dietary risks for pesticide chemicals, an additional safety factor of 10X is presumptively applied to protect infants and children, unless reliable data support selection of a different

factor. In implementing FFDCA section 408, EPA also calculates a variant of the RfD referred to as a Population Adjusted Dose (PAD). A PAD is the RfD divided by any portion of the children's safety factor that does not correspond to one of the traditional additional uncertainty/safety factors used in general Agency risk assessment. The reason for calculating PADs is so that other parts of the Agency, which are not governed by FFDCA section 408, can, when evaluating the same or similar substances, easily identify which aspects of a pesticide risk assessment are a function of the particular statutory commands in FFDCA section 408. For acute assessments, the risk is expressed as a percentage of a maximum acceptable dose or the acute PAD (*i.e.*, the acute dose which EPA has concluded will be ''safe''). As discussed below in Unit V.C., dietary exposures greater than 100 percent of the acute PAD are generally cause for concern and would be considered ''unsafe'' within the meaning of FFDCA section 408(b)(2)(B). Throughout this document general references to EPA's calculated safe dose are denoted as an acute PAD, or aPAD, because the relevant point of departure for carbofuran is based on an acute risk endpoint.

2. Acetylcholinesterase Inhibition. Carbofuran is a member of the class of pesticides called *N*-methyl carbamates (NMCs). The primary toxic effect caused by NMCs, including carbofuran, is neurotoxicity resulting from inhibition of the enzyme acetylcholinesterase (AChE). The toxicity profile of these pesticides is characterized by rapid time to onset of effects followed by rapid recovery (minutes to hours). Consistent with its mechanism of action, toxicity data on AChE inhibition from laboratory rats provide the basis for deriving the PoD for carbofuran.

AChE inhibition is a disruption of the normal process in the body by which the nervous system chemically communicates with muscles and glands. Communication between nerve cells and a target cell (*i.e.,* another nerve cell, a muscle fiber, or a gland) is facilitated by the chemical, acetylcholine. When a nerve cell is stimulated it releases acetylcholine into the synapse (or space) between the nerve cell and the target cell. The released acetylcholine binds to receptors in the target cell, stimulating the target cell in turn. As EPA has explained, ''the end result of the stimulation of cholinergic pathway(s) includes, for example, the contraction of smooth (*e.g.,* in the gastrointestinal tract) or skeletal muscle, changes in heart rate or glandular secretion (*e.g.,* sweat glands) or communication between nerve cells in the brain or in the autonomic ganglia of the peripheral nervous system.'' (Ref. 78 at 10).

AChE is an enzyme that breaks down acetylcholine and terminates its stimulating action in the synapse between nerve cells and target cells. When AChE is inhibited, acetylcholine builds up prolonging the stimulation of the target cell. This excessive stimulation potentially results in a broad range of adverse effects on many bodily functions including muscle cramping or paralysis, excessive glandular secretions, or effects on learning, memory, or other behavioral parameters. Depending on the degree of inhibition these effects can be serious, even fatal.

EPA's cholinesterase inhibition policy statement explains EPA's approach to evaluating the risks posed by AChE-inhibiting pesticides such as carbofuran (Ref. 78 at 10). The policy focuses on three types of effects associated with AChE-inhibiting pesticides that may be assessed in animal and human toxicological studies: (1) Physiological and behavioral/functional effects; (2) AChE inhibition in the central and peripheral nervous system; and (3) AChE inhibition in red blood cells and blood plasma. The policy discusses how such data should be integrated in deriving an acceptable dose (RfD/PAD) for a AChE-inhibiting pesticide.

After clinical signs or symptoms, AChE inhibition in the nervous system provides the next most important endpoint for evaluating AChE-inhibiting pesticides. Although AChE inhibition in the nervous system is not itself regarded as a direct adverse effect, it is ''generally accepted as a key component of the mechanism of toxicity leading to adverse cholinergic effects'' (Id. at 25). As such, the policy states that it should be treated as ''direct evidence of potential adverse effects'' and ''data showing this response provide valuable information in assessing potential hazards posed by antiAChE pesticides'' (Id.). Unfortunately, useful data measuring AChE inhibition in the peripheral nervous system tissues has only been relatively rarely captured by standard toxicology testing, particularly for the NMC compounds. For central nervous system effects, however, more recent neurotoxicity studies ''have sought to characterize the time course of inhibition in * * * [the] brain, including brain regions, after acute and 90-day exposures'' (Id. at 27).

AChE inhibition in the blood is one step further removed from the direct harmful consequences of AChE-inhibiting pesticides. According to the policy, inhibition of blood AChEs ''is not an adverse effect, but may indicate a potential for adverse effects on the nervous system'' (Id. at 28). The policy states that ''[a]s a matter of science policy, blood AChE data are considered appropriate surrogate measures of potential effects on peripheral nervous system AChE activity in animals, for central nervous system (''CNS'') AChE activity in animals when CNS data are lacking and for both peripheral and central nervous system AChE in humans'' (Id. at 29). The policy notes that ''there is often a direct relationship between a greater magnitude of exposure [to a AChE-inhibiting pesticide] and an increase in incidence and severity of clinical signs and symptoms as well as blood AChE inhibition'' (Id. at 30). Thus, the policy regards blood AChE data as ''appropriate endpoints for derivation of reference doses or concentrations when considered in a weight-of-the-evidence analysis of the entire database * * *'' (Id. at 29). Between AChE inhibition measured in red blood cell (''RBC'') or blood plasma, the policy states a preference for reliance on RBC AChE measurements because plasma is composed of a mixture of acetylcholinesterase and butyrylcholinesterase, and inhibition of the latter is less clearly tied to inhibition of acetylcholinesterase in the nervous system (Id. at 29, 32).

EPA has relied on a benchmark dose (BMD) approach for deriving the PoD from the available rat toxicity studies. A BMD is a point estimate along a dose-response curve that corresponds to a specific response level. For example, a BMD_{10} represents a 10% change from the background; 10% is often used as a typical value for the response of concern (Ref. 76). Generically, the direction of change from background can be an increase or a decrease depending on the biological parameter and the chemical of interest. In the case of carbofuran, inhibition of AChE is the toxic effect of concern. Following exposure to carbofuran, the normal biological activity of the AChE enzyme is decreased (*i.e.,* the enzyme is inhibited). Thus, when evaluating BMDs for carbofuran, the Agency is interested in a decrease in AChE activity compared to normal activity levels, which are also termed ''background'' levels. Measurements of ''background'' AChE activity levels are usually obtained from animals in experimental studies that are not treated with the pesticide of interest (*i.e.,* ''negative control'' animals).

In addition to the BMD, a confidence limit was also calculated. Confidence limits express the uncertainty in a BMD that may be due to sampling and/or

experimental error. The lower confidence limit on the dose used as the BMD is termed the BMDL, which the Agency uses as the PoD. Use of the BMDL for deriving the PoD rewards better experimental design and procedures that provide more precise estimates of the BMD, resulting in tighter confidence intervals. Use of the BMDL also helps ensure with high confidence (*e.g.,* 95% confidence) that the selected percentage of AChE inhibition is not exceeded. From the PoD, EPA calculates the RfD and aPAD. Specific to carbofuran and the other NMCs, EPA the FIFRA SAP has reviewed and supported the statistical methods used to derive the BMD and BMDLs on multiple occasions (Refs. 34, 35, 36).

In the Agency's BMD analysis for carbofuran, EPA used a response level of 10% brain AChE inhibition; this value represents the estimated dose where AChE is inhibited by 10%, compared to untreated animals. For the last several years EPA has used the 10% value to regulate AChE inhibiting pesticides, including organophosphorous pesticides (OPs) and NMCs. For a variety of toxicological and statistical reasons, EPA chose 10% brain AChE inhibition as the response level for use in BMD calculations. EPA analyses have demonstrated that 10% is a level that can be reliably measured in the majority of rat toxicity studies; is generally at or near the limit of sensitivity for discerning a statistically significant decrease in AChE activity across the brain compartment; and is a response level close to the background (Refs. 34, 35).

B. Estimating Human Dietary Exposure Levels

Pursuant to section 408(b) of the FFDCA, EPA has evaluated carbofuran's dietary risks based on ''aggregate exposure'' to carbofuran. By ''aggregate exposure,'' EPA is referring to exposure to carbofuran by multiple pathways of exposure. EPA uses available data and standard analytical methods, together with assumptions designed to be protective of public health, to produce separate estimates of exposure for a highly exposed subgroup of the general population, for each potential pathway and route of exposure. For acute risks, EPA then calculates potential aggregate exposure and risk by using probabalistic [1] techniques to combine distributions of potential exposures in the population for each route or pathway. For dietary analyses, the relevant sources of potential exposure to carbofuran are from the ingestion of residues in food and drinking water. The Agency uses a combination of monitoring data and predictive models to evaluate environmental exposure of humans to carbofuran.

1. Exposure from Food. The level of human exposure to pesticide residues in food is a function of both the pesticide residues in food and the amount of food consumed. Data on the residues of carbofuran in foods are available from a variety of sources. One of the primary sources of data comes from federally-conducted surveys, including the Pesticide Data Program (PDP) conducted by the USDA. Further, market basket surveys, which are typically performed by registrants, can provide additional residue data. These data generally provide a characterization of pesticide residues in or on foods consumed by the U.S. population that closely approximates real world exposures because they are sampled closer to the point of consumption in the chain of commerce than field trial data, which are generated to establish the maximum level of legal residues that could result from maximum permissible use of the pesticide. In certain circumstances, when EPA believes the information will provide more accurate exposure estimates, EPA will rely on field trial data (see below in Unit VI.E.1).

EPA relies on USDA's Continuing Survey of Food Intake by Individuals (CSFII) for information on food consumption by the US population as well as 32 subgroups based on age, gender, ethnicity, and region. The latest CSFII was conducted in 1994–1996 and 1998. The 1998 survey was a special survey required by the FQPA to supplement the number of children survey participants. DEEM–FCID also contains ''recipes'' that convert foods as consumed (*e.g.,* pizza) back into their component raw agricultural commodities (*e.g.,* wheat from flour, or tomatoes from sauce, etc.). This is necessary because residue data are generally gathered on raw agricultural commodities rather than on finished ready-to-eat food. Data on residue values for a particular pesticide and the RfD or PADs for that pesticide are inputs to the DEEM–FCID computer program to estimate exposure and risk.

The DEEM–FCID computer program estimates exposure by combining data on human consumption amounts with residue values in food commodities. DEEM–FCID also compares exposure estimates to appropriate RfD or PAD values to estimate risk. EPA uses DEEM–FCID to estimate exposure for the general U.S. population as well as for 32 subgroups based on age, sex, ethnicity, and region. DEEM–FCID allows EPA to process extensive volumes of data on human consumption amounts and residue levels in making risk estimates. Matching consumption and residue data, as well as managing the thousands of repeated analyses of the consumption database conducted under probabilistic risk assessment techniques, requires the use of a computer.

For carbofuran's assessment, EPA used DEEM–FCID to calculate risk estimates based on a probabilistic distribution. DEEM–FCID combines the full range of residue values for each food with the full range of data on individual consumption amounts to create a distribution of exposure and risk levels. More specifically, DEEM–FCID creates this distribution by calculating an exposure value for each reported day of consumption per person (''person/day'') in CSFII, assuming that all foods potentially bearing the pesticide residue contain such residue at a value selected randomly from the exposure data sets. The exposure amounts for the thousands of person/days in the CSFII are then collected in a frequency distribution. EPA also uses DEEM–FCID to compute a distribution taking into account both the full range of data on consumption levels and the full range of data on potential residue levels in food. Combining consumption and residue levels into a distribution of potential exposures and risk requires use of probabilistic techniques.

The probabilistic technique that DEEM–FCID uses to combine differing levels of consumption and residues involves the following steps:

(1) Identification of any food(s) that could bear the residue in question for each person/day in the CSFII;

(2) Calculation of an exposure level for each of the thousands of person/days in the CSFII database, based on the foods identified in Step #1 by randomly selecting residue values for the foods from the residue database;

(3) Repetition of Step #2 one thousand times for each person/day; and

[1] Probabilistic analysis is used to predict the frequency with which variations of a given event will occur. By taking into account the actual distribution of possible consumption and pesticide residue values, probabilistic analysis for pesticide exposure assessments ''provides more accurate information on the range and probability of possible exposure and their associated risk values'' (Ref. 77). In capsule, a probabilistic pesticide exposure analysis constructs a distribution of potential exposures based on data on consumption patterns and residue levels and provides a ranking of the probability that each potential exposure will occur. People consume differing amounts of the same foods, including none at all, and a food will contain differing amounts of a pesticide residue, including none at all.

(4) Collection of all of the hundreds of thousands of potential exposures estimated in Steps ##2 and 3 in a frequency distribution.

The resulting probabilistic assessment presents a range of exposure/risk estimates.

2. Exposure from water. EPA may use field monitoring data and/or simulation water exposure models to generate pesticide concentration estimates in drinking water. Monitoring and modeling are both important tools for estimating pesticide concentrations in water and can provide different types of information. Monitoring data can provide estimates of pesticide concentrations in water that are representative of the specific agricultural or residential pesticide practices in specific locations, under the environmental conditions associated with a sampling design (*i.e.,* the locations of sampling, the times of the year samples were taken, and the frequency by which samples were collected). Although monitoring data can provide a direct measure of the concentration of a pesticide in water, it does not always provide a reliable basis for estimating spatial and temporal variability in exposures because sampling may not occur in areas with the highest pesticide use, and/or when the pesticides are being used and/or at an appropriate sampling frequency to detect high concentrations of a pesticide that occur over the period of a day to several days.

Because of the limitations in most monitoring studies, EPA's standard approach is to use simulation water exposure models as the primary means to estimate pesticide exposure levels in drinking water. Modeling is a useful tool for characterizing vulnerable sites, and can be used to estimate peak pesticide water concentrations from infrequent, large rain events. EPA's computer models use detailed information on soil properties, crop characteristics, and weather patterns to estimate water concentrations in vulnerable locations where the pesticide could be used according to its label (69 FR 30042, 30058–30065 (May 26, 2004)). These models calculate estimated water concentrations of pesticides using laboratory data that describe how fast the pesticide breaks down to other chemicals and how it moves in the environment at these vulnerable locations. The modeling provides an estimate of pesticide concentrations in ground and surface water. Depending on the modeling algorithm (*e.g.,* surface water modeling scenarios), daily concentrations can be estimated continuously over long periods of time, and for places that are of most interest for any particular pesticide.

EPA relies on models it has developed for estimating pesticide concentrations in both surface water and ground water. Typically EPA uses a two-tiered approach to modeling pesticide concentrations in surface and ground water. If the first tier model suggests that pesticide levels in water may be unacceptably high, a more refined model is used as a second tier assessment. The second tier model for surface water is actually a combination of two models: The Pesticide Root Zone Model (PRZM) and the Exposure Analysis Model System (EXAMS). The second tier model for ground water uses PRZM alone.

A detailed description of the models routinely used for exposure assessment is available from the EPA OPP Water Models Web site: *http://www.epa.gov/oppefed1/models/water/index.htm.* These models provide a means for EPA to estimate daily pesticide concentrations in surface water sources of drinking water (a reservoir) using local soil, site, hydrology, and weather characteristics along with pesticide application and agricultural management practices, and pesticide environmental fate and transport properties. Consistent with the recommendations of the FIFRA SAP, EPA also considers regional percent cropped area factors (PCA) which take into account the potential extent of cropped areas that could be treated with pesticides in a particular area. The PRZM and EXAMS models used by EPA were developed by EPA's Office of Research and Development (ORD), and are used by many international pesticide regulatory agencies to estimate pesticide exposure in surface water. EPA's use of the percent cropped area factors and the Index Reservoir scenario was reviewed and approved by the FIFRA SAP in 1999 and 1998, respectively (Refs. 30, 31).

In modeling potential surface water concentrations, EPA attempts to model areas of the country that are vulnerable to surface water contamination rather than simply model ''typical'' concentrations occurring across the nation. Consequently, EPA models exposures occurring in small, highly agricultural watersheds in different growing areas throughout the country, over a 30-year period. The scenarios are designed to capture residue levels in drinking water from reservoirs with small watersheds with a large percentage of land use in agricultural production. EPA's models take into account that pesticide residues in water fluctuate daily, seasonally, and yearly as a result of the timing of pesticide applications, the vulnerability of the water supply to pesticide loading through runoff, spray drift and/or leaching, and changes in the weather. Concentrations are also affected by the method of application, the location and characteristics of the sites where a pesticide is used, the climate, and the type and degree of pest pressure.

EPA uses the output of daily concentration values from tier two modeling as an input to DEEM–FCID, which combines water concentrations with drinking water consumption information in the daily diet to generate a distribution of exposures from consumption of drinking water contaminated with pesticides. These results are then used to calculate a probabilistic assessment of the aggregate human exposure and risk from residues in food and drinking water.

3. Aggregate Exposure Analyses. Using probabilistic analyses, EPA combines the national food exposures with the exposures derived for individual region and crop-specific drinking water scenarios to derive estimates of aggregate exposure. Although food is distributed nationally, and exposures to pesticide residues are therefore not expected to vary substantially throughout the country, drinking water is locally derived and consumed and there can be significant variations in pesticide levels in local watersheds due to geographic, climatic, and other factors. To be protective of all population subgroups, EPA uses modeled estimates from vulnerable watersheds in calculating aggregate exposure.

EPA's standard acute dietary exposure assessment calculates total dietary exposure over a 24-hour period; that is consumption over 24 hours is summed and no account is taken of the fact that eating and drinking occasions may spread out exposures over a day. This total daily exposure generally provides reasonable estimates of the risks from acute dietary exposures, given the nature of most chemical endpoints. Due to the rapid recovery associated with carbofuran toxicity (AChE inhibition), 24-hour exposure periods may or may not be appropriate. To the extent that a day's eating or drinking occasions leading to high total daily exposure might be found close together in time, or to occur from a single eating event, minimal AChE recovery would occur between eating occasions (*i.e.,* exposure events). In that case, the ''24-hour sum'' approach, which sums eating events over a 24-hour period, would provide reasonable estimates of risk from food

and drinking water. Conversely, to the extent that eating occasions leading to high total daily exposures are widely separated in time (within one day) such that substantial AChE recovery occurs between eating occasions, then the estimated risks under any 24-hour sum approach may be overstated. In that case, a more sophisticated approach—one that accounts for intra-day eating and drinking patterns and the recovery of AChE between exposure events—may be more appropriate. This approach is referred to as the ''Eating Occasions Analysis'' and it takes into account the fact that the toxicological effect of a first dose may be reduced or tempered prior to a second (or subsequent) dose.

Thus, rather than treating a full day's exposure as a one-time ''bolus'' dose, as is typically done in the Agency's assessments, the Eating Occasion analysis uses the actual time of eating or drinking occasion, and amounts consumed as reported by individuals to the USDA CSFII. The actual CSFII-recorded time of each eating event is used to ''separate out'' the exposures due to each eating occasion; in doing so, this ''separation'' allows the Agency to distinguish between each intake event and account for the fact that at least some partial recovery of AChE inhibition attributable to the first (earlier) exposure occurs before the second exposure event. For chemicals for which the toxic effect is rapidly reversible, the time between two (or more) exposure events permits partial to full recovery from the toxic effect from the first exposure and it is this ''partial recovery'' that is specifically accounted for by the Eating Occasion Analysis. More specifically, an estimated ''persisting dose'' from the first exposure event is added to the second exposure event to account for the partial recovery of AChE inhibition that occurs over the time between the first and second exposures. The 'persisting dose' terminology, and this general approach were originally suggested by the FIFRA SAP in the context of assessing AChE inhibition from cumulative exposures to OP pesticides (Ref. 33).

C. Selection of Acute Dietary Exposure Level of Concern

Because probabilistic assessments generally are based on a realistic range of residue values to which the population may be exposed, EPA's starting point for estimating exposure and risk for such aggregate assessments is the 99.9th percentile of the population under evaluation, which represents one person out of every 1000 persons. When using a probabilistic method of estimating acute dietary exposure, EPA typically assumes that, when the 99.9th percentile of acute exposure is equal to or less than the aPAD, the level of concern for acute risk has not been exceeded. By contrast, where the analysis indicates that estimated exposure at the 99.9th percentile exceeds the aPAD, EPA would generally conduct one or more sensitivity analyses to determine the extent to which the estimated exposures at the high-end percentiles may be affected by unusually high food consumption or residue values. To the extent that one or a few values seem to ''drive'' the exposure estimates at the high end of exposure, EPA would consider whether these values are reasonable and should be used as the primary basis for regulatory decision making (Ref. 77).

V. Carbofuran Background and Regulatory History

A. Tolerance Reassessment and Pesticide Reregistration

In July 2006, EPA completed a refined acute probabilistic dietary risk assessment for carbofuran as part of the tolerance reassessment program under section 408(q) of the FFDCA and pesticide reregistration under section 4 of FIFRA. The assessment was conducted using Dietary Exposure Evaluation Model-Food Commodity Intake Database (DEEM–FCID™, Version 200–2.02), which incorporates consumption data from the United States Department of Agriculture's (USDA's) Nationwide Continuing Surveys of Food Intake by Individuals (CSFII), 1994–1996 and 1998, as well as carbofuran monitoring data from USDA's Pesticide Data Program [2] (PDP), estimated percent crop treated information, and processing/cooking factors, where applicable. The assessment was conducted applying an additional 500-fold safety factor that included a 5X children's safety factor, pursuant to section 408(b)(2)(C). That refined assessment showed acute dietary risks from carbofuran residues in food significantly above EPA's level of concern (Ref. 14). Based in part on the results of that assessment, EPA concluded that carbofuran failed to meet the revised safety standard in FFDCA section 408(b) and the standard for FIFRA reregistration.[3]

The tolerance reassessment and FIFRA reregistration process for carbofuran contained numerous opportunities for public participation. These included public comment periods on the preliminary ecological risk assessment (June–August 2005), the preliminary human health risk assessment (September–November 2005), the revised combined risk assessment (March–May 2006), and the interim Registration Eligibility Document (RED) (August–November 2006). EPA received over 200 comments (plus a letter campaign supporting carbofuran with 2,896 signatories) to the 2006 RED. FMC submitted extensive comments throughout the process (including, but not limited to, a comment of 62 pages plus 13 attachments totaling over 900 pages on August 23, 2005, a letter with 20 attachments on November 11, 2005, 46 pages of comments on January 26, 2006, 78 pages of comments on February 17, 2006, a 15-page letter with 8 attachments on May 22, 2006, over 200 pages on May 24, 2006, and other submissions. Following issuance of the RED in August 2006, FMC stated that they would be submitting new data to refute EPA's ecological and human health risk concerns, as well as EPA's benefits assessments. Twenty-three submissions with studies and analyses were submitted in 2007, all of which EPA reviewed. FMC submitted 175 pages of comments to the proposed tolerance revocations jointly with the NPC, NCGA, NCC, and NSA on 9/29/09. The Agency has also met numerous times with FMC, growers, and other stakeholders regarding carbofuran.

One particular aspect of the risk assessment process that involved substantial public participation opportunities was EPA's review of the human toxicology studies performed with carbofuran. In making a determination on whether these studies met the standards of the Human Research rule, EPA, as required, sought the advice of the HSRB. The HSRB review process includes the opportunity for the public both to submit written comments and to make an oral presentation to the HSRB. FMC gave both written and oral comments at the HSRB meeting, which was held May 2–4, 2006. FMC also submitted written comments on the final HSRB report on the meeting.

[2] USDA's Pesticide Data Program monitors for pesticides in certain foods at the distribution points just before release to supermarkets and grocery stores.

[3] Although not relevant to this proceeding, in addition to determining that use of carbofuran resulted in unacceptable dietary risks, EPA concluded that use of carbofuran did not meet the standard for FIFRA registration based on unacceptable occupational and ecological risks.

B. Draft Notice of Intent to Cancel Carbofuran Registrations

In January 2008, EPA published a draft Notice of Intent to Cancel (NOIC) all carbofuran registrations, based in part on carbofuran's dietary risks. As mandated by FIFRA, EPA solicited comments from the FIFRA Scientific Advisory Panel (SAP) on its draft NOIC.[4] As part of that process, EPA presented its dietary risk assessment of carbofuran to the FIFRA SAP, and requested comment on key issues in the risk assessment: The Agency's approach to selecting the point of departure and the children's safety factor. FMC and the remaining Petitioners participated in this meeting, making substantial presentations to the SAP. As described in the proposal, the Agency believes that the Panel's responses unambiguously support the Agency's approach with regard to carbofuran's hazard identification and hazard characterization (73 FR 44875 (July 31, 2008)). In addition, EPA believes that, on balance, the application of a 4X children's safety factor is consistent with the SAP's advice. Additional detail on the SAP's advice and EPA's responses can be found at Ref. 83.

C. Proposed Revocation of Carbofuran Tolerances

Having considered the comments from the SAP, EPA initiated the process to revoke all carbofuran tolerances, publishing a proposed revocation on July 31, 2008 (73 FR 44,864 (July 31, 2008) (FRL–8378–8)). EPA proposed to revoke all of the existing tolerances for residues of carbofuran on the grounds that aggregate exposure from all uses of carbofuran fails to meet the FFDCA section 408 safety standard (Id). Based on the contribution from food alone, EPA calculated dietary exposures to carbofuran exceed EPA's level of concern for all of the more sensitive subpopulations of infants and children. At the 99.9th percentile, aggregate carbofuran dietary exposure from food and drinking water from contaminated ground water was estimated to range from 1100% of the aPAD for adults, to greater than 10,000% of the aPAD for infants, the population subgroup with the highest estimated dietary exposure (Ref. 12). Similarly, aggregate dietary exposures from food and drinking water from surface water, based on contamination from use on corn in Nebraska, ranged from 340% of the aPAD for adults, to 3,900% aPAD for infants. EPA also determined that, based on actual residue levels measured in food in commerce, individual children consuming typical amounts of a single food item received unsafe levels of carbofuran. For example, based on the level of residues detected on in the food supply, a child between 3–5 years, who consumed ½ cup of cantaloupe, would receive a dose ranging between 180% and 7,200% of the aPAD. Finally, the proposal discussed a number of sensitivity analyses the Agency had calculated in order to further characterize the potential risks to children. Every one of these sensitivity analyses determined that estimated exposures significantly exceeded EPA's level of concern for children.

EPA held a 60-day comment period on the proposed revocation rule. In the proposed rule, EPA made clear that if any person had concerns with EPA's proposed revocation, those concerns must be raised during the comment period to be preserved. Specifically, EPA stated:

> In addition to submitting comments in response to this proposal, you may also submit an objection at the time of the final rule. If you anticipate that you may wish to file objections to the final rule, you must raise those issues in your comments on this proposal. EPA will treat as waived, any issue not originally raised in comments on this proposal. Similarly, if you fail to file an objection to the final rule within the time period specified, you will have waived the right to raise any issues resolved in the final rule. After the specified time, issues resolved in the final rule cannot be raised again in any subsequent proceedings on this rule.

(73 FR at 44865).

D. Petitioners' Comments on the Proposed Rule

The comment period for the proposed rule closed on September 29, 2008. During the comment period, the Petitioners submitted comments challenging particular aspects of EPA's risk assessment. For example, the Petitioners challenged the basis for EPA's 4X children's safety factor, and the method and assumptions on which EPA relied to estimate drinking water concentrations. In addition, the registrant, FMC Corporation, requested that EPA cancel the use on 22 of the crops on which it was registered, including many of the foods posing the highest risks to children. FMC also requested that EPA modify its labels to include a number of additional restrictions intended to mitigate the risks identified in EPA's risk assessment. For example, use was prohibited on much of the Eastern US to protect vulnerable sources of groundwater; use restrictions were imposed in other areas of the country, preventing use within set distances to prevent runoff into sources of surface water drinking water supplies.

On November 7, 2008, the Petitioners submitted additional information as a supplement to their September comments. Specifically, they submitted carbofuran use data that the Petitioners used in preparing its surface water assessments. The information consisted of a spreadsheet that contained all of the data provided to the Water Panel by FMC, and a document that explained the materials, methods, and procedures employed by the Panel to utilize this data.

On December 24, 2008, FMC submitted a petition requesting that EPA stay the effective date of the tolerance revocations, and that EPA consider additional information, including further risk mitigation measure that the registrant intended to implement, as well as additional analyses that the Petitioners' experts were developing.

E. Final Rule Revoking Carbofuran Tolerances

On May 15, 2009, EPA published its final rule, based on a revised risk assessment that addressed the voluntary cancellations and label restrictions submitted by the close of the September 29 comment period. The only food uses that remained registered after the voluntary cancellations were sunflowers, corn, potatoes, and pumpkins. In response to the changes made on the labels, EPA revised its risk assessment to account for the reduced number of crops, the altered geographic restrictions, and the additional risk mitigation measures proposed as part of FMC's comments.

Having considered all comments received by the close of the comment period, and based on its revised analyses, EPA concluded that aggregate exposures from all remaining uses of carbofuran were still unsafe for infants and children, and that revocation of the remaining tolerances was warranted. The final rule explained that, although the recent cancellation of several registered uses reduced the dietary risks to children, EPA's analyses still showed that estimated exposures significantly exceed EPA's level of concern for children. For example, EPA determined that the estimated risks could be as high as 9,400% of the aPAD for infants. A detailed description of the risk assessment supporting the final rule follows.

[4] The draft NOIC was based on all of carbofuran's combined risks—dietary, occupational, and ecological. Because some non-food use registrations remain, EPA anticipates issuing the NOIC subsequent to undertaking the activities required to revoke the carbofuran tolerances to cancel these remaining uses.

1. Toxicity. AChE inhibition in brain and the PNS is the initial adverse biological event which results from exposure to carbofuran, and with sufficient levels of inhibition leads to other effects such as tremors, dizziness, as well as gastrointestinal and cardiovascular effects, including bradycardia (Ref. 15). Thus, AChE inhibition provides the most appropriate effect to use in risk extrapolation for derivation of RfDs and PADs. Protecting against AChE inhibition ensures that the other adverse effects associated with cholinergic toxicity, mentioned above, do not occur.

There are three studies available that compare the effects of carbofuran on eleven-day-old rats (*i.e.*, post-natal day 11 or PND11) rats with those in young adult rats (herein called comparative AChE studies) (Refs. 1, 2, 4, and 66). Two of these studies were submitted by FMC, the registrant, and one was performed by EPA–ORD. An additional study conducted by EPA–ORD involved PND17 rats (Ref. 63). Although it is not possible to directly correlate ages of juvenile rats to humans, PND11 rats are believed to be close in development to newborn humans. PND17 rats are believed to be closer developmentally to human toddlers (Refs. 10, 22, and 23). Other studies in adult rats used in the Agency's analysis included additional data from EPA–ORD (Refs. 54, 62, and 66).

The studies in juvenile rats show a consistent pattern that juvenile rats are more sensitive than adult rats to the effects of carbofuran. These effects include inhibition in AChE in addition to incidence of clinical signs of neurotoxicity such as tremors. This pattern has also been observed for other NMC pesticides, which exhibit the same mechanism of toxicity as carbofuran (Ref. 81). It is not unusual for juvenile rats, or indeed, for infants or young children, to be more sensitive to chemical exposures as metabolic detoxification processes in the young are still developing. Because juvenile rats, called 'pups' herein, are more sensitive than adult rats, data from pups provide the most relevant information for evaluating risk to infants and young children and are thus used to derive the PoD. In addition, typically (and this is the case for carbofuran) young children (ages 0–5 years) tend to be the age groups most exposed to carbofuran because they tend to ingest larger amounts of food and water per their body weight than do teenagers or adults. As such, the focus of EPA's analysis of carbofuran's dietary risk from residues in food and water is on young children (ages 0 to 5 years). Since these age groups experience the highest levels of dietary risk, protecting these groups against the effects of carbofuran will, in turn, also protect other age groups.

The Agency used a meta-analysis to calculate the BMD_{10} and $BMDL_{10}$ for pups and adults; this analysis includes brain data from studies where either adult or juvenile rats or both were exposed to a single oral dose of carbofuran. The Agency used a dose-time-response exponential model where benchmark dose and half-life to recovery can be estimated together. This model and the statistical approach to deriving the BMD_{10} s, $BMDL_{10}$ s, and half-life to recovery have been reviewed and supported by the FIFRA SAP (Refs. 34, 35, and 36). The meta-analysis approach offers the advantage over using single studies by combining information across multiple studies and thus provides a robust PoD.

For AChE-inhibiting pesticides, EPA generally evaluates the effects of the pesticide on both brain and RBC AChE. RBC AChE is used as a surrogate for effects on the PNS because data directly measuring effects on the PNS are difficult to obtain.

Using quality brain AChE data from the three studies (two FMC, one EPA–ORD) conducted with PND11 rats, in combination, provides data to describe both low and high doses. By combining the three studies in PND11 animals together in a meta-analysis, the entire dose-response range is covered. The results of the BMD analysis for PND11 pup brain AChE data provide a BMD_{10} of 0.04 mg/kg/day and $BMDL_{10}$ of 0.03 mg/kg/day—this $BMDL_{10}$ of 0.03 mg/kg/day provides the PoD (Ref. 70).

EPA, however, lacked adequate data on carbofuran's effects on RBC AChE. Two studies required from FMC were rejected as flawed. To account for the lack of data in the PNS and/or a surrogate (*i.e.*, RBC AChE inhibition data) in pups at the low end of the response curve, and for the fact that RBC AChE inhibition appears to be a more sensitive point of departure compared to brain AChE inhibition, EPA determined that, consistent with the statutory mandate, some portion of the statutory default 10X children's safety factor needed to be retained. Because there are some carbofuran data that characterize the toxicity in juveniles, EPA concluded that the weight-of-the-evidence supports reducing the statutory factor of 10X to a value lower than 10X. This results in a children's safety factor that is less than 10 but more than 1.

The modified children's safety factor takes into account the greater sensitivity of the RBC AChE. The preferred approach to comparing the relative sensitivity of brain and RBC AChE inhibition would be to compare the BMD_{10} estimates. However, BMD_{10} estimates from the available RBC AChE inhibition data are not reliable due to lack of data at the low end of the dose response curve. As an alternative approach, EPA used the ratio of brain to RBC AChE inhibition at the BMD_{50}, since there are quality data at or near the 50% response level such that a reliable estimate can be calculated. EPA estimated the RBC BMD_{50} to brain BMD_{50} potency ratio using EPA's data for RBC (the only reliable RBC data in PND11 animals for carbofuran) and all available data in PND11 animals for brain. There is, however, an assumption associated with using the 50% response level—namely that the magnitude of difference between RBC and brain AChE inhibition is constant across dose. In other words, EPA is assuming the RBC and brain AChE dose response curves are parallel. There are currently no data to test this assumption for carbofuran.

Comparing RBC BMD_{50} and brain BMD_{50} AChE inhibition, EPA calculated a BMD_{50} ratio of 4.1X. Accordingly, EPA concluded that a children's safety factor of 4X would be protective of infants and children.

Using the $BMDL_{10}$ of 0.03 mg/kg/day, combined with the default 10X interspecies and intraspecies factors, along with the 4X children's safety factor results in an aPAD = 0.000075 mg/kg/day for infants and children. The aPAD for youths and adults is calculated in the same manner, but EPA does not apply the 4X children's safety factor, resulting in an aPAD of 0.0002 mg/kg/day.

2. Acute Exposures from Food. The estimated acute dietary exposure from carbofuran residues in food alone (*i.e.,* assuming no additional carbofuran exposure from drinking water), is below EPA's level of concern for the U.S. Population and all population subgroups. Children 1 to 2 years of age (78% aPAD) were the most highly exposed population subgroup when food only was included. The major driver of the acute dietary exposure risk (food only) for Children 1 to 2 years is milk, at greater than 90% of the exposure.

3. Acute Exposures from Drinking Water. EPA's analyses show that those individuals-both adults as well as children—who receive their drinking water from vulnerable sources are exposed to levels that exceed EPA's level of concern—in some cases by orders of magnitude. This primarily includes those populations consuming drinking water from ground water from

shallow wells in acidic aquifers overlaid with sandy soils that have had crops treated with carbofuran. It could also include those populations that obtain their drinking water from reservoirs located in small agricultural watersheds, prone to runoff, and predominated by crops that are treated with carbofuran, although there is more uncertainty associated with these exposure estimates.

a. Ground Water. In EPA's revised assessment, ground water concentrations were estimated for all remaining crops on carbofuran labels, and used two new Tier 2 scenarios. Based on a new corn scenario, representative of potentially vulnerable areas in the upper Midwest, EPA estimated 1-in-10-year concentrations for ground water source drinking water of 16 to 1.6×10^{-3} µg/L, for pH 6.5 and 7, respectively. A potato scenario representing use in the Northwest estimated no measurable concentrations of carbofuran in ground water. Other remaining uses were modeled using a Tier 1 ground water model (Screening Concentration in Groundwater) with estimated peak 90-day concentrations of 48–178 µg/L, depending on application rate. Well setback prohibitions of 50 feet were proposed on the September 2008 label for the flowable and granular formulations in select counties in Kentucky (seven counties), Louisiana (one county), Minnesota (one county), and Tennessee (one county). Analysis of the impact of these setbacks for the use on corn indicated that the setbacks would not reduce concentrations significantly at locations where exposure to carbofuran in ground water is of concern because at acid pHs, carbofuran does not degrade sufficiently during the travel time from the application site to the well to substantially reduce the concentration.

Exposure estimates for this assessment are drawn primarily from EPA's modeling. To conduct its modeling, EPA examined readily available data with respect to ground water and soil pH to evaluate the spatial variability of pH. Ground water pH values can span a wide range; this is especially true for shallow ground water systems, where local conditions can greatly affect the quality and characteristics of the water (higher or lower pHs compared to average values). The ground water simulations reflect variability in pH by modeling carbofuran leaching in four different pH conditions (pH 5.25, 6.5, 7.0, and 8.7), representing the range in the Wisconsin aquifer system. The upper and lower bound of pH values that EPA chose for this assessment were measured values from the aquifer, and the remaining two values were chosen to reflect common pH values between the measured values. Based on EPA's assessment, the maximum 1-in-10-year peak carbofuran concentrations in vulnerable ground water for a single application on corn in Wisconsin, at a rate of 1 pound per acre were estimated to range from a low of less than 1 ppb based on a pH of 7 or higher, to a high of 16 ppb, based on a pH of 6.5.

The results of EPA's revised corn modeling, based on a scenario in Wisconsin, are consistent with the results of the PGW study developed by FMC in Maryland in the early 1980s. Using higher use rates than currently permitted, the peak concentration measured in the PGW study was 65 ppb; when scaled to current use rates, the estimated peak concentration was 11 ppb. EPA's modeling is also consistent with a number of other targeted ground water studies conducted in the 1980s showing that high concentrations of carbofuran can occur in vulnerable areas; the results of these studies as well as the PGW study are summarized in References 13 and 67.

While there have been additional ground water monitoring studies that included carbofuran as an analyte since that time, there has been no additional monitoring targeted to carbofuran use in areas where aquifers are vulnerable. However, data compiled in 2002 by EPA's Office of Water show that carbofuran was detected in treated drinking water at a few locations. Based on samples collected from 12,531 ground water supplies in 16 states, carbofuran was found at one public ground water system at a concentration of greater than 7 ppb and in two ground water systems at concentrations greater than 4 ppb (measurements below this limit were not reported). An infant receiving these concentrations would receive doses equivalent to 220% of the aPAD or 130% aPAD, respectively, based on a single 8 ounce serving of water. As this monitoring was not targeted to carbofuran, the likelihood is low that these samples capture peak concentrations. Given the lack of targeted monitoring, EPA has primarily relied on modeling to develop estimates of carbofuran residues in ground water sources of drinking water.

EPA compiled a distribution of estimated carbofuran concentrations in water based on these estimates, which was used to generate probabilistic assessments of the potential exposures from drinking water derived from vulnerable ground water sources. Based on these assessments, estimated exposures ranged between 770% aPAD for adults to 9400% aPAD for infants.

b. Surface Water. For the final rule, EPA conducted additional refined modeling based on the September 2008 label submitted by FMC. The modeling addressed all of the domestic uses that remain registered, and included certain refinements to better understand the impacts of varying pH. EPA also conducted modeling to assess the impact of the proposed spray drift buffer requirements and other spray drift measures included on the September label.

EPA estimated carbofuran concentrations resulting from the use on pumpkins by adjusting the estimated drinking water concentrations (EDWC) from a previous run simulating melons in Missouri; adjustments accounted for differences in application rate and row spacing. Two EDWCs were calculated for pumpkins: One based on a 36-inch row spacing, representing pumpkins for consumption (77.6 ppb); and a second based on a 60-inch row spacing, representing decorative pumpkins (46.6 ppb).

EPA had previously evaluated the corn rootworm rescue treatment at seven representative sites, representing use in states with extensive carbofuran usage at locations more vulnerable than most in each state in areas corn is grown. Using measured rainfall values, and assuming typical rather than maximum use rates, peak concentrations for the corn rescue treatments simulated for Illinois, Iowa, Indiana, Kansas, Minnesota, Nebraska, and Texas ranged from 16.6–36.7 ppb (Ref. 47). Under the revised assessment to account for the September 2008 use restrictions, concentrations for corn, calculated including the proposed spray drift buffers in Kansas and Texas, decreased 5.1% and 4.7%, respectively, from simulations with no buffer from the previous assessment (Ref. 47). In Kansas, the 1-in-10-year peak EDWCs decreased from 33.5 to 31.8 ppb when a 300-foot buffer was added, and in Texas, from 29.9 to 28.5 ppb with the addition of a 66-foot buffer.

For the sunflower use, 12 simulations were performed for sunflowers, 9 in Kansas, and 3 in North Dakota. The North Dakota scenario was used to represent locations where sunflowers are grown that are vulnerable to pesticide movement to surface water while the Kansas scenario represents places that are not particularly vulnerable, based on the limited rainfall and generally well-drained soils (hydrologic group B soils) that are found in that area. Estimated 1-in-10-year concentrations ranged from 11.6 to 32.7

µg/L. When simulating three applications, one at plant and two foliar with a 14-day interval between the two foliar applications and a 66-foot buffer, the 1-in-10-year peak EDWC for North Dakota was 22.4 µg/L. In contrast, the same three applications in Kansas with a 14-day interval between the foliar applications and a 300-foot buffer produced a 1-in-10-year peak EDWC of 20.5 µg/L. The 1-in-10-year peak EDWCs, assuming that carbofuran is applied only at plant, were 14.0 and 16.0 µg/L in Kansas and North Dakota respectively. EPA also evaluated the impact of pH on carbofuran concentrations for sunflowers, resulting in a 10% decrease in 1-in-10-year peak concentrations assuming high pH in the reservoir. Spray drift buffers of 66 and 300 feet decreased concentrations 4.7 and 5.1% for corn and 10.0% and 16.0% for sunflowers, respectively, in comparison to previous labels that had no spray drift buffer requirements. Additional details on these assessments can be found at Reference 84.

These predicted carbofuran water concentrations are similar or lower than the peak concentrations reported in the United States Geological Survey-National Ambient Water Quality Survey (USGS–NAWQA) monitoring data. In addition, these data, which represent concentrations in surface water prior to any treatment by a public drinking water system, are consistent with the results of the 2002 data on finished water compiled by EPA's Office of Water. Based on samples collected from 1,394 surface water source drinking water supplies in 16 states, carbofuran was found at no public drinking water supply systems at concentrations exceeding maximum contaminant level (MCL) of 40 ppb. However, carbofuran was found at one surface water public water system in finished (*i.e.,* post-treatment) water at concentrations greater than 4 ppb (measurements below this limit were not reported). Sampling is costly and is conducted typically four times a year or less at any single drinking water facility. The overall likelihood of collecting samples that capture peak exposure events is, therefore, low. For chemicals with acute risks of concern, such as carbofuran, higher concentrations and resulting risk is primarily associated with these peak events, which are not likely to be captured in monitoring unless the sampling rate is very high.

There are few surface water field-scale studies targeted to carbofuran use that could be compared with modeling results. Most of these studies were conducted in fields that contain tile drains, which is a common practice throughout midwestern states to increase drainage in agricultural fields (Ref. 13). Drains are common in the upper Mississippi river basin (Illinois, Iowa, and the southern part of Minnesota), and the northern part of the Ohio River Basin (Indiana, Ohio, and Michigan) (Ref. 58). Although it is not possible to directly correlate the concentrations found in most of the studies with drinking water concentrations, these studies confirm that carbofuran use under such circumstances can contaminate surface water, as tile drains have been identified as a conduit to transport water and contaminants from the field to surface waters.

EPA conducted dietary exposure analyses based on the modeling scenarios for the proposed September 2008 label. Exposures from all modeled scenarios substantially exceeded EPA's level of concern (Ref. 12). For example, a Kansas sunflower scenario, assuming two foliar applications at a typical 1 lb active ingredient (a.i.) per acre use rate, applied at 14-day intervals, estimated a 1-in-10-year peak carbofuran water concentration of 11.6 ppb. Exposures at the 99.9th percentile based on this modeled distribution ranged from 160% of the aPAD for youths 13 to 19 years, to greater than 2,000% of the aPAD for infants. This scenario is intended to be representative of sites that are less vulnerable than most on which sunflowers could be grown. By contrast, exposure estimates from a comparable North Dakota sunflower scenario, intended to represent more vulnerable sites, estimated a 1-in-10-year peak concentration of 22.4 ppb. These concentrations would result in estimated exposures ranging between 450% aPAD for youths 13 to 19 years, to 5,500% aPAD for infants. Similarly, exposures based on a Washington surface water potato scenario, and using a 3 lb a.i. acre rate, ranged from 230% of the aPAD for children 6 to 12 years to 890% of the aPAD for infants, with a 1-in-10-year peak carbofuran concentration of 7.2 ppb. Although other crop scenarios resulted in higher exposures, estimates for these two crops are presented here, as they are major crops on which a large percentage of carbofuran use occurs. For example, one of EPA's refined exposure analyses is based on a Nebraska corn rootworm ''rescue treatment'' scenario, and assumes a single aerial application at a typical rate of 1 lb a.i. per acre. The full distribution of daily concentrations over a 30-year period was used in the probabilistic dietary risk assessment. The 1-in-10-year peak concentration of the distribution of values for the Nebraska corn rescue treatment was 22.3 ppb. Estimated dietary exposures based on these concentrations ratned from 340% of the aPAD for adults to 3900% of the aPAD for infants. More details on these assessments, as well as the assessments EPA conducted for other crop scenarios, can be found in References 12, 47, and 67.

4. Aggregate (food and water) Exposures. EPA conducted a number of probabilistic analyses to combine the national food exposures with the exposures from the individual region and crop-specific drinking water scenarios. Although food is distributed nationally, and residue values are therefore not expected to vary substantially throughout the country, drinking water is locally derived and consumed and concentrations of pesticides in source water fluctuate over time and location for a variety of reasons. Consequently, EPA conducted several estimates of aggregate dietary risks by combining exposures from food and drinking water. These estimates showed that, because drinking water exposures from any of the crops on the label exceed safe levels, aggregate exposures from food and water are unsafe. Although EPA's assessments showed that, based on the Idaho potato scenarios, exposures from ground water from use on potatoes would be safe, surface water exposures from carbofuran use on potatoes far exceed the safety standard. More details on the individual aggregate assessments presented below, as well as the assessments EPA conducted for other regional and crop scenarios, can be found in References 12 and 13.

The results of aggregate exposures from food and from drinking water derived from ground water in extremely vulnerable areas (*i.e.,* from shallow wells associated with sandy soils and acidic aquifers, such as are found in Wisconsin), ranged from 780% of the aPAD for adults, to 9,400% of the aPAD for infants.

The results of aggregate exposure from food and water derived from one of the least conservative surface water scenarios—Kansas sunflower, with two foliar applications—ranged from 190% of the aPAD for adults to 2,100% aPAD for infants. These estimates reflect the risks only for those people in watersheds with characteristics similar to that used in the scenario, and assuming that water treatment does not remove carbofuran. The estimated water concentrations are comparable to the maximum peak concentrations reported in monitoring studies that were not designed to detect peak, daily

concentrations of carbofuran in vulnerable locations.

More details on this assessment, as well as the assessments EPA conducted for other crop scenarios, can be found in References 12, 47, and 67. For example, in the proposed rule, EPA presented the results from aggregate exposures resulting from a Nebraska surface water scenario based on a Nebraska corn rootworm ''rescue treatment.'' Estimated exposures from that scenario ranged from 330% of the aPAD for youths 13 to 19 years to 3,900% of the aPAD for infants.

As noted previously, EPA's food and water exposure assessments typically sum exposures over a 24-hour period, and EPA used this 24-hour total in developing its acute dietary risk assessment for carbofuran. Because of the rapid nature of carbofuran toxicity and recovery, EPA conducted an analysis using information about dietary exposure, timing of exposure within a day, and half-life of AChE inhibition from rats to estimate risk to carbofuran at durations less than 24 hours. Specifically, EPA has evaluated individual eating and drinking occasions and used the AChE half-life to recovery information (herein called half-life information) to estimate the residual effects from carbofuran from previous exposures within the day. The carbofuran analyses are described in the 2009 aggregate (dietary) memo (Ref. 55).

Using the two FMC time course studies in rat pups, EPA calculated half-lives for recovery of 186 and 426 minutes (Refs. 24 and 25). The two values provide an indication that half-lives to recovery can vary among juvenile rats. By extension, children are expected to vary in their ability to recover from AChE inhibition where longer recoveries would be associated with a potentially higher ''persisting dose'' (as described below).

This analysis had little impact on the exposures from food alone. However, accounting for drinking water consumption throughout the day and using the half-life to recovery information, risk is reduced by approximately 2–3X. Consequently, risk estimates for which food and drinking water are jointly considered and incorporated (*i.e.,* Food + Drinking Water) are also reduced considerably—by a factor of two or more in some cases—compared to baseline. But even though the risk estimates from aggregate exposure are reduced, they nonetheless still substantially exceed EPA's level of concern for infants and children. Using drinking water derived from the surface water from the Idaho potato surface water scenario, which estimated one of the lowest exposure distributions, aggregate exposures at the 99.9th percentile ranged from 328% of the aPAD under the scenario for which infants rapidly metabolize carbofuran (*e.g.,* 186 minute half-life), to a high of 473% of the aPAD under the scenario for which infants metabolize carbofuran more slowly, (*e.g.,* scenarios in which a 426 minute half life is assumed).

Moreover, even accounting for the estimated decreased risk from accounting for carbofuran's rapid reversibility, the Agency remains concerned about the risks from single eating or drinking events, as illustrated in the following example, based on an actual food consumption diary from the CSFII survey. A 4-month old male non-nursing infant weighing 10 kg is reported to have consumed a total of 1,070 milliters (ml) of indirect water over eight different occasions during the day. The first eating occasion occurred at 6:30 a.m., when this 4 month old consumed 8 fluid ounces of formula prepared from powder. The FCID food recipes indicate that this particular food item consists of approximately 87.7% water, and therefore, 8 ounces of formula contains approximately 214 ml (or grams) of indirect water; with the powder (various nutrients, dairy, soy, oils, etc.) accounting for the remaining 12.3%. This infant also reportedly consumed a full 8-ounce bottle of formula at 12 p.m., 4 p.m., and 8 p.m. that day. The food diary also indicates that the infant consumed about 1 tablespoon of water (14.8 ml) added to prepare rice cereal at 10 a.m., about 2 ounces of water (59.3 ml) added to pear juice at 11 a.m., another ½ tsp of water (2.5 ml) to prepare more rice cereal at 8:30 p.m.; and finally, he consumed another 4 ounces of formula (107 ml) at 9:30 p.m.

The infant's total daily water intake (1,070 ml, or approximately 107 ml/kg/day) is not overly conservative, and represents substantially less than the 90th percentile value from CSFII on a ml water/kg bodyweight (ml/kg/bw) basis. As noted, carbofuran has been detected in finished water at concentrations of 4 ppb. For this 10 kg body weight infant, an 8-ounce bottle of formula prepared from water containing carbofuran at 4 ppb leads to drinking water exposures of 0.0856 micrograms of active ingredient/kilogram of bodyweight (µg ai/kg bw), or 114% of the aPAD. Based on the total daily water intake of 1,070 ml/day (no reversibility), total daily exposures from water at 4 ppb concentration would amount to 0.4158 µg ai/kg bw, or 555% of the aPAD; this is the amount that would be used for this person-day in the Total Daily Approach.

Peak inhibition occurs following each occasion on which the infant consumed 8 fluid ounces of formula (6 a.m., 12 p.m., 4 p.m. and 8 p.m.); however, the maximum persisting dose occurs following the 9:30 p.m. eating occasion, based on a 186-minute half-life parameter. This produces a maximum persisting dose of 0.1457 µg ai/kg bw, or about 30% of the total daily exposure of 0.4158 µg ai/kg bw derived above, or expressed as a fraction of the level of concern, the maximum persisting dose amounts to about 194% of the aPAD (or 30% of 554%). Note that with drinking water concentration at 4 ppb, an infant consuming one 8 oz bottle of formula—prepared from powder and tap water containing carbofuran at 4 ppb will obtain exposures of approximately 114% of aPAD. Since many infants consume the equivalent of this amount on a single eating occasion, accounting for reversibility over multiple occasions is not essential to ascertain that infants quite likely have obtained drinking water exposures to carbofuran exceeding the level of concern based on drinking water concentrations found in public drinking water supplies.

In this regard, it is important to note EPA's Eating Occasion Analyses underestimate exposures to the extent that they do not take into account carry-over effects from previous days, and because drinking water pesticide concentrations are randomly picked from the entire 30-year distribution. As discussed previously, DEEM-FCID [FN(TM)] is a single day dietary exposure model, and the DEEM-based Eating Occasion Analysis accounts for reversibility within each simulated person-day. All of the empirical data regarding time and amounts consumed (and corresponding exposures based on the corresponding residues) from the CSFII survey are used, along with the half-life to assess an equivalent persisting dose that produced the peak inhibition expected over the course of that day. This is a reasonable assumption for food alone; since the time between exposure events across 2 days is relatively high (compared to the half-life)—most children (≤9 months) tend to sleep through the night—and the time between dinner and breakfast the following morning is long enough it is reasonable to ''ignore'' persisting effects from the previous day. A single day exposure model will underestimate the persisting effects from drinking water exposures (formula) among infants, and newborns in particular (<3 months), since newborns tend to wake up every 2 to 4 hours to feed. Any carry over

effects may be important, especially if exposures from the previous day are relatively high, since the time between the last feeding (formula) of the day and the first feeding of the subsequent day is short. A single day model also does not account for the effect of seasonal variations in drinking water concentrations, which will make this effect more pronounced during the high use season (*i.e.,* the time of year when drinking water concentrations are high). Based on these analyses, the Agency concludes that the current exposure assessment methods used in the carbofuran dietary assessment provide realistic and high confidence estimates of risk to carbofuran exposure through food and water.

F. Response to FMC Comments on the Final Rule

FMC's comments raised a range of issues. Those issues are not summarized here because FMC basically refilled many of its comments as objections without modifying them in response to EPA's decision in the final rule. In addition, FMA submitted a an alternate risk analysis purporting to show that aggregate carbofuran exposures to children would be safe. However, FMC failed to provide the data and details of that assessment to the Agency. They also failed to provide several critical components that served to support key inputs into that assessment; and for several of these, EPA was unable to replicate the claimed results based on the information contained in the comments. In the absence of such critical components, the Agency was unable to accept the validity or utility of the analyses, let alone rely on the results.

Nonetheless, based on the summary descriptions provided in the registrant's comments, EPA concluded that the risk analyses contained a critical flaw. The commenters' determination of safety rests on the presumption that under real world conditions, events will always occur exactly as hypothesized by the multiple assumptions in their assessment. For example, the comments assumed, despite all available evidence to the contrary, that children would not be appreciably more sensitive to carbofuran's effects than adults. They assumed that carbofuran's effects will be highly reversible, and that children will be uniformly sensitive, such that the effects will be adequately accounted for by the assumption of a 150-minute half-life, despite the fact that children are not uniformly sensitive. They further assumed that there would be no carry over effect from the preceding day's exposures for infants. They assumed that the cancellation of use on alfalfa would reduce carbofuran residues in milk by over 70%, even though many cows' diet consists primarily of corn. They assumed that residues would decrease between 19% and 23% as a result of the buffer requirements on the September 2008 label, even though the label does not require the use of all of the recommended ''best management practices'' (*e.g.,* no requirements regarding swath displacement), and applicators do not universally use such practices in the absence of any requirement. They assumed that average ground water pH adequately characterizes the temporal and spatial heterogeneity common in most areas, despite the available evidence to the contrary. Finally, they assumed that the percent of the crop treated in any watershed would never exceed 5%, despite varying pest pressures, consultant recommendations, and individual grower decisions. Leaving aside that EPA believes most, if not all of these assumptions are not supported by the available evidence described throughout the final rule, the probability of all these assumptions always simultaneously holding true under real world conditions is unreasonably low, and certainly does not approach the degree of certainty necessary for EPA to conclude that children's exposures will be safe.

Determining whether residues will be safe for U.S. children is not a theoretical paper exercise; it cannot suffice to hypothesize a unique set of circumstances that make residues ''fit in the box.'' There must be a reasonable certainty that under the variability that exists under real world conditions, exposures will be ''safe.'' EPA's assessments incorporate a certain degree of conservatism precisely to account for the fact that assumptions must be made that may not prove accurate. This consideration is highly relevant for carbofuran, because as refined as EPA's assessments are, areas of uncertainty remain with regard to carbofuran's risk potential. For example, a recent epidemiological study reported that 45% of maternal and cord blood samples in a cohort of New York City residents of Northern Manhattan and the South Bronx between 2000 and 2004, contained low, but measurable residues of carbofuran (Ref. 88). The Agency is currently unable to account for the source of such sustained exposures at this frequency.

A further consideration is that the risks of concern are acute risks to children. For acute risks, the higher values in a probabilistic risk assessment are often driven by relatively high values in a few exposures rather than relatively lower values in a greater number of exposures. This is due to the fact that an acute assessment looks at a narrow window of exposure where there are unlikely to be a great variety of consumption sources. Thus, to the extent that there is a high exposure it will be more likely due to a high residue value in a single consumption event. Additionally worrisome in this regard is that carbofuran is a highly potent (*i.e.,* has a very steep dose-response curve), acute toxicant, and therefore any aPAD exceedances are more likely to have greater significance in terms of the potential likelihood of actual harm. For all of these reasons, EPA determined that the existing carbofuran tolerances did not meet the FFDCA safety standard, and should therefore be revoked.

VI. Response to Objections and Requests for Hearing

A. Overview

Petitioners raised several objections that correspond to four basic categories of issues. The first category of objections and hearing requests relates to challenges to EPA's selection of the appropriate children's safety factor. In this category of issues, they raise primarily two claims: (1) That EPA's scientific basis for retaining a 4X safety factor is flawed, and (2) the statistical calculations supporting the 4X safety factor are flawed, and based on faulty assumptions. The second category of issues relate to the manner in which EPA conducted its assessment of the exposure from carbofuran through drinking water sources. In this regard, all of their objections fall within three basic categories of issues: (1) EPA should have accounted for a more realistic percent of the crop treated (PCT) in its surface water modeling; (2) EPA's ground water concentration estimates are not based on the best available data, but on obsolete data and overly conservative assumptions; and (3) FMC's new label restrictions and revised terms of registration will ensure that drinking water concentrations will not exceed 1.1 ppb. The third category of issues relates to the manner in which EPA conducted its dietary risk assessment. Under this category, the objections and hearing requests raise four primary issues: (1) Petitioners challenge the way in which EPA's risk assessments accounted for individuals to recover from the effects of carbofuran between exposures; (2) EPA should have relied on the carbofuran human study and therefore use of the default 10X interspecies factor is inconsistent with

the ''best available data; (3) the import tolerances by themselves are safe and EPA should have retained them even if EPA believed tolerances associated with the domestic uses were unsafe; and (4) Petitioners claim that the combined food and water exposures are safe, based on FMC's drinking water estimates of a 1.1 ppb maximum concentration, which are guaranteed by new label restrictions submitted as part of objections. Finally, Petitioners raise one legal objection unaccompanied by a hearing request. They argue that EPA lacks authority to limit issues and supporting information that can be raised in objections and hearing to those raised in earlier comments.

EPA denies each of the Petitioners' objections as well as their hearing requests. In the first instance, EPA denies Petitioners' objections and their hearing requests because the objections are inextricably intertwined with proposed changes to carbofuran's FIFRA registration that were not submitted until after publication of the final tolerance revocation rule. Objections to EPA's decision based on FIFRA registration amendments proposed after EPA's decision are irrelevant, and thus immaterial, to a challenge to EPA's decision (See Unit VI.C.). Secondly, an individual analysis of Petitioners' objections and hearing requests leads to the same conclusion for the reasons summarized below.

The Petitioners' hearing requests fail to meet the statutory and regulatory requirements for holding a hearing. In most cases, EPA has denied the request on the grounds that the objection is irrelevant, and therefore immaterial, with regard to EPA's final tolerance revocation regulation. In particular, many claims are immaterial because they largely restate the claims in their combined comments on EPA's proposed rule without challenging the substance or even responding to EPA's explanations for the reasons that EPA declined to adopt the approaches or otherwise make the revisions suggested by the Petitioners in their comments. These claims are irrelevant to the determinations reached in the final rule. In several instances, EPA concluded that Petitioners evidentiary proffer was inadequate, because the data and information submitted, even if accurate, would be insufficient to justify the factual determination urged, or to resolve one or more of the issues in their favor. Further, in many cases, the evidence submitted constituted mere allegations and general denials and contentions, which EPA regulations expressly provide to be insufficient to justify a hearing. In addition, many of Petitioners' claims do not present genuine and substantial issues of fact and/or are immaterial to the relief requested.

On the merits, the majority of Petitioners' objections are denied for substantially the same reasons given in EPA's final rule and response to comments. As noted, many of Petitioners' objections are simply their recycled comments which do not address the conclusions reached by EPA in the final rule. To the extent a response is even needed to such a stale claim, it is provided in the final rule and the response to comments.

The remainder of this Unit is organized in the following manner. Unit VI.B describes in greater detail the requirements pertaining to when it is appropriate to grant a hearing request. In Unit VI.C, EPA generally denies all of Petitioners' objections and hearing requests. Unit VI.D provides EPA's response to the Petitioners legal objection that EPA lacks the legal authority to limit the issues and supporting information that can be raised in an objection and hearing to those raised in comments on the proposed rule. Units VI. G and I provide Petitioners' claims regarding EPA's risk assessment. EPA's conclusions on the hearing requests and objections are summarized in Unit VI.K.

EPA has adopted a 4-part format in Units VI.E through I. for explaining its ruling on each of the subissues EPA identified in the objections. First, the Petitioners' claim and any arguments or evidence tendered to support that claim are described. Second, background information on the claim is provided including whether and how the claim was presented in Petitioners' comments and, if it was presented, EPA's reasons for denying the claim in its final rule and response to comments. Third, EPA explains its reasons for denying a hearing on that claim. Finally, EPA explains its reasons for denying the claim on the merits.

B. The Standard for Granting an Evidentiary Hearing

EPA has established regulations governing objections to tolerance rulemakings and tolerance petition denials and requests for hearings on those objections. (40 CFR Part 178; 55 FR 50291 (December 5, 1990)). Those regulations prescribe both the form and content of hearing requests and the standard under which EPA is to evaluate requests for an evidentiary hearing.

As to the form and content of a hearing request, the regulations specify that a hearing request must include: (1) A statement of the factual issues on which a hearing is requested and the requestor's contentions on those issues; (2) a copy of any report, article, or other written document ''upon which the objector relies to justify an evidentiary hearing;'' and (3) a summary of any other evidence relied upon to justify a hearing. (40 CFR 178.27).

The standard for granting a hearing request is set forth in section 178.32. That section provides that a hearing will be granted if EPA determines that the ''material submitted'' shows all of the following:

> (1) There is a genuine and substantial issue of fact for resolution at a hearing. An evidentiary hearing will not be granted on issues of policy or law.
>
> (2) There is a reasonable possibility that available evidence identified by the requestor would, if established, resolve one or more of such issues in favor of the requestor, taking into account uncontested claims or facts to the contrary. An evidentiary hearing will not be granted on the basis of mere allegations, denials, or general descriptions of positions and contentions, nor if the Administrator concludes that the data and information submitted, even if accurate, would be insufficient to justify the factual determination urged.
>
> (3) Resolution of the factual issue(s) in the manner sought by the person requesting the hearing would be adequate to justify the action requested. An evidentiary hearing will not be granted on factual issues that are not determinative with respect to the action requested. For example, a hearing will not be granted if the Administrator concludes that the action would be the same even if the factual issue were resolved in the manner sought.
>
> (40 CFR 178.32(b)).

This provision essentially imposes four requirements upon a hearing requestor. First, the requestor must show it is raising a question of fact, not one of law or policy. Hearings are for resolving factual issues, not for debating law or policy questions. Second, the requestor must demonstrate that there is a genuine dispute as to the issue of fact. If the facts are undisputed or the record is clear that no genuine dispute exists, there is no need for a hearing. Third, the requestor must show that the disputed factual question is material—*i.e.,* that it is outcome determinative with regard to the relief requested in the objections. Finally, the requestor must make a sufficient evidentiary proffer to demonstrate that there is a reasonable possibility that the issue could be resolved in favor of the requestor. Hearings are for the purpose of providing objectors with an opportunity to present evidence supporting their objections as the regulation states, hearings will not be granted on the basis of ''mere allegations, denials, or general

descriptions of positions or contentions.'' (40 CFR 178.32(b)(2)).

EPA's hearing request requirements are based heavily on FDA regulations establishing similar requirements for hearing requests filed under other provisions of the FFDCA (53 FR 41126, 41129 (October 19, 1988)). FDA pioneered the use of summary judgment-type procedures to limit hearings to disputed material factual issues and thereby conserve agency resources. FDA's use of such procedures was upheld by the Supreme Court in 1972, (*Weinberger* v. *Hynson, Westcott & Dunning, Inc.,* 412 U.S. 609 (1973)), and, in 1975, FDA promulgated generic regulations establishing the standard for evaluating hearing requests (40 FR 22950 (May 27, 1975)). It is these regulations upon which EPA relied in promulgating its hearing regulations in 1990.

Unlike EPA, FDA has had numerous occasions to apply its regulations on hearing requests. FDA's summary of the thrust of its regulations, which has been repeatedly published in the **Federal Register** in orders ruling on hearing requests over the last 24 years, is instructive on the proper interpretation of the regulatory requirements. That summary states:

> A party seeking a hearing is required to meet a threshold burden of tendering evidence suggesting the need for a hearing.' [] An allegation that a hearing is necessary to sharpen the issues' or fully develop the facts' does not meet this test. If a hearing request fails to identify any evidence that would be the subject of a hearing, there is no point in holding one.
>
> A hearing request must not only contain evidence, but that evidence should raise a material issue of fact concerning which a meaningful hearing might be held. [] FDA need not grant a hearing in each case where an objection submits additional information or posits a novel interpretation of existing information. [] Stated another way, a hearing is justified only if the objections are made in good faith and if they ''draw in question in a material way the underpinnings of the regulation at issue.'' Finally, courts have uniformly recognized that a hearing need not be held to resolve questions of law or policy

(49 FR 6672, 6673 (February 22, 1984); 72 FR 39557, 39558 (July 19, 2007) (citations omitted)).

EPA has been guided by FDA's application of its regulations in this proceeding. Congress confirmed EPA's authority to use summary judgment-type procedures with hearing requests when it amended FFDCA section 408 in 1996. Although the statute had been silent on this issue previously, the FQPA added language specifying that when a hearing is requested, EPA ''shall * * * hold a public evidentiary hearing if and to the extent the Administrator determines that such a public hearing is necessary to receive factual evidence relevant to material issues of fact raised by the objections'' (21 U.S.C. 346a(g)(2)(B)). This language grants EPA broad discretion to determine whether a hearing is ''necessary to receive factual evidence'' to objections (H.R. Rep. No. 104–669, at 49 (1996)).

C. General Denial of Objections and Hearing Requests

Petitioners' objections and hearing requests are denied in their entirety as irrelevant, and therefore immaterial, to EPA's determination in the May 15, 2009 final rule that the carbofuran tolerances were unsafe and could not be sustained under FFDCA section 408. In that final rule, EPA assessed the risks from carbofuran based on existing uses of carbofuran, as modified by all use restrictions proposed by FMC. EPA concluded that the carbofuran tolerances substantially exceeded the FFDCA safety standard, particularly as to infants and children.

Petitioners' objections and hearing requests as to that final rule disclose on their face their irrelevance to the conclusions reached in the May 15, 2009 final rule. As Petitioners summarize their objections on the first page of their submission:

> Petitioners disagree that the carbofuran tolerances are unsafe and argue that the available scientific data show that there is a reasonable certainty of no harm to human health from the continued use of carbofuran for certain specific uses and related tolerances *under the terms for reregistration proposed by Petitioners.*

(Objections at 1) (footnote omitted) (emphasis added). As Petitioners' footnote to this sentence reveals, however, the proposed terms for FIFRA reregistration referenced by Petitioners include significant terms submitted to EPA on June 29, 2009, 44 days after publication of the final rule revoking carbofuran's FFDCA tolerances. In fact, the body of Petitioners' objections show that FMC's June 29, 2009 proposed FIFRA registration amendments are inextricably intertwined with the claims made in the objections. Thus, Petitioners are actually not objecting to the conclusions in EPA's final rule; rather, they are suggesting that EPA might reach a different result in a different factual scenario.

Objections, however, must be directed ''with particularity [at] the provisions of the regulation or order deemed objectionable.'' 21 U.S.C. 346a(g)(2). The key here is that a party must file particularized objections to—that is, identify some type of error in—a specific regulatory decision. In no sense, however, can it be claimed that EPA erred, or that there is something objectionable, in its May 15, 2009 file rule because EPA did not consider a proposed revision to the terms of the carbofuran registration that had not yet been made. EPA need not shoot at a moving target, much less a target that is not in existence. Therefore, Petitioners' objections are irrelevant, and thus immaterial, to the May 15, 2009 final rule; they are based on hypothetical terms of carbofuran use not before the Agency as it made its determination in that final rule.

Moreover, it is not as if Petitioners' proposed terms for carbofuran use are simple, straightforward use deletions that could be immediately effectuated. While such a proposal is still irrelevant as a challenge to a prior EPA determination, such a proposal might lead EPA to expeditiously modify its action. Rather, Petitioners have proposed an unprecedented scheme involving FMC playing a role as a middleman between EPA and growers to ensure that carbofuran use in no one area exceeds a certain percentage of the cropped area. FMC has properly filed proposed amendments to its FIFRA registration, which would incorporate these new restrictions on carbofuran use and EPA will review these proposals consistent with the substantive and procedural requirements of FIFRA. At such time as these new terms of registration are determined by EPA to meet the standard for registration, and not before, would it be appropriate for EPA to consider whether the tolerance revoked by the May 15, 2009 rule should be re-established.

Finally, Petitioners argue that it can raise its proposed terms of carbofuran use because EPA cannot limit them from putting forward new issues in a hearing. As explained below, EPA believes Petitioners have misconstrued the law on this point. However, even assuming for the sake of argument that Petitioners are correct that new issues can be raised at a hearing on objections, Petitioners admit that any newly raised issues must meet the standard of relevance. As explained above, however, objections based on terms or FIFRA registration proposed after EPA's final rule are irrelevant to the correctness of EPA's determination in that final rule.

EPA has nonetheless evaluated each of Petitioners' objections and hearing requests and determined that there are alternate grounds for denying them. (See Units VI.E through I). EPA has undertaken this analysis for all of the objections despite the fact that it is not at all clear that those of Petitioners'

claims which appear to be unrelated to FMC's recently proposed registration amendments would either individually or collectively change EPA's safety determination for the carbofuran tolerances given the relatively high level of risk estimated for the carbofuran tolerances in the final revocation rule. Petitioners have certainly not provided any road map as to how a safety finding could be made absent FMC's recently-proposed registration amendments. The failure to make such a showing is further justification for EPA's denial of Petitioners' objections and hearing requests.

D. Response to Petitioners' Objection That EPA Lacks the Authority To Limit the Issues That May Be Raised in Objections and Hearing Requests

1. Response to Legal Issue. Petitioners claim that EPA lacks the authority to restrict the issues that may be raised as part of their objections. Specifically, they challenge EPA's interpretation that the failure to raise issues or provide information during the comment period on the proposed rule bars consideration of such issues or evidence as part of submitted objections or hearings. Petitioners make two arguments in support of this contention: (1) That neither FFDCA section 408(g) on its face nor EPA's regulations implementing FFDCA section 408(g) limit the issues that can be raised in objections, or in any hearing; and (2) that even though the rulemaking phase is governed by 553 of the Administrative Procedure Act (APA), the hearing must be held in accordance with APA sections 556 and 557, which requires that the ''exclusive record for decision must consist of testimony and exhibits received at the hearing, as well as other papers filed in the hearing proceeding'' (Obj at 64). On this basis, the Petitioners conclude that all of the cases cited in the Final Rule requiring parties to raise all issues and information on which they intend to rely in subsequent proceedings are inapplicable.

These arguments are premised on several fundamental misconstructions of the FFDCA section 408 and the APA. None of the cases they cite address the specific question of whether and how the requirements of section 553 of the APA apply to FFDCA section 408. And for many of these cases, Petitioners misquote the cases, misinterpret the holdings, or misconstrue language taken out of context.

Petitioners' first argument, that neither section 408(g) nor EPA's regulations limit the issues that can be raised in objections or in any hearing, is incorrect and misses the point. As discussed at length in the Final Rule, the provisions of 408(g) are not to be viewed in isolation, but as part of a coherent statutory structure inextricably linked to the FFDCA's informal rulemaking procedures and section 553 of the APA. Petitioners concede that FFDCA section 408 establishes an informal rulemaking process (Obj at 62–63). As an informal rulemaking, the process is governed by section 553 of the APA and the case law interpreting these requirements, except to the extent that section 408 provides otherwise.[5] In this regard, it is well established that the failure to raise factual or legal issues during the comment period of a rulemaking constitutes waiver of the issues in further proceedings. *E.g., Forest Guardians* v. *U.S. Forest Service,* 495 F.3d 1162, 1170–1172 (10th Cir. 2007) (Claim held waived where commenters ''failed to present its claims in sufficient detail to allow the agency to rectify the alleged violation''); *Nuclear Energy Institute* v. *EPA,* 373 F.3d 1251, 1290–1291 (DC Cir. 2004) (''To preserve a legal or factual argument, we require its proponent to have given the agency a 'fair opportunity' to entertain it in the administrative forum before raising it in the judicial forum.'') *Native Ecosystems Council* v. *Dombeck,* 304 F.3d 886, 889–900 (9th Cir. 2002) (Purpose of requirement that issues not presented at administrative level are deemed waived is to avoid premature claims and ensure that agency be given a chance to bring its expertise to bear to resolve a claim); *Kleissler* v. *U.S. Forest Service,* 183 F.3d 196, 202 (3d Cir. 1999) (Policy underlying exhaustion requirement is that ''objections and issues should first be reviewed by those with expertise in the contested subject area''); *National Association of Manufacturers* v. *U.S. DOI,* 134 F.3d 1095, 1111 (DC Cir. 1998) (''We decline to find that scattered references to the services concept in a voluminous record addressing myriad complex technical and policy matters suffices to provide an agency like DOI with a 'fair opportunity' to pass on the issue''); *Linemaster Switch Corporation* v. *EPA,* 938 F.2d 1299, 1305–1306 (DC Cir. 1991) (declining to consider in challenge to final rule, data alluded to in comments but not submitted during the comment period, and information submitted to EPA office that was not developing the rule).

Moreover, EPA clearly stated in the proposed rule that the Agency considered that the usual requirements applicable to informal rulemakings would remain applicable in this informal rulemaking. The proposal explicitly noted that ''[i]f you anticipate that you may wish to file objections on the final rule, you must raise those issues in your comments on this proposal. EPA will treat as waived, any issue not originally raised in comments on this proposal'' (73 FR 44,865 (July 31, 2008)).

The fact that FFDCA section 408 in certain limited circumstances supplements the informal rulemaking with a hearing does not fundamentally alter the requirements applicable to informal rulemakings. Nor, as discussed below, does it convert this into a formal rulemaking, subject to the exception in section 553. The FFDCA section 408 establishes a unique statutory structure with multiple procedural stages, and delegates to EPA the discretion to determine the implementation that best achieves the statutory objectives. Accordingly, EPA interprets the notice and comment rulemaking portion of the FFDCA section 408 process as an integral part of the FFDCA process, inextricably linked to the administrative hearing. The point of the rulemaking is to resolve the issues that can be resolved, and to identify and narrow any remaining issues for adjudication. Consequently the administrative hearing does not represent an unlimited opportunity to supplement the record, particularly with information that was available during the comment period, but that commenters have chosen to withhold. For example, as discussed at greater length in Unit VI.E.2, both in their comments, and again in their objections, the Petitioners failed to provide the underlying mathematical modeling that supported their claim that the appropriate children's safety factor was 1X, rather than 4X. Instead, they presented only summary results. Similarly, although the Petitioners claimed in their comments to have conducted an alternate analysis showing that aggregate carbofuran exposures to children would be safe, they failed to provide the data and details of that assessment to the Agency. They also failed to provide several critical components that served to support key inputs into that assessment.

To read the statute otherwise would be to render the rulemaking portion of the process entirely duplicative of the hearing, and thus, ultimately meaningless. *See, e.g., FDA* v. *Brown & Williamson Tobacco,* 529 U.S. 120, 132–133 (2000) (Court must interpret statute as a symmetrical and coherent regulatory scheme, and fit, if possible,

[5] For example, section 408(d) allows the Agency to proceed to a final rule after publication of a submitted petition, rather than requiring publication of a proposal.

all parts into a harmonious whole.) *APW, AFL–CIO* v. *Potter,* 343 F.3d 619, 626 (2nd Cir. 2003) (''A basic tenet of statutory construction * * * [is] that a text should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another * * *''), *quoting Silverman* v. *Eastrich Mulitple Investor Fund,* 51 F.3d 28, 31 (3rd Cir. 1995). The equities of this construction are particularly strong, where, as here, the information was (or should have been) available during the comment period. *See, Kleissler,* 183 F.3d at 202 (''[A]dministrative proceedings should not be a game or a forum to engage in unjustified obstructionism by making cryptic and obscure reference to matters that 'ought to be' considered and then, after failing to do more to bring the matter to the agency's attention, seeking to have that agency determination vacated'') *citing Vermont Yankee Nuclear Power Corp.* v. *NRDC,* 435 U.S. 519, 553–54 (1978). For example, one of Petitioners' exhibits is the drinking water modeling that served as the basis for the comments submitted on the proposed rule. The documents are dated well before the close of the comment period, and were clearly available for submission along with the comments (Exhibit 15). Yet they were only provided to EPA as part of the Petitioners' objections.

Contrary to Petitioners' contention, EPA's interpretation is entirely consistent with the FFDCA's language and structure. The fact that the statute and regulations allow ''any person'' to file objections is immaterial. At issue is not ''who'' may raise objections, but what issues may be raised as part of the objections to justify a hearing. And on the relevant question, the statute is clear that only certain issues—those of material fact—may be raised in objections to justify a hearing (21 U.S.C. 346a(g)(2)(B)). EPA's regulations expand on this limitation, providing, among other requirements, that hearings will not be held on legal or policy issues, nor on the basis of mere allegations, nor where EPA concludes that the data and information submitted, even if accurate, would be insufficient to justify the factual determination urged (*See* 40 CFR 178.32). It is true that FFDCA section 408(g)(2)(A) provides little guidance on the objections that a party may raise, requiring only that parties identify the specific provisions challenged, and state ''reasonable grounds'' for their objection. But the relative silence of the statutory provision does not mean that EPA is required to allow parties to raise any and all objections; rather it means that Congress left the question of what constitutes ''reasonable grounds'' for EPA to resolve.

In construing that requirement, EPA gives weight to the fact that 408(g) is only one part of a larger, multi-stage, administrative process, and that the statute does not support an interpretation that this one phase be granted greater significance than the rest of the process. Also relevant is that Congress delegated broad discretion to the Agency to determine whether a hearing is ''necessary'' (21 U.S.C. 346a(g)(2)(B)). Accordingly, EPA believes that whether an objection states ''reasonable grounds'' is to be measured against the context of the rulemaking, and the provisions applicable to hearing requests.

Fundamentally, FFDCA section 408 delegates broad discretion to EPA, both to determine how best to harmonize the statutory process and to determine what constitutes ''reasonable grounds'' for objections. Consequently, the relevant question is whether EPA's exercise of discretion in requiring parties to present all available factual issues and evidence during the rulemaking is reasonable. It is undeniably a reasonable exercise of discretion to ensure that the rulemaking is not an opportunity for one party to waste the time and resources of all parties—both the government and other rulemaking participants—by failing to raise all of their issues or withholding information for the purpose of surprising the government at a later point during the proceeding. *See, e.g., Vt. Yankee,* 435 U.S. at 553–554; *United States* v. *L.A. Tucker Truck Lines,* 344 U.S. 33, 37 (1952) (''courts should not topple over administrative decisions unless the administrative body * * * has erred against objection made at the time appropriate under its practice'').

EPA has consistently interpreted section 408 in this fashion since the 1996 amendments. For example, EPA previously ruled that a petitioner could not raise new issues in filing objections to EPA's denial of its Original petition. *See* 72 FR 39318, 39324 (July 18, 2007) (''The FFDCA's tolerance revocation procedures are not some sort of 'game,' whereby a party may petition to revoke a tolerance on one ground, and then, after the petition is denied, file objections to the denial based on an entirely new ground not relied upon by EPA in denying the petition.''). EPA reasoned that new issues were not cognizable because they ''not an objection to the 'provisions of the * * * order [denying the petition]' '' (Id.). Similarly, in a recent decision EPA denied NRDC's request for a hearing because they had failed in their original petition to raise the claim asserted in their objection (73 FR 42683, 42696 (July 23, 2008)). EPA noted that although NRDC did argue in its petition that EPA cannot make a safety finding without completing the endocrine screening program under FFDCA section 408(p), it did not assert claims regarding the endocrine data and the children's safety factor. Citing its previous decision, EPA denied NRDC's objections and hearing requests as to the children's safety factor (Id.). In that same decision, EPA also denied a number of hearing requests on the ground that requestor failed to proffer supporting evidence; EPA opined that a failure to offer evidence at an earlier stage of the administrative proceeding could not be cured by suddenly submitting such evidence with a hearing request. (*See* 73 FR 42683, 42710 (July 23, 2008) (''Presumably Congress created a multi-stage administrative process for resolution of tolerance petitions to give EPA the opportunity in the first stage of the proceedings to resolve factual issues, where possible, through a notice-and-comment process, prior to requiring EPA to hold a full evidentiary hearing, which can involve a substantial investment of resources by all parties taking part * * * Accordingly, if a party were to withhold evidence from the first stage of a tolerance petition proceeding and only produce it as part of a request for a hearing on an objection, EPA might very likely determine that such an untimely submission of supporting evidence constituted an amendment to the Original petition requiring a return to the first stage of the administrative proceeding (if, consideration of information that was previously available is appropriate at all'').

The two cases Petitioners cite that are specific to section 408(d) do not alter this assessment. Neither of those cases addressed the scope of the evidence that could be properly raised as part of objections to justify a hearing. Nor were the courts examining the extent of EPA's authority to impose requirements on the filing of objections under 408(g). Rather these courts were evaluating the scope of the FFDCA's exclusive review provisions, and whether the plaintiffs could bring a challenge to EPA policies and individual tolerance decisions without first exhausting the FFDCA's petition process. *Geertson Farms* v. *Johanns,* 439 F.Supp.2d 1012, 1022–1023 (N.D. Ca 2006); *NY* v. *EPA,* 350 F.Supp.2d 429, 442–443 (S.D.N.Y. 2004). This issue is not identical to the questions at issue here: for example, the

court in *Geertson Farms* held that the plaintiffs' procedural and policy decisions were properly raised initially before the Agency through the petition process. 439 F.Supp2d at 442. Yet it is undeniable that EPA's regulations preclude the reliance on policy or legal issues as a justification for an Agency hearing.

Nor do the Petitioners' other cases compel a different result. The majority of the Petitioners' cases concern FFDCA section 701(e), which differs in several significant respects from FFDCA section 408. Section 701(e) imposes no requirements whatsoever on the party submitting the objection: ''any person may file objections * * * specifying the provisions of the order deemed objectionable, stating the grounds therefore * * *'' 21 U.S.C. 371(e)(2). This section also expressly provides that FDA must hold a hearing upon request: ''As soon as practicable after such request for a public hearing, the Secretary, after due notice, shall hold such a public hearing for the purpose of receiving evidence relevant and material to the issues raised by such objections.'' 21 U.S.C. 371(e)(3). In the face of this language, it is unsurprising that the courts held that FDA lacked discretion to deny a hearing. Further, under FFDCA section 701(e) the mere filing of an objection automatically stays the effectiveness of the challenged provisions. ''Until final action is taken upon such objections is taken by the Secretary under paragraph (3), the filing of such objections shall operate to stay the effectiveness of those provisions of the order to which the objections are made.'' 21 U.S.C. 371(e)(3). By contrast, section 408 grants the Administrator the discretion to stay the effectiveness of the regulation if objections are filed. 21 U.S.C. 346a(g)(1). Indeed, the Petitioners' own cases specifically distinguish between section 701(e) and other FFDCA provisions. See *Pactra Industries* v. *Consumer Product Safety Commission,* 555 F.2d 677, 685 (9th Cir. 1977) (rejecting FDA argument that FFDCA section 701 should be read consistently with FFDCA sections 505 and 507 to allow for summary judgment procedures).

Petitioners' second argument is equally incorrect.[6] As an initial matter, the parties agree that FFDCA 408 establishes a hybrid rulemaking procedure, with informal rulemaking initiating, and frequently ending, the process (74 FR 23070 (May 15, 2009)); Obj at 62). Hybrid rulemaking is not formal rulemaking, which is the only rulemaking to which APA sections 556 and 557 apply. Nevertheless, Petitioners contend that once objections are raised, ''Congress required the use of a formal rulemaking procedure involving an on-the-record hearing for resolving factual disputes.'' (Obj at 62) Nothing in the FFDCA section 408 or the APA supports this interpretation. And the cases cited in support of this argument are inapposite or misconstrued.

The APA section 553 on its face applies to all rulemakings except ''[w]hen rules are required by statute to be made on the record after opportunity for an agency hearing'' (5 U.S.C. 553(c)). Under this language, APA section 553 will apply unless two requirements are met: (1) The statute requires an opportunity for a hearing as part of the rulemaking, and (2) the hearing is required to be ''on the record.'' FFDCA section 408 hearings are neither ''required,'' nor mandated to be ''on the record.'' The case law is clear that statutes containing both characteristics are the hallmark of formal rulemaking, and that formal rulemaking is the rare exception. *AT&T* v. *FCC*, 572 F.2d 17, 21–23 (2d Cir. 1978) (''The APA requires trial-type hearings only '[w]hen rules (or adjudications) are required by statute to be made (or determined) on the record after opportunity for an agency hearing.' '') (citations omitted); *Minden Beef Co* v. *Cost of Living Council*, 362 F.Supp. 298 (D. Neb. 1973) (examining whether statutory provision that ''[t]o the maximum extent possible, the President or his delegate shall conduct formal hearings * * *'' makes hearings mandatory, in determinating whether formal rulemaking required). *See also*, *e.g., Girard* v. *Klopfenstien*, 930 F.2d 738, 741 (9th Cir. 1991) (''The APA does not apply because a debarment hearing is not required by statute. The fact that the hearing is 'on the record' does not trigger an application of the formal adjudication provisions of section 554 of the APA''); *Smedberg Machine & Tool* v. *Donovan*, 730 F.2d 1089, 1092–93 (7th Cir. 1984) (holding section 554 inapplicable to a proceeding that ''gives the adminsitrative law judge the discretion, rather than the obligation to conduct a review hearing.''). As discussed below, in contrast to other sections of the FFDCA, such as section 701(e), FFDCA section 408 makes clear that a hearing is not mandatory upon request, but that EPA has broad discretion to determine whether a public hearing is necessary to receive factual evidence. *See*, 21 U.S.C. 346a(g)(2)(B), 346a(g)(2)(C). *See also*, H.R. Rep. No. 104–669, at 49 (1996).

The Supreme Court made clear in *Florida East Coast Railway* v. *FLRA*, that the circumstances under which rules are ''required to be made on the record after opportunity for an agency hearing'' are limited to those where Congress clearly indicates the intent to do so. 410 US 224, 241 (1973). The mere fact that statute offers an *opportunity* for an agency hearing is not sufficient to bring rulemaking under scope of this exemption. Id. *See also*, *U.S.* v. *Allegheny-Ludlum Steel*, 406 U.S. 742 (1972); *NRA* v. *Brady*, 914 F.2d 475, 485 (9th Cir. 1990) (No oral hearing required where statute required Secretary to ''afford interested parties opportunity for hearing'' and Agency regulations reserved right to determine whether oral hearing warranted); *Wisconsin Gas Co* v. *FERC*, 770 F.2d 1144, 1165–1168 (DC Cir. 1985) (APA 556 hearing not required when statute only contained provisions requiring decision ''after a hearing'' and ''substantial evidence'' standard of judicial review); *AT&T* v. *FCC*, 572 F.2d 17, 21–23 (2d Cir. 1978) (APA 556 hearing not required when statute only contained provisions requiring decision ''after a hearing'' and ''substantial evidence'' standard of judicial review) *Philips Petroleum Co* v. *FPC*, 475 F.2d 842, 851–852 (10th Cir. 1973) (formal rulemaking not required even though statute required ''full hearing'' and Agency traditionally conducted trial-type adjudicative hearing).

Unless the statute providing for agency action prescribes ''hearings on the record,'' either in those exact words or by using similar words to indicate that Congress specifically intended to impose the full trial-type requirements of sections 556 and 557, the statute does not fall within section 553's exception. *FL East Coast Railway*, 410 US at 241. While the absence of those words is not dispositive, ''in the absence of these magic words, Congress must clearly indicate its intent to trigger the formal, on the record hearing provisions of the APA.'' *City of West Chicago, Illinois* v. *NRC*. 701 F.2d 632, 641 (7th Cir. 1983) (citations omitted). *See also*, *e.g.*, *National Classification Committee* v. *ICC*. 765 F.2d 1146, 1150–1151 (DC Cir. 1985) (''Thus under *Florida East Coast*, there is a strong presumption that the procedural guarantees of section 553 of the APA are sufficient unless Congress specifically indicates to the contrary'' *citing Vermont Yankee Nuclear Power Corp* v. *NRC*, 435 U.S. 519 (1978)); *AT & T* v. *FCC*, 572 F.2d at 21–23 (''The words, 'on the record' have become, as the District of Columbia Circuit has

[6] As discussed below, it is not clear that a determination that a hearing, if held, must be held in accordance with APA sections 556 and 557 precludes EPA from exercising its discretion to restrict the issues and evidence that may be raised at this final stage of the administrative process.

observed, a 'touchstone test' for the applicability of the APA's trial-type procedures''); *Philips Petroleum Co*, 475 F.2d at 851–852 (''The fact, as previously noted, that the Gas Act does not contain the words 'on the record' furnishes a strong argument in support of the Commission's contention that informal rulemaking satisfies the requirements of the APA''); *Minden Beef Co*, 362 F.Supp. at 306–307 (''Requiring 'formal hearings' is not identical with requiring that rules be made on the record after opportunity for agency hearing.'') What is notable is that, in all cases, the court required clear expression that Congress specifically intended to impose full trial-type requirements.

Thus the question is whether Congress indicated any intent to entirely remove the FFDCA section 408 process from the requirements of 553. The mere fact that FFDCA section 408 requires some (or even many) of the procedures applicable under section 556 and 557 does not resolve the question. *See*, *e.g.*, *National Classification Committee* v. *U.S.*, 765 F.2d 1146, 1150–1151 (DC Cir. 1985) (Rejecting argument that formal rulemaking required on grounds that ''[u]nder *Florida East Coast* there is a strong presumption that the procedural guarantees of section 553 of the APA are sufficient unless Congress specifically indicates to the contrary''); *Association of National Advertisers* v. *FTC*, 627 F.2d 1151, 1165–1168 (DC Cir. 1979) (formal rulemaking not required, even though statute ''did order use of procedures not required in informal rulemaking'' such as rights to rebuttal and cross-examination at public hearing.); *American Public Gas Association* v. *FPC*, 567 F.2d 1016, 1065–1067 (DC Cir. 1977) (Formal rulemaking not required by statutory provisions requiring ''full hearing'' and ''substantial evidence'' standard of judicial review).

In fact, the language and legislative history of section 408 provide clear indication of Congressional intent not to subject proceedings under these sections to APA sections 556 and 557. FFDCA section 408 does not reference APA sections 556 or 557 (see, *e.g.*, 7 U.S.C. 136d(c)(2)). By contrast, the previous version of section 408 did reference APA section 556, and the deletion of this requirement provides clear evidence of Congressional intent not to exempt FFDCA from APA 553. Prior to the 1996 amendments, section 408(d)(5) of the original act, which governed the conduct of hearings, specifically referenced APA 556. (''Any report, recommendations, underlying data, and reasons certified to the Secretary by an advisory committee shall be made part of the record of the hearing, if relevant and material, subject to the provisions of section [556] of the APA.''). 21 U.S.C. 346(d)(5). Moreover, the previous version of the statute contained additional language consistent with the requirement of hearings subject to APA sections 556 and 557; for example, the previous version of section 408(d)(5) repeatedly makes reference to ''testifying at such hearing.'' A further consideration is that several other provisions of the FFDCA do explicitly reference APA sections 554 or 556. *Compare*, 21 U.S.C. 333(g)(3) (''A civil penalty * * * shall be assessed by the Secretary by an order made on the record after opportunity for a hearing provided in accordance with this subparagraph and section 554 of title 5''); 21 U.S.C. 342(f)(1)(C) (requiring the Secretary, upon any declaration of imminent hazard under this section to ''initiate a proceeding in accordance with sections 554 and 556 of title 5''). The fact that Congress chose not to explicitly reference APA sections 556 or 557 provides a strong indication that they did not intend to impose such a requirement on section 408 proceedings. *See*, *e.g.*, *St Louis Fuel and Supply Co* v. *FERC*, 890 F.2d 446, 449 (DC Cir. 1989) (holding that formal hearing under APA 554 not required on that grounds that ''[w]e consider it significant that, unlike section 7193(c), other prescriptions in the DOE Organization Act expressly invoke the APA'') (citations omitted).

Nor does any provision of FFDCA section 408 include the requirement that the hearing be ''on the record.'' By contrast, several other provisions of the FFDCA include that exact phrase. *Compare*, 21 U.S.C. 335a(i) (''The Secretary may not take action * * * unless the Secretary has issued an order for such action made on the record after opportunity for an agency hearing on disputed issues of material fact.''); 21 U.S.C. 335b(b)(1)(A) (''A civil penalty shall be assessed * * * by an order made on the record after an opportunity for an agency hearing * * *''); 21 U.S.C. 335(c)(b) (''The Secretary may not take action * * * unless the Secretary has issued an order for such action made on the record after opportunity for an agency hearing on disputed issues of material fact.'') Under all rules of statutory construction, those differences are presumed to be intentional. *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (''[W]here Congress includes particular language in one section of a statute and omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion'').

Equally significant is that the language of section 408 explicitly grants EPA broad discretion to deny a hearing. Section 408(g)(2)(B) provides that EPA shall ''hold a public evidentiary hearing, *if and to the extent* the Administrator *determines that such a public hearing is necessary* to receive factual evidence relevant to material issues of fact raised by the objections'' (21 U.S.C. 346a(g)(2)(B)) (emphasis added). This language grants EPA the discretion to determine whether the issues raised in objections are ''material'' issues of fact. Further, even where evidence relevant to an issue of material fact is proffered (essentially the standard set forth in 40 CFR 178.32), EPA construes the statutory language as requiring it to hold a hearing only where it determines it is necessary to receive proffered evidence. In other words, the statute grants EPA the discretion to determine that the issues could be resolved entirely on the basis of the existing written record. *See Philips Petroleum*, 475 F.2d at 848–849 (Formal rulemaking under APA 556 not required even though statute required that hearing be held, but ''Commission has a very broad discretion in determining the form of its proceedings'').

EPA's construction is confirmed by the House Commerce Committee Report accompanying the final bill, which states:

> New subparagraph (g)(2)(B) allows an objector to request a public evidentiary hearing. *The Administrator would decide whether [a] hearing were necessary* to receive factual evidence relevant to material issues of fact raised by the objections. *The Committee expects EPA to use this discretion fairly* and to grant hearings to responsible parties on all sides.

H.R. Rep. No. 104–669, at 49 (1996) (emphasis added). Notably, in an earlier version of the 1996 amendments, the House bill provided for a mandatory hearing during the notice-and-comment rulemaking stage of an EPA-initiated proceeding. [H.R. 1627, 104th Cong. Section 405 (new FFDCA section 408(e)(2)) (''EPA *shall provide* an opportunity for a public hearing * * *'') (emphasis added). This requirement was dropped prior to enactment but the contrast with section 408(g)(2)(B) confirms the discretionary character of the latter.

If this were not sufficient indication of Congressional intent, further evidence is provided by the fact that in amending section 408, Congress chose not to adopt the provisions of section 701(e) that Petitioners cite in their objections. Clearly, Congress could have

adopted the same provisions found in FFDCA 701(e), or in any of the other comparable FFDCA provisions discussed above, but chose not to do so.

EPA agrees that, when a hearing is warranted, the FFDCA requires an evidentiary hearing that comports with the procedures contemplated by 408(g)(2)(B). But that is not the same as a requirement that section 553 be inapplicable to the proceedings, or that any hearing be held in accordance with APA sections 556 and 557.[7] Rather, section 408's provisions are consistent with APA sections 553 (b) and (c), which recognize the potential for hearings as part of informal rulemaking: ''Except when notice or hearing is required by statute, * * * the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments, *with or without the opportunity for oral presentation.''* 5 U.S.C. § 553(b)(c) (emphasis added).

Finally, Petitioners' citation to case law interpreting FFDCA section 701(e) does not compel a different result. Petitioners claim that the provisions of FFDCA 701(e) are ''near identical'' to those under section 408, and on this basis, argue that, ''by analogy'' these decisions compel an identical interpretation of the requirements of FFDCA section 408 (Obj at 65). Petitioners are correct that section 701(e) of the FFDCA has been held to be ''one of those statutes, few in number, that does require rule-making hearings to be on the record in accordance with APA sections 556.'' *Pactra, supra*, 555 F.2d 677, 685 (9th Cir. 1977), *citing Florida East Coast Railway*, 410 U.S. at 237–38, (*dictum*). But in all other regards, Petitioners are incorrect.

As previously discussed, there are several significant differences between the statutory language of FFDCA sections 701 and 408 that render Petitioners' citation to these cases inapposite. Hearings are mandatory upon request under section 701, and the filing of objections operates to automatically stay the provisions of the rule. Section 701(e)(2) requires only that the objection ''state the grounds therefore,'' rather than requiring the a statement of ''reasonable grounds.'' *See Pactra* at 684 (distinguishing FFDCA section 701(e) from 507(f) because the latter requires hearing applicants to show 'reasonable grounds'). Further, although section 701 does not itself contain the requirement that the hearing be ''on the record,'' the legislative history of this provision indicates that Congress intended such hearings to be ''on the record.'' *Pactra*, 555 F.2d at 682–684 (detailing FFDCA section 701 legislative history). These characteristics played a significant role in the court's decision that FDA lacked the authority to deny hearings under section 701(e) on the basis of summary judgment proceedings.[8] However, as shown above, the legislative history of section 408 provides a clear indication of a contrary Congressional intent with respect to hearings under this section.

Petitioner's reliance on the ''substantial evidence'' standard in FFDCA section 408(i) is equally misplaced. Incorporation of that standard into judicial review provisions alone has been consistently held to be insufficient to indicate Congressional intent to impose the full requirements of APA sections 556 and 557 to a rulemaking. *Wisconsin Gas Co* v. *FERC*, 770 F.2d at 1167 (''The procedures required to develop this 'substantial evidence' are not necessarily the strict adversary procedures of sections 556 and 557 of the Administrative Procedures Act''); *Public Systems* v. *FERC*, 606 F.2d 973, 979, n. 32 (DC Cir. 1979) (substantial evidence requirement in Natural Gas Act ''carries no implications for procedures to be followed by the Commission in compiling the record''); *American Public Gas Association* v. *FPC*, 567 F.2d 1016, 1065–1067 (DC Cir. 1977) (''In our view, however, this requirement [of the substantial evidence standard] in the judicial review provision of the Act does not dictate the procedure to be followed, or the nature of the hearing to be held).

The specific language of 408(i) defines the standard for the reviewing court; it does not describe the process by which the agency hearing is to be conducted. This is quite different from the language under 501(c) of the CWA, on which the DC Circuit relied in holding that hearings pursuant to APA section 554 were required. *Marathon Oil* v. *EPA*, 564 F.2d 1253, 1262–1265 (DC Cir. 1977). The CWA section 501(c) states ''[i]n any judicial proceeding * * * in which review is sought of *a determination under this chapter required to be made on the record after notice and opportunity for a hearing * * *''* 33 U.S.C. 1369(c) (emphasis added).[9] By contrast, FFDCA section 408(i) merely provides that ''[a]s to orders issued following a public evidentiary hearing, the findings of the Administrator with respect to questions of fact *shall be sustained if supported by substantial evidence when considered on the record as a whole''* (21 U.S.C. 346a(i)) (emphasis added). It is also worth noting that the court expressly distinguished this case, which dealt exclusively with an adjudicatory proceeding, from those circumstances in which an agency proceeds through rulemaking. 564 F.2d at 1262, n. 30.

In any event, even if section 556 did apply to hearings under section 408, Petitioners cannot avoid the case law under section 553 and EPA's interpretation of the interrelationship between any hearing granted under section 408(g)(2) and the rulemaking preceding it. Petitioners cite to the general evidentiary provision in section 556(d) that provides that only irrelevant or immaterial evidence may be excluded and argue that this generic standard necessarily defines the scope of a hearing regardless of the statutory scheme in which it is embedded. However, context matters. As the DC Circuit noted, ''the informal procedures of section 553 of the APA and the more formal requirements of sections 556 and 557 are not mutually exclusive.'' *American Public Gas Association*, 567 F.2d at 1067. Even the caselaw relied upon by Petitioners does not suggest that section 556(d)'s evidentiary provision trumps all other considerations. Petitioners cite primarily to *Catholic Medical Center, Inc.* v. *NLRB*, 589 F.2d 1166, 1170 (2d Cir. 1978). In that case, the Second Circuit interpreted section 556(d) as specifying that ''an agency thus may not provide for the exclusion of evidence *not protected by a privilege or countervailing policy* . * * *'' Id. (emphasis added). Here, EPA has interpreted its authority to impose such a countervailing policy. Moreover, EPA's interpretation is clearly within the broad discretion granted it by the statute and the policy underlying the interpretation is a reasonable adaptation of judicial practice with regard to issues not presented in notice and comment rulemaking proceedings. Thus, Petitioners' technical and formalistic argument concerning section 556(d), which ignores the context of the section 408(g)(2) hearing provision, must be rejected.

Similarly unavailing is Petitioners' argument concerning section 556(e)'s

[7] EPA's regulations currently provide for a trial-type adjudicatory hearing. These regulations were adopted under the preceding statutory provision, and EPA has not yet undertaken any effort to revise the regulations to take into account the revised provisions of section 408.

[8] Contrary to Petitioners' allegation, the DC Circuit has not ''arrived at the same conclusion'' (Obj at 65). All of the discussion from *Independent Cosmetic Manufacturers and Distributors* v. *U.S. Dept of Health, Education, and Welfare* presented in their objections is dicta from a dissenting opinion. 574 F.2d 553, 572 (DC Cir. 1978).

specification that the ''exclusive record for decision'' after a hearing is material or testimony submitted in the hearing or hearing proceeding. Petitioners assert that this provision somehow removes any limitations on what can be submitted at the hearing because ''that 'exclusive record' is independent of whatever record may exist in the prior informal rulemaking * * *.'' (Obj at 64). Yet the hearing record is not ''independent'' of the rulemaking record in that EPA regulations require that the rulemaking record be included in the record of the hearing (40 CFR 179.179.83(a)(1)). Once again, Petitioners' argument fails because it considers section 556 in isolation rather than taking into account the context of the entire administrative proceeding in which the hearing is embedded.

Finally, Petitioners complain that EPA ''raised a host of new issues and assertions for the first time in the Final [rule],'' and it would be inequitable for EPA to prevent them from raising objections on these new assessments. Petitioners identify ten categories of ''new computations and contentions'' that they claim raise issues that go beyond those addressed in their prior comments. With one exception, all of these ''new computations and contentions'' were revisions to analyses conducted in response to Petitioners' comments. Indeed, some of these were revisions undertaken in response to Petitioners' specific request; for example, the ''new'' BMD analyses they identify were: (1) Corrections made in response to an EPA error identified in their comments; (2) an extrapolation of BMD_{50} s, using the dose-time-response model, to develop a common point of comparison between all studies, which they had claimed was the appropriate approach; and (3) a calculation generating a new dose-response model in order to calculate the BMD_{50} s for brain and RBC AChE inhibition, in response to Petitioners' claim that failure to do so was inappropriate (Refs. 24, 25, 85). Since these analyses were done at their behest, they can hardly complain that they present new issues on which they had no opportunity to comment. The Agency's underlying methodologies were the same as those used for the proposed rule; the analyses were based on information provided by the Petitioners and/or to address the revisions requested as part of the Petitioners' comments.

Regarding the remaining analyses: The ''new exposure estimates for ground and surface water,'' as well as the ''revised dietary risk and drinking water assessments'' and ''new assessment of the impact of buffers and setbacks'' were conducted to accurately reflect the use under the registration, as modified by FMC's cancellation of uses and additional mitigation measures. The same is true for the ''new analysis of the various carbofuran labels;'' the analysis related to the labels submitted as part of the September 2008 comments. The chlopyrifos studies were raised in response to the Petitioners' citation to a subset of chlorpyrifos data. They acknowledge that the ''new literature citations'' were provided to address one of their contentions (Obj at 56). The sole exception relates to EPA's calculation of carbofuran-specific half-lives for use in the dietary risk assessment. As discussed in Unit VI.G.2, EPA does not reject Petitioners' challenge to EPA's calculation of the 186-minute half-life on the basis that it is untimely.[10]

A fair indication that EPA has not raised a host of new issues in the final rule is that, with the exception of the revised half-lives, Petitioners do not challenge the substance of any of the allegedly ''new'' information. Indeed, as discussed in the sections below, Petitioners have in many instances failed to address any of the explanations or revised analyses EPA presented in the final rule.

Ultimately, Petitioners' complaint misses the point. EPA does not interpret the statute and regulations to preclude the submission of any new information as part of the objections phase. Such a position would in fact be inconsistent with EPA's own regulations and past practice, which require that in order to support a hearing request, a party submit more than ''mere allegations or denials'' (40 CFR 178.32(b)(2)). Rather, EPA's interpretation in this regard is analogous to the determination of whether a final rule is the logical outgrowth of the proposal and the comments. For example, EPA does not reject Petitioners' citation to new studies in support of the contention that RBC AChE data are generally more sensitive than PNS tissues on the grounds that they are untimely. This is because these studies are simply more evidence supplementing the issue they fairly raised in their comments, and are intended to rebut EPA's response in the final rule. Similarly, the submission of new analyses relating to the ground water pH in Exhibit 14 is not considered untimely, as the issues they raise relating to ground water pH were fairly raised in comments and discussed throughout the rulemaking. Ultimately, EPA's policy is merely that the objections phase does not present an opportunity for parties to begin the process entirely anew, by raising issues or information that could have been fairly presented as comments on the proposed rule. Nor is the statute's additional procedural step an excuse to withhold information that was clearly available at the time of the rulemaking.

2. Implications for FMC's Submission of New Registration Amendments as Part of their Objections. On June 29, 2009, in conjunction with their objections on the final rule, FMC Corporation submitted a request for EPA to amend its registration in several regards. Some of the requested amendments were further mitigation measures intended to address carbofuran's dietary risks. The most significant of these was a proposal intended to ensure that only 2% of any watershed would be treated with carbofuran. The proposal would require that, within five days of applying the product, all applicators report to FMC the following information: The location that the product will be used, crop, use rate, application method, acreage, and quantity applied. Based on this information, FMC would track the percentage in each watershed. ''Whenever it appears that carbofuran has been applied to 1.75% of any watershed,'' the registrant would report that information immediately to EPA, ''cease further sales in any county that overlaps with such a watershed for that use season, and shall attempt to recall all unused carbofuran within such counties by offering to repurchase such unused product'' (Exhibit 2). Additionally, FMC requested that its registration be amended to require that ''based on watershed boundaries, FMC * * * prior to each use season, allocate to its distributors in a manner which will attempt to ensure that no distributor receives more carbofuran for sale than can be accommodated by the 2% watershed area cap in any watershed supplied by that distributor.''

In addition, FMC proposed to add geographic restrictions that would prohibit use in certain parts of the country. Specifically, they proposed to restrict the use of carbofuran on potatoes to the three states: Idaho, Oregon, and to select counties in Washington. They proposed to restrict use on Sunflowers to only Colorado, Kansas, Nebraska, and South Dakota, as well as limited portions of North Dakota and Oklahoma. Under this proposal, use on corn would be restricted to Colorado, Iowa, Illinois, Indiana, Kansas, Missouri, Nebraska, and limited counties in Wisconsin. Further, they

[10] The Petitioners' claim that ''EPA provided new information concerning the raw data collected and records maintained by ORD in relation to its toxicology studies'' is inaccurate. EPA provided no new information on this topic in the final rule.

proposed to add set-backs (*i.e.*, areas where carbofuran could not be applied) ranging between 100 and 1,000 feet from drinking water wells, depending on the geographic area. Finally, as part of these amendments, FMC also requested that EPA revise its registration to permit use of carbofuran on pumpkins in Ohio, Illinois, and Indiana, and to cancel the use on pumpkins in the southeastern United States.

As made clear in Unit VI.C., FMC's newly-proposed registration amendments are irrelevant to the prior determinations made in the final tolerance revocation rule. Further, as discussed in Unit VI.D., as a consequence of the failure to raise these amendments measures as part of their comments on the proposal, EPA considers that all issues arising exclusively as a result of these proposed amendments have been waived. There is no evident reason that FMC could not have offered these amendments as part of its September 2008 proposals. All of the information on which they rely was available in September of 2008. All of the risk concerns that the amendments were intended to address were discussed at length in EPA's proposed rule. Since 2006, EPA has clearly stated its determination that carbofuran's potential to leach into ground water and to runoff into surface water caused unacceptable dietary risks. EPA's methodologies for evaluating these risks have not changed since 2006. Indeed, EPA deferred regulatory action for several months, subsequent to the Agency's determination in 2006 that carbofuran did not meet either the FIFRA or FFDCA standard, to allow the Petitioners time to generate data to address the exact same issues these proposals are intended to address. In their comments on the proposed rule, Petitioners provided some mitigation measures intended to address issues relating to the carbofuran's leaching and runoff potential: Well set-backs, buffers, geographic use restrictions, and aerial application recommendations.

As previously discussed, EPA provided clear notice in the proposed rule that issues that that were not raised during the comment period would be considered waived in subsequent stages of the administrative process (73 FR 44,865). Petitioners were well aware of this, as they commented that ''EPA's requirement to raise all issues in the comments does not appear to be legally binding'' (Ref. 18 at 118). Indeed they acknowledged that they ''agree that identifying disputed issues in the comments is efficient and desirable, and may help to narrow the issues arising in subsequent objections and an administrative hearing. Therefore, the commenters have made a good faith attempt to raise in these comments the principal issues of which they are aware'' (Id.).

At this stage of the process, the statute requires the Petitioners to object to the conclusions and provisions in EPA's final rule, not to propose some new alternate license that they claim would meet the statutory standards (21 U.S.C. 346a(g)(2)(A) (''any person may file objections * * * specifying with particularity the provisions of the regulation * * * deemed objectionable''). In fact, one might fairly read their proposal as an admission that the existing license fails to meet the statutory standards.

A further consideration is that the question of whether these amendments can be approved depends on whether the Agency eventually determines the amended registration meets the standards of FIFRA, which include considerations beyond the dietary risks evaluated under the FFDCA. Under FIFRA, the Agency's review of the amendments is also subject to a statutorily mandated schedule (established as part of the Pesticide Regulatory Improvement Act (PRIA)). These are no small matters. In terms of timing, FMC explicitly acknowledged in its letter submitting the proposed amendments that the amendments were subject to the PRIA review process, requesting that the actions be subject to the PRIA 8-month statutory deadline (which would establish a statutory deadline of February 2010 for Agency consideration of FMC's application). It is not clear whether FMC is arguing that its application be accorded a higher priority than other applications and be taken out of turn, or whether FMC is arguing that the consideration of the objections and request for hearing must be delayed until the FIFRA review process is completed. EPA rejects either position; Petitioners cannot use this tolerance proceeding to evade FIFRA's statutory review scheme, or use that scheme to delay this tolerance proceeding.

As noted, although FIFRA incorporates the FFDCA dietary risk standard, FIFRA also requires the Agency to evaluate a much wider scope of issues in determining whether to grant new license requirements. For example, EPA must evaluate the impact this proposal would have on worker and ecological risks. In addition, EPA must carefully evaluate the policy implications involved in authorizing Petitioners' scheme. In this regard, it is worth noting that FMC's scheme is a novel one that raises significant policy questions that are specific to FIFRA, such as whether the steps proposed could be adequately enforced, which could affect the confidence that everybody would, in fact, comply with all the steps, (*e.g.,* who would investigate whether users have properly notified FMC of use of the product; would users have to keep records to demonstrate to inspectors that they had appropriately reported use; how would further sales in a county be prohibited); and whether the steps themselves are appropriate tools from a policy perspective for dealing with risks associated with the use of a pesticide (*e.g.,* is it appropriate to require users to report use to a pesticide manufacturer; is such reporting subject to approval under the Paperwork Reduction Act; is it appropriate public policy to limit sales in a watershed so that some growers may have preferential access to a product; would the scheme encourage early and potentially unnecessary purchase of product by users; under what circumstances, if any, should EPA approve label and license conditions that require the extra vigilance that would be required here of users, distributors, and state and federal regulators). Even if this scheme were determined independently to meet the FFDCA safety standard, if ultimately EPA were unable to grant the amendment based on the other considerations that it must evaluate under FIFRA, the unacceptable dietary risks would still remain. Thus, whether this scheme could result in a determination that the dietary risks are acceptable is not ultimately severable from the larger FIFRA process. Nor would it be appropriate to attempt to resolve FIFRA issues in a hearing under the FFDCA.

Indeed it is questionable whether consideration of the proposed amendments would be appropriate even under Petitioners' position that all objections made in good faith may be presented at this stage of the proceeding (Obj at 61). For example, less than six months prior to their recent submission, the Petitioners proposed voluntarily cancellation of all use on pumpkins except in the Southeastern United States, alleging that sales data demonstrated that carbofuran was needed in the Southeastern U.S. In response to this amendment, which was submitted as part of their comments on the proposed rule, EPA analyzed the dietary risks based on this proposed use pattern for the final rule. A request, mere months later, for additional use on pumpkins in states with different geographic and weather conditions and

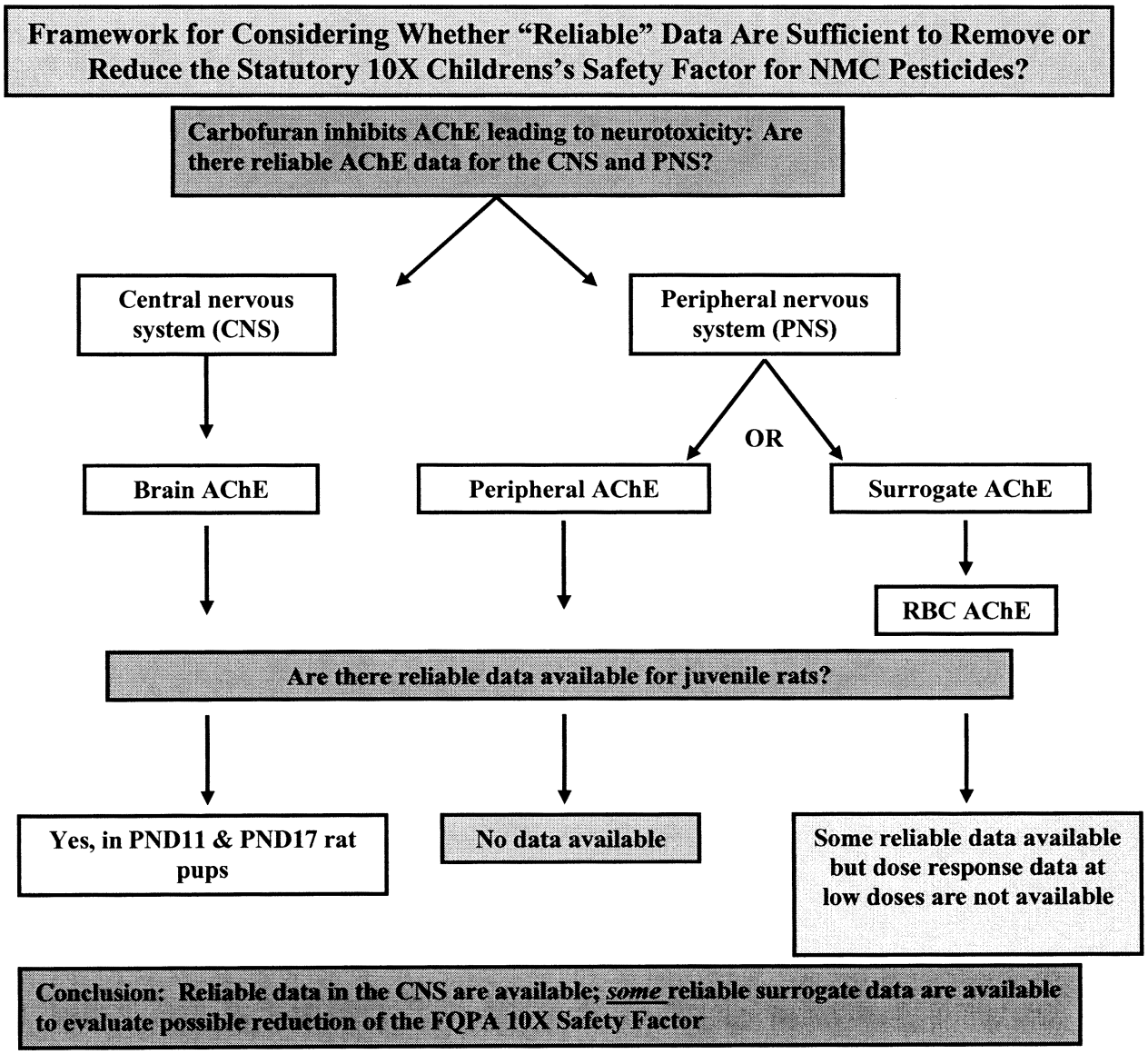
cancellation of the use in the Southeastern U.S., may fairly be considered suspect—an action intended to delay the revocation process by forcing the Agency to conduct yet additional analyses, rather than a good-faith objection.

For all of these reasons, EPA has determined that reliance on these proposed amendments as a basis for raising objections to the final rule, or for requesting a hearing is not appropriate. Nevertheless, EPA evaluated the individual objections premised on the newly requested terms and conditions of registration. And in each case, the submitted materials relating to these objections and hearing requests independently failed to meet the statutory and regulatory requirements to justify a hearing, as discussed in the Units below.

E. Response to Specific Issues Raised in Objections and Hearing Requests Relating to EPA's Children's Safety Factor

To more fully understand Petitioners' objection and hearing request with regard to EPA's choice of a 4X children's safety factor and EPA's responses, a little background is helpful. Section 408 of the FFDCA imposes a default additional safety factor for the protection of infants and children, to take into account the fact that children are frequently more sensitive to a pesticide's effects than adults. This default 10X safety factor can only be revised if the Agency has ''reliable data'' to demonstrate that the alternative safety factor—or no safety factor—''will be safe for infants and children'' (21 U.S.C. 346a(b)(2)(C)). In determining whether a different factor is safe for children, EPA focuses on the three factors listed in section 408(b)(2)(C)—the completeness of the toxicity database, the completeness of the exposure database, and potential pre- and post-natal toxicity. In examining these factors, EPA strives to make sure that its choice of a safety factor, based on a weight-of-the-evidence evaluation, does not understate the risk to children. (Ref. 79). The Agency's approach to evaluating whether sufficient ''reliable'' data exist to support the reduction or removal of the statutory default 10X is described below in Figure 1.

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EPA has consistently required that data comparing the AChE inhibition in young rat pups (typically PND11) and adult rats be submitted on AChE-inhibiting pesticides, such as carbofuran, to determine the extent of children's potential sensitivity. The study measures the levels of AChE inhibition in both potentially relevant target tissues: The brain and either the PNS or red blood cell (RBC), which serves as a surrogate for the PNS. EPA required these data from FMC for carbofuran, and FMC on two occasions submitted the studies. Both sets of data, however, were rejected by EPA as scientifically flawed because they inaccurately measured the levels of RBC AChE.

Despite the invalidity of the two FMC studies as to RBC AChE, EPA still has certain, limited RBC AChE data and other PNS-related data on carbofuran from other studies. These other carbofuran data indicate the following: (1) PNS-related effects (tremors) occur in pups as a result of exposure to carbofuran at low doses; (2) juveniles are more sensitive than adults to carbofuran based on brain measures; (3) juveniles are more sensitive than adults to carbofuran based on RBC AChE measures; and (4) the relative sensitivity of juveniles compared to adults as to RBC AChE is significantly greater the relative sensitivity of juveniles compared to adults as to brain AChE. It is also noteworthy that the data in adult rats showed RBC AChE was generally more sensitive to carbofuran's effects than brain AChE (RBC AChE inhibition was higher than brain at every dose except the lowest), although these data are of limited relevance, because they were conducted on adult animals rather than pups, and adult responses are frequently not predictive of children's responses. However, because the available pup RBC AChE data from EPA–ORD did not involve testing at doses that produced a sufficiently low level of inhibition, the data were not sufficient to develop a PoD for juveniles based on RBC AChE.

Accordingly, in making its children's safety factor determination for carbofuran, EPA was faced with three significant issues: (1) Sufficient data on carbofuran that are routinely-required for AChE-inhibiting pesticides to measure PNS effects was not available; (2) available data measuring the levels of AChE inhibition in brain and RBC indicated that juveniles were more sensitive than adults to carbofuran and other carbofuran data indicated that PNS-related effects could occur in pups at low dose levels; and (3) although the evidence on carbofuran as to RBC AChE inhibition in juveniles indicated that effects on juveniles' PNS might be the most sensitive endpoint, there was not sufficient data to calculate a PoD (for use in determining the safe dose or PAD) on these effects. Despite the incompleteness of the toxicity database and the evidence indicating the potential for pre- and post-natal toxicity at a very sensitive level, which indicate the need to retain a children's safety factor, EPA nonetheless determined that, because there was limited reliable data in juveniles, a full statutory default 10X was not necessary to ensure that children's exposures would be ''safe.'' EPA undertook a complex comparison of the brain and RBC AChE data in juveniles and determined that the likely increased level of sensitivity for RBC AChE inhibition is 4X. EPA thus concluded that using an additional children's safety factor of 4X applied to the PoD from data on brain AChE inhibition in juveniles would protect infants and children.

1. Challenge to EPA's Scientific Basis for Retention of a 4X Children's Safety Factor. Petitioners object to EPA's conclusion that the lack of peripheral tissue data justifies retention of any portion of the children's safety factor. Petitioners raise two claims in this regard. First, they allege that a carbofuran PoD based on brain AChE is adequately protective of PNS effects. Second, they claim that RBC AChE inhibition data are not the best surrogate for PNS effects when brain data are available, and therefore, these data are not an ''appropriate surrogate for PNS effects'' and should not have been relied upon as the basis for retaining any portion of the safety factor. In support of these points, Petitioners submit summaries of the testimony they intend to offer at a hearing, along with copies of published studies that they allege provide evidence of the points raised in the testimony.

In essence, these two main issues overlap, particularly with respect to the evidence submitted. Petitioners rely on the same studies to support both points. However, they are presented below separately as discrete issues in the interest of clarity. Supplemental to these two main points, EPA has identified three separate allegations made by Petitioners in support of this objection, which are also analyzed individually in this section.

a. *Objection/hearing request subissue: Whether a carbofuran PoD based on pup brain AChE inhibition data alone is adequately protective of PNS effects.* Petitioners argue that by establishing the PoD on pup brain AChE inhibition data, EPA has adequately accounted for all PNS effects in pups without the need for an additional children's safety factor. They argue that brain data will adequately protect against PNS effects, based on the claim that the available data show that the brain is equally sensitive or more sensitive than PNS tissue. In support of this objection, Petitioners' submit the evidence contained in Exhibits 4 and 6. Exhibit 4 consists of a report by Kendall Wallace, PhD, entitled ''Expert Report: Carbofuran FQPA Safety Factor,'' along with published studies conducted with OP chemicals, and other NMC chemicals (Ref. 17, 51, 53, 54, 59, 61, 62, 72). Exhibit 6 consists of a report by Lucio Costa, PhD, entitled, ''Expert Report: Carbofuran's FQPA Safety Factor and Interspecies Uncertainty Factor,'' as well as published literature studies conducted with chlorpyrifos and disulfoton, both OP pesticides, and a single study with propoxur, an NMC pesticide.

i. Background. In the proposed tolerance revocation, EPA presented its rationale for retention of a children's safety factor.

As explained in Unit IV.A, EPA uses a weight of evidence approach to determine the toxic effect that will serve as the appropriate PoD (or regulatory endpoint) for a risk assessment for AChE inhibiting pesticides, such as carbofuran (Ref. 78). Neurotoxicity resulting from carbofuran exposures can occur in both the central (brain) and peripheral nervous systems (PNS). In its weight of the evidence analysis, EPA reviews data, such as AChE inhibition data from the brain, peripheral tissues and blood (*e.g.*, RBC or plasma), in addition to data on clinical signs and other functional effects related to AChE inhibition. Based on these data, EPA selects the most appropriate effect on which to regulate; such effects can include clinical signs of AChE inhibition, central or peripheral nervous tissue measurements of AChE inhibition or RBC AChE measures (Id). Due to the rapid nature of NMC pesticide toxicity it is difficult to document effects in the PNS or even AChE inhibition in the PNS and thus studies measuring AChE inhibition in the PNS are very rare for NMC pesticides. Although RBC AChE inhibition is not adverse in itself, EPA's policy is to use it as a surrogate for inhibition in peripheral tissues when peripheral data are not available. As such, RBC AChE inhibition provides an indirect indication of adverse effects on the nervous system (Id.).

There are laboratory data on carbofuran for cholinesterase activity in plasma, RBC, and brain from studies in

multiple laboratory animals (rat, mouse, dog, and rabbits). Among these are three studies that compare the effects of carbofuran on PND11 rats with those in young adult rats (*i.e.*, 'comparative AChE studies') (Refs. 1, 2, 66). Two of these studies were submitted by FMC and one was performed by EPA–ORD. An additional study conducted by EPA–ORD involved PND17 rats (Ref. 63).

The studies in juvenile rats show a consistent pattern that juvenile rats are more sensitive than adult rats to the effects of carbofuran. These effects include inhibition of brain AChE in addition to the incidence of clinical signs of PNS neurotoxicity, such as tremors, at lower doses in the young rats. This pattern has also been observed for other NMC pesticides, which exhibit the same mechanism of toxicity as carbofuran (Ref. 81). The 2008 SAP, in its review of the carbofuran draft NOIC, concurred with EPA that the brain AChE data clearly indicate that the juvenile rat is more sensitive than the adult rat (Ref. 36).

The Agency does not have any AChE inhibition data for carbofuran in the PNS tissue of adult or juvenile animals. There is data on RBC AChE inhibition, which is a surrogate for PNS tissue AChE inhibition, in adult animals at both high and low doses, and RBC data in pups, but only at doses causing greater than 50% AChE inhibition (a very high level of inhibition). In adults, the data show that RBC is generally more sensitive to the effects of carbofuran than the brain, but that at the lowest dose tested, brain and RBC have similar sensitivity. In pups, the available data at higher doses show that, like adults, RBC is more sensitive than brain. For example, the EPA–ORD studies showed that RBC AChE inhibition is more sensitive than brain AChE inhibition in both PND11 and PND17 pups at the lowest dose tested. However, the lowest dose (0.1 mg/kg) in both studies missed the lower portion of the RBC AChE inhibition dose-response curve for pups. At the lowest dose, PND 11 pups had approximately 40% brain and 53% RBC AChE inhibition while PND17 pups had approximately 25% brain and 50% RBC AChE inhibition. Consequently, the Agency does not have RBC AChE inhibition data in pups at the low doses (*i.e.*, those that cause only 10% inhibition) that are relevant to risk assessment to serve as a surrogate for PNS tissue data.

EPA explained that additional evidence for the sensitivity of the PNS to carbofuran's effects comes from data in pregnant rats exposed to carbofuran that showed clinical signs that may be indicative of peripheral toxicity. Finally, EPA explained that data from other AChE inhibiting pesticides show that direct measures of peripheral nervous system (*e.g.*, lung, heart, and liver AChE) can be more sensitive than brain AChE inhibition. To help illustrate, EPA gave an example of another chemical for which brain inhibition alone was not at all predictive of toxicity, to help explain why the lack of carbofuran data was so significant. The example given was fenamiphos (an OP pesticide), where cholinergic toxicity (*e.g.*, tremors, miosis, salivation) was observed following inhibition of RBC, but not brain, even up to maximally tolerated doses (McDaniel and Moser, Ref. 53).

Normally, EPA would regulate based on the most sensitive endpoint, which in this case would appear to be the effects on children's PNS. However, as discussed above, EPA lacked the information that would allow it to establish a PoD (or regulatory endpoint) based on the effects on children's PNS. EPA therefore established its PoD based on the AChE inhibition in pup brain. Generally, by regulating based on pup data, EPA would directly account for any additional sensitivity that children might have, because the safe levels estimated from these data would be the levels at which infants and children would be affected. In such circumstances, EPA could reduce the children's safety factor.

But because EPA lacked the data on the PNS effects in pups at low doses of carbofuran, which are most analogous to the exposures that infants and children will receive from eating food with carbofuran residues, the Agency could not be confident that assessing risk using brain AChE inhibition would be protective of potential effects in the PNS for infants and children. Accordingly, EPA determined that, even though the Agency was relying on pup data, consistent with the statutory mandate that an additional safety factor be applied to account for children's increased sensitivity in the absence of information affirmatively demonstrating that no such safety factor is necessary, the Agency could not conclude that removal of the statutory default 10X would be ''safe for infants and children.'' As some information was available to characterize the effects on infants and children, EPA concluded that the full default 10X was unnecessary, and that it could safely reduce the factor to 4X.

Petitioners raised many of the same assertions in their comments on EPA's proposed rule that they raise in their objections. For example, the Petitioners claimed that because EPA relied on pup brain data, no additional safety factor would be necessary to account for children's increased sensitivity, because ''brain data are a better surrogate for the PNS than RBC data.'' The comments also contended that RBC data are problematic in a number of regards, *e.g.,* they are more variable. They also argued that EPA had generally relied exclusively on brain data for other NMC pesticides, and that to require an additional safety factor for carbofuran based on the lack of RBC AChE data was inconsistent with those other decisions.

In the final rule and response to comments EPA responded to all of the Petitioners' claims, and comprehensively restated its reasoning that the lack of PNS inhibition data warranted retention of some portion of the children's safety factor for carbofuran (74 FR 68694–68695 (May 15, 2009)). In essence, EPA explained that Petitioners had not presented any information that fundamentally altered the available risk information before the Agency. Specifically, EPA concluded that, given that (1) the EPA–ORD data clearly show that a surrogate measure of the peripheral nervous system (RBC AChE) in juvenile rats is more sensitive to the effects of carbofuran than brain AChE inhibition; (2) clinical signs consistent with toxicity to the peripheral nervous system were seen at very low doses of carbofuran; and (3) data from other AChE inhibiting pesticides show that direct measures of peripheral nervous system (*e.g.,* lung, heart, and liver AChE) can be more sensitive than brain AChE inhibition, the Agency could not be confident that assessing risk using brain AChE inhibition would be protective of potential effects in the peripheral nervous system for infants and children.

ii. Denial of hearing request. EPA is denying Petitioners' hearing request on this subissue because the evidence proffered, even if established, is insufficient to justify the factual determination urged (40 CFR 178.32(b)(2)). The totality of the evidence submitted fails to demonstrate a reasonable possibility that exclusive reliance on *carbofuran* brain data will be protective, largely because they have failed to proffer any evidence on several points that are critical to their argument. As such, the objection rests on speculation and mere allegation, and a hearing will not be granted on this basis (Id. *See, e.g.,* 73 FR 42708 (July 23, 2008); 57 FR 6667, 6671 (February 27, 1991)).

It is important to remember that to obtain a hearing on EPA's children's safety factor decision, Petitioners must proffer more than evidence on whether

EPA erred, Petitioners must proffer evidence showing there is ''reliable data'' supporting the children's safety factor they urge. Without the latter, their objection is immaterial because the default position is retention of an additional 10X safety factor. Accordingly, EPA has evaluated Petitioners' proffers on its children's safety factor claims in terms of whether they are sufficient to provide the ''reliable data'' needed to justify the 1X safety factor that Petitioners propose.

For purposes of resolving whether the statute requires the retention of a children's safety factor, the critical issue is whether sufficient data exists to determine the effects on children's peripheral nervous systems from low doses of carbofuran. None of the evidence submitted affirmatively addresses this question. As discussed in more detail below, the only evidence proffered in support of this objection was: (1) A subset of the available carbofuran data from adult animals; and (2) data, primarily in adult animals, from other chemicals to demonstrate that generally, reliance on brain data will be protective of PNS effects, and therefore EPA can assume that the same will hold true for carbofuran. However, the Petitioners have failed to submit any data to demonstrate that the effects seen in adults will be predictive of the effects in juveniles. They have also submitted no evidence specific to carbofuran that demonstrates the effects of low doses on children's peripheral nervous systems. This is critical because the evidence they do proffer on other chemicals fails to establish that as a general matter, reliance on brain data will always be protective of the effects on the PNS. The majority of the evidence in other chemicals actually proves that reliance on brain data is frequently not protective of the effects on the PNS. And the remainder of the evidence on this point, taken in the light most favorable to the Petitioners, provides only equivocal support for Petitioners. Such evidence, by itself, is insufficient to relieve the uncertainty that remains with respect to carbofuran, based on the affirmative evidence in carbofuran-specific data, showing that reliance on brain data may not be protective. And such evidence, that entirely fail to address the points that the statute makes central to a determination of the appropriate children's safety factor, cannot justify a hearing.

When examined more closely, their overall evidentiary proffer is even less impressive. As discussed, much of the evidence was conducted in adult rats. Indeed the only evidence Petitioners submitted in support of this objection that was specific to carbofuran's effects on the PNS was data in adult rats. No evidence was submitted to demonstrate that adult data are generally predictive of responses in pups. Nor was any evidence submitted to support the assumption that pups will respond to low doses of carbofuran in the same way as adults. Thus their evidentiary proffer is effectively based on mere speculation that adult data will be predictive of pup responses, which cannot justify a hearing (40 CFR 178.32(b)(2)). As EPA previously explained in the proposed and final rules, responses in adult rats are not necessarily predictive of, or relevant to, responses in juveniles since the metabolic capacity of juveniles is less than that of adults (73 FR 44864, 74 FR 23046). As such, juvenile rats can be more sensitive to some toxic agents. Simply put, studies that only involve adult animals, therefore, do not provide information on effects on the young, which is the focus of the children's safety factor. No matter how much evidence Petitioners can amass showing that brain AChE is protective of RBC AChE in adult animals, that does not relieve the uncertainty concerning potential sensitivity of PNS tissues in juvenile animals, particularly when all of the existing carbofuran data shows that pups are more sensitive than adults to the effects of carbofuran, and that clinical signs consistent with toxicity to the PNS were seen in pups at very low doses of carbofuran. Accordingly, in the absence of carbofuran data in pup PNS tissues or a surrogate such as RBC data, the Petitioners' evidentiary proffer fails to establish a reasonable possibility that this issue could be resolved in their favor. A hearing is not appropriate in such cases (40 CFR 178.32(b)(2)).

The central tenet of this objection is that regulating based on the effects in the CNS will ensure that the PNS is protected. In this regard, Petitioners do cite to studies in juvenile animals, but all of them are conducted with chemicals other than carbofuran.[11] Moreover, the Petitioners' evidence fails to demonstrate that the PNS can never be more sensitive than the CNS, or even that the PNS is typically less sensitive than the CNS. Rather, the evidence shows only that the CNS (brain) is sometimes more sensitive, and sometimes less sensitive than the PNS, depending on the chemical involved. Because the data do not show a consistent pattern, it indicates only that the relative sensitivity between the central and peripheral nervous systems varies depending on the chemical involved, which cannot establish that exclusive reliance on brain data as a general proposition will always be protective of PNS effects in pups. Nor can it establish that reliance on the brain data will be protective of the PNS effects in the case of carbofuran.

When data are not available for a specific chemical, conclusions based on other chemicals can only be scientifically supported if it has been demonstrated that the conclusion is always true. If, ''in some cases,'' the conclusion is not true, then in the absence of data on the specific chemical, the conclusion cannot be made for that chemical, and uncertainty exists regarding the effects of the individual chemical. Since there are no data on the effects of carbofuran in PNS tissues or RBC data at low doses in pups, even assuming that they were able to prove that for the specific chemicals identified, the CNS is sometimes more sensitive than the PNS, significant uncertainty would remain regarding carbofuran's effects on the PNS. This is because the only evidence specific to the effects of carbofuran on the PNS at low dose levels that can be used as a comparison with the brain AChE levels is the adult RBC data.

This also affects the materiality of this objection. If the adult RBC AChE data are not considered, as Petitioners suggest, no carbofuran-specific data exists to demonstrate the level of AChE inhibition in the PNS of either adults or pups at the low dose levels relevant to risk assessment. Thus, even assuming Petitioners could successfully establish every point they raise in this regard, the fact still remains that a decision maker would have no data that provides any information relating to the potential effects of carbofuran on a child's PNS. Given that FFDCA section 408(b)(2)(C) compels the application of a 10X safety factor in the absence of information to account for the presumptive sensitivity of children, the lack of any data bearing on carbofuran's PNS effects would require the Agency to apply a 10X safety factor, rather than the 4X factor applied in the final rule.

A further flaw in the Petitioners' evidence is that it is internally inconsistent. Notwithstanding their allegations (discussed in subissue b below) that RBC data are inherently unreliable and should be discounted in favor of brain data, the carbofuran adult RBC data are one of the primary pieces of evidence proffered to support the claim that reliance on the carbofuran pup brain data will protect against all

[11] Most of the studies were conducted on OP chemicals, and expressly caution against extending the results to NMC chemicals such as carbofuran; a point also raised by Petitioners' own experts (Ex 4, 6).

potential PNS effects (Exhibit 4). As discussed in more detail below, the Report cites to the carbofuran data with adult rats to conclude that brain AChE inhibition correlated closely with RBC AChE inhibition. ''This was further substantiated by the study published by McDaniel *et al.* (Ref. 54), where they report that the 'lowest dose of carbofuran (0.10 mg/kg) significantly decreased brain ChE activity but not RBC ChE or motor activity' * * *'' (Id. at 4, 6). Yet having granted scientific validity to the adult RBC data, they must also concede the relevance of the EPA–ORD carbofuran pup RBC data, which clearly demonstrate that at every dose tested, RBC AChE, and therefore the PNS for which it is a surrogate, is more sensitive than the brain in juvenile rats exposed to carbofuran. They raise no challenge specific to the scientific validity of the EPA–ORD data, but rely only on their generic challenge that RBC data are inherently less reliable than brain data. No hearing is warranted based on such evidence. See 49 FR 6672 (February 22, 1984) (challenge to one of five related studies; in the absence of any additional data bearing on the clinical study, the objection constitutes nothing more than an allegation); 68 FR 46403 (August 5, 2003) (hearing denied because cited studies only contained equivocal statements supporting objector's position).

Accordingly, the sum of their evidence is no more than mere speculation that the effects of carbofuran exposure in the CNS will be protective of effects in the PNS. This falls far short of the ''reliable data'' on the safety of infants and children needed to justify the entire removal of the 10X children's safety factor and thus cannot justify a hearing (40 CFR 178.21(b)(2)). *See, e.g.,* 73 FR 42697 (July 23, 2008) (denying hearing where the only evidence submitted was NRDC's claim that if the DDVP two-generation rat reproduction study had been conducted pursuant to the 1998 guidelines it might have shown endocrine effects at lower doses than the doses at which DDVP's cholinesterase effects were seen on grounds that this was mere speculation); 57 FR 6667 (February 27, 1992) (hearing denied to an objector who challenged FDA's rejection of a study for only containing partial histopathological data on the grounds that ''[s]peculation regarding data that do not exist cannot serve as the basis for a hearing'').

A detailed examination of Petitioners' evidence follows below.

(a) Testimony intended to show that brain is the appropriate endpoint. Petitioners allege that the ''critical effect of concern due to carbofuran is nervous system AChE. Brain is a direct measure of such toxic effects, while RBC not linked to any biological function.'' On this basis, they conclude that brain represents the most appropriate endpoint for risk assessment.

Essentially this testimony fails to prove any dispute of material fact. EPA relied on the carbofuran pup brain AChE inhibition data to establish carbofuran's PoD. The Petitioners have not argued that PNS effects are irrelevant. Indeed, their submissions make clear that effects on the PNS are appropriate considerations in a risk assessment; the only point they dispute is whether brain or RBC data best account for those effects (Exhibits 4, 6).

Alternatively, if they intend to argue that RBC data entirely lacks any scientific validity, this is contradicted in several places by their other objections and their own submissions. As discussed above, the commenters rely on the adult carbofuran RBC data to support their claim that reliance on the pup brain data is adequately protective of PNS effects. Moreover, they explicitly acknowledge that reliance on RBC data is scientifically valid in the context of the human data (Obj at 13). Consequently, the submitted materials are insufficient to justify the factual determinations urged, and therefore fail to support a determination that an evidentiary hearing is warranted (40 CFR 178.32(b)(2)).

(b) Testimony purporting to show that reliance on brain data is sufficiently protective of the PNS. The Petitioners raise several arguments in this regard. First, they allege that, ''brain responds rapidly to carbofuran, which readily passes blood/brain barrier'' (Obj at 12–13). Petitioners' primary point, however, is that ''the extent of brain inhibition by carbofuran more accurately compares with the extent of PNS inhibition, and therefore brain data are adequately protective'' (Id.). In support of this claim, Petitioners cite to Exhibits 4 and 6, containing a mixture of ''expert testimony'' and published studies. None of the information contained in these exhibits is sufficient to establish a reasonable possibility that this issue could be resolved in their favor.

Petitioners' first claim simply reiterates points made in their comments on the proposed rule. As explained in the final rule, EPA agrees that the data show that the brain responds rapidly to carbofuran, and that it readily passes the blood/brain barrier. However, evidence regarding the speed with which the brain reacts proves nothing with regard to the relative sensitivity of PNS tissues (Ref. 85 at 46). Petitioners have presented nothing that challenges the substance of EPA's response. Consequently, these claims do not present a live controversy as to a material issue of disputed fact; both parties agree on the facts at issue, which is that the brain responds rapidly to carbofuran. Moreover, a simple repetition of comments made on the proposal without more is insufficient to warrant a hearing. *See, e.g.,* 73 FR at 42698–42699 (July 23, 2008) (denying several NRDC hearing requests because the objections were based on EPA's preliminary DDVP risk assessment, rather than the revised risk assessment published with the final order); 53 FR 53176 (December 30, 1988) (where FDA responds to a comment in final rule, repetition of comment in objections does not present a live controversy unless objector proffers some evidence calling FDA's conclusion into question); 62 FR 64102, 64105 (December 3, 1997) (objector claimed that addition of ethoxyquin invalidated studies; hearing denied because objector did ''not dispute FDA's explanation in the final rule as to why addition of ethoxyquin did not compromise the CIVO studies, and provided no information that would have altered the agency's conclusion on this issue'').

Petitioners' second point—that brain AChE inhibition correlates closely with PNS inhibition, and demonstrates that reliance on brain data will be protective of the PNS—is a disputed material issue of fact that could warrant a hearing, except that none of the evidence submitted in support of this point presents a reasonable possibility that the Petitioners could establish the points alleged. Consequently, they have failed to demonstrate that a hearing is warranted on this objection (40 CFR 178.32(b)(2)).

(c) Exhibit 4. This exhibit consists of a report by Kendall Wallace, PhD, entitled ''Expert Report: Carbofuran FQPA Safety Factor,'' along with published studies (Ref. 17, 51, 53, 54, 59, 61, 62, 72). The report argues that, ''it is my opinion that for carbofuran, the evidence indicates that inhibition of brain AChE is an appropriate surrogate for PNS AChE inhibition and that there is reasonable certainty that a PoD for carbofuran based on brain AChE inhibition is protective of any adverse CNS and PNS effects.'' The only carbofuran evidence directly cited in support of this allegation is data conducted on adult animals, using RBC AChE data, which they elsewhere try to discount. This assumes that adults and pups are similarly sensitive despite the carbofuran-specific evidence to the contrary. No evidence is discussed or

submitted to support this assumption. This therefore constitutes a mere allegation, which does not justify a hearing.

None of the published studies conducted with other chemicals cited in the Report provide more than equivocal support for the points above; in fact, in several instances, the study results support EPA rather than the Petitioners.[12] The studies contained in this exhibit fall into two general categories. The first group of studies consists of a subset of the chlorpyrifos literature—which is generally more relevant to the subissue discussed in the next objection, arguing that RBC data are not a good surrogate for the PNS—rather than demonstrating affirmatively that brain is a protective surrogate for the PNS. The second category of studies is one paper on physostigmine, a carbamate, that is discussed in the body of the report. All but one of these studies was conducted using adult rats.

Marable, *et al.* (Ref. 51) and Nostrandt *et al.* (Ref. 59) are two of the chlorpyrifos studies Petitioners submitted as part of the comments on the proposed rule, and they contain little evidence to demonstrate that brain data correlate well with the PNS, and thus are generally protective of the PNS. Marable *et al.* involved chronic exposures to adult dogs; in addition to the fact that adult animals were used, and therefore provide evidence of little relevance to the question at issue, there are significant differences between the results of chronic and acute exposures. As a result of the repeated exposures, blood, brain and peripheral tissues were at steady state, which cannot occur from an acute exposure, and therefore this study can provide no information on the effects from acute exposures. Nostrandt *et al.* actually reported that, following a single low dose of chlorpyrifos, brain inhibition was less (not greater) than the inhibition obtained in heart which is part of the PNS (although higher inhibition was not seen in the diaphragm or retina, other parts of the PNS). At higher doses, the inhibition in brain and peripheral tissues were more similar. Thus, this study contradicts the Petitioners' claim that brain data will be protective of all PNS effects. Petitioners offer no explanation of how the resubmission of these studies addressed EPA's conclusion in the final rule that the chlorpyrifos data failed to prove their claim.

Chen, *et al.* (Ref. 17), another study of chlorpyrifos, discussed whether plasma or RBC AChE should be used to establish a regulatory endpoint in humans and compared data from several animal studies, some of which were conducted with adults and some with pups. This is the only study in Exhibit 4 that contains data on pups. The results of one of the studies reported in Chen, *et al.* shows that at the lowest doses, inhibition was greater in the heart, which is part of the PNS, than in the brain (56% and 41% respectively); note that these are the data in adult rats reported in Nostrandt *et al.* (described above). Based on data from a developmental study of chlorpyrifos by Hoberman (Ref. 37), Chen *et al.* reported that the doses estimated to produce 50% inhibition in heart and brain actually show that in 5-day old pups (both males and females), the heart is 2–3 times more sensitive than brain. Thus, this study contradicts Petitioners' claim that brain data will be protective of PNS effects, since the PNS inhibition was greater than brain at the lowest doses in both adults and pups. And in fact, it supports EPA's concern that the absence of data at low doses is significant because the effects at low doses can differ significantly from those at higher doses. The data from Hoberman showed that at higher doses, ranging from 30–100 mg/kg, the levels of inhibition in the brain were higher than the levels in the PNS (Ref. 37 at 16)—the exact opposite of what occurred at the lowest doses.

The second group of studies consists of data on NMC chemicals. McDaniel *et al.* (Ref. 53) and Padilla *et al.* (Ref. 62) were cited in support of the claim that the difference in sensitivity between the brain and RBC is generally less for NMC chemicals. These studies were conducted with adult animals, and so do nothing to address the question before the Agency with respect to pups. These studies merely confirm the existing carbofuran data in adults, which shows that at the lowest dose tested, brain and RBC are essentially the same.

Somani *et al.* (Ref. 72) is a study on another NMC chemical, physostigmine, in adult animals, cited to support the claim that ''in adult rats, brain AChE is somewhat more sensitive than RBC or peripheral AChE to inhibition by acute doses of physostigmine.'' As an initial matter, it is unclear that this study provides more than equivocal support for their claim; the study authors claim only that the brain ''appears'' to have the lowest values. However, even conceding that this study shows that the CNS tissues in adult rats are more sensitive to the effects of physostigmine than the PNS tissues, the data in this study is of limited relevance to the issue at hand, which is the effects in juveniles. Thus it is ultimately insufficient to affirmatively support the Petitioners' claim.

In sum, based on the evidence contained in this exhibit, EPA concludes that there is not a reasonable probability that the proffered evidence would resolve the issue in Petitioners' favor, and that consequently no hearing is warranted on this basis. First, all but one of the studies discussed in this exhibit were conducted with adult animals, rather than pups. As such, they provide evidence of little relevance to the question of whether pups' PNS are more sensitive than the CNS. In the absence of carbofuran PNS data, or pup RBC data, much of this evidence is effectively mere speculation about whether adult data will be predictive of pup responses, which cannot justify a hearing (40 CFR 178.32(b)(1)).

(d) Exhibit 6. This exhibit consists of a report by Lucio Costa, PhD, entitled, ''Expert Report: Carbofuran's FQPA Safety Factor and Interspecies Uncertainty Factor,'' as well as published literature studies conducted with chlorpyrifos and disulfoton, both OP pesticides, and a single study with propoxur, an NMC pesticide (Refs. 71, 19, 20, 21, 61, 52, 41, 64, 16). According to Costa, these studies generally show that there was similar or greater AChE inhibition in brain than in the PNS tissues of heart, ileum, or the diaphragm, which Petitioners claim proves that reliance on carbofuran pup brain AChE inhibition data will necessarily be protective of all effects in the PNS (Exhibit 6 at 3). The exhibit also references a human incident study (Ref. 50) of carbamate poisoning in early childhood and in adults, claiming that, ''Lifshitz * * * showed that signs of adverse effects in the CNS, rather than PNS, prevailed in young children at the low dose levels covered by the paper.''

EPA concludes that there is not a reasonable probability that the evidence contained in this exhibit would resolve the issue in Petitioners' favor. The results of these studies fail to demonstrate the point for which Petitioners cite them—that brain AChE is always equally or more sensitive than PNS AChE, and therefore exclusive reliance on brain data can be assumed to be protective. Consequently, the fact that Petitioners can identify examples of other chemicals, whether OPs or NMCs, that sometimes affect the brain more severely than the PNS does not prove

[12] It is interesting to note that, in Exhibit 4, the expert actually faults EPA for comparing OP and NMC pesticides, saying ''Although OP pesticides inhibit AChE, they are completely different from carbofuran and other *N*-methylcarbamates * * *:'' (Exhibit 4 at 4). Yet the Exhibit includes papers on effects of chlorpyrifos, an OP, and these papers are not discussed in the text of the Exhibit.

that this will be the case with carbofuran. Furthermore, in several of the cited examples the Petitioners misinterpret the findings, which actually support EPA's position.

As explained in EPA's final rule, Petitioners are relying on only a subset of the chlorpyrifos data. The data, when examined in total, do not support a conclusion that brain data will always be protective of PNS effects (74 FR 23054–23055 (May 15, 2009)). But even relying solely on the studies Petitioners reference in this exhibit, it is clear that brain is not always inhibited to the same degree as peripheral tissues, nor is it always protective of peripheral tissues. The data in Padilla *et al.* (Ref. 61) are the only chlorpyrifos data that support a conclusion that reliance on the CNS data will be protective of the PNS. However, the Padilla study involved chronic dosing of rats via the feed, and as such, cholinesterase measurements reflected steady-state conditions. This study cannot provide information relevant to acute exposure. None of the other chlorpyrifos studies referenced in this exhibit support this conclusion. In Mattson *et al.* (Ref. 52), and Hunter *et al.* (Ref. 41), following a single dose to pregnant dams, heart and liver tissues were more inhibited than brain tissues. Similarly, in Richardson and Chambers (Ref. 64), where repeated doses were administered to pregnant dams, at both the low and high doses, the lung tissue was more inhibited than the brain tissue in the one-day old pups. In Carr *et al.* (Ref. 16), the results were more equivocal; in a repeated dosing study using pups of varying ages, whether brain or peripheral tissues were most inhibited depended on the age of the pups and the dose. Nevertheless, Carr (2001) showed that brain inhibition decreased as the age of the pups increased, even though inhibition in the heart tissues did not. In other words, the submitted material only supports a conclusion that brain is sometimes inhibited by chlorpyrifos to the same degree as the peripheral tissues, and in reality, the studies show that brain is often inhibited to a lesser extent than peripheral tissues. This cannot support a conclusion that reliance exclusively on brain data will necessarily be protective in the absence of some additional carbofuran-specific evidence.

The results are similar for the disulfoton studies. Schwab *et al.* (Ref. 71) shows that after both a single dose and repeated doses, the brain and peripheral tissues were equally inhibited. However, these results are contradicted by Costa *et al.* (Ref. 19) and Costa and Murphy (1983), where the results varied depending on the dosing and the brain area examined. In Costa and Murphy (Ref. 21), diaphragm tissues were more inhibited than brain tissues after a single dose of disulfoton, while after repeated doses, brain and diaphragm tissues were similarly inhibited. Thus, the relative sensitivity between CNS and PNS changes with repeated dosing, and these studies provide no information on RBC inhibition with which to compare the other tissues.

Finally, the Lifshitz study does not support the claim for which it was cited. The study presents no data on the dose levels associated with the poisoning incidents, and in fact concludes that there was ''insufficient information to compare the doses ingested by [adults and children].'' However, based on the symptomology reported (comas, stupor, and severe hypotoxicity) it is likely that the doses were high, not low, as the Report claims. Also, this study cannot be used to discount PNS effects in children; a large percentage of the children clearly showed PNS effects (myosis, diarrhea). In addition, because this was a retrospective study of patients admitted to a hospital intensive care unit, given the severity of some of the CNS symptoms, such as comas, it is not unlikely that even if the subjects also showed PNS symptoms, they were not reported. Finally, the study authors' conclusion was that in children, the ''clinical presentation [of carbamate poisoning] differs from adult poisoning manifestations'' (Ref. 50). Or in other words, that the effects in adults from exposure to carbamates such as carbofuran are not necessarily predictive of the effects in children. It is difficult to see how this study could be fairly argued to support Petitioners' allegations.

In conclusion, the totality of the evidence in Exhibits 4 and 6 fail to support Petitioners' contention. As shown in Table 1 below, the majority of the study results demonstrate that the PNS is frequently more sensitive than the CNS. The remainder, taken in the light most favorable to the Petitioners, provide merely equivocal support.

TABLE 1—SUMMARY OF PETITIONERS' STUDIES

	Study design	Relative inhibition	Is CNS protective of PNS?
Chlorpyrifos Studies			
Padilla *et al.* 2005	Single dose, adults	RBC > brain ≈ diaphragm	Yes (same sensitivity).
Mattsson *et al.* 2000	Single dose, pregnant dams	RBC > heart > brain	No.
Hunter *et al.* 1999	Single dose, pregnant dams	Liver > brain Blood not measured.	No.
Richardson and Chambers 2003	Repeated doses to pregnant dams, measured pups at 1 day old (not direct dose).	Low dose, lung > serum ≈ brain > heart. High dose, lung > brain ≈ heart > serum. Note, serum has only ≈ 50% AChE, not true measure of AChE.	No.
Carr *et al.* 2001	Repeated doses to pups	PND6: brain ≈ diaphragm > heart ≈ lung > skeletal muscle ≈ serum. PND10: heart ≈ hindbrain ≈ diaphragm ≈ lung > skeletal muscle > forebrain ≈ serum. PND16: heart ≈ lung > brain. PND20: heart > lung > brain. PND25: brain > PNS. Brain inhibition decreased with age, heart did not.	Not always, depending on age, dose, and brain region.

TABLE 1—SUMMARY OF PETITIONERS' STUDIES—Continued

	Study design	Relative inhibition	Is CNS protective of PNS?
Nostrandt *et al.* 1997 (also cited in Chen *et al.* 1999).	Acute dose, adults	RBC > heart > brain > diaphragm	No.
Hoberman 1998 as cited in Chen *et al.* 1999.	Repeated doses to pregnant dams, measured in pups at 5 days old (not direct dose).	RBC > heart > brain	No.
Disulfoton Studies			
Schwab *et al.* 1981	Single dose	heart ≈ ileum ≈ brain	Yes, similar sensitivity.
	Repeated doses	brain ≈ ileum > heart No blood measured	
Costa *et al.* 1981	Single dose	Brain > ileum	Not always, depends on dosing paradigm and brain region.
	Repeated doses	Forebrain > ileum > hindbrain	
		Brain ≈ ileum	Not consistent within same study.
	Repeated doses	No blood measured.	
Costa and Murphy 1983	Single dose	Diaphragm > brain	Not always, depends on dosing paradigm.
	Repeated doses	Brain ≈ diaphragm ≈ plasma. Note, plasma has only ≈ 50% AChE, not true measure of AChE.	

Accordingly, Petitioners' proffer is facially insufficient because there is no reasonable possibility that it can establish a necessary element of Petitioners' objection—that there are ''reliable data'' that show it would be safe for infants and children to remove entirely the 10X children's safety factor.

iii. *Denial of objection.* The objections do not address the fundamental issue that EPA is required by the statute to resolve: Are there 'reliable' data to support reduction or removal of the statutory 10X for protection of infants and children? The statute compels that EPA may only revise the 10X default safety factor if, ''on the basis of reliable data'' EPA can conclude that the alternative safety factor will be ''safe'' (21 U.S.C. 346a(b)(2)(C)). The statute also requires EPA to account for the ''completeness of the toxicity data'' in making this determination (Id). In this case, the Agency concluded that there are sufficient data to reduce the 10X safety factor but there is insufficient information to justify removing the factor entirely.

Similar to other AChE inhibiting pesticides, carbofuran can affect both the central and peripheral nervous system. Because the relative sensitivity of the central and peripheral nervous system varies among pesticides and the children's safety factor should account for the most sensitive toxicity endpoint, the Agency considers the availability of data in both the central and peripheral nervous systems important in its safety factor evaluation.

As shown in Figure 1, above, there are several datasets that evaluate the effects of carbofuran on the central nervous system (*e.g.,* brain AChE inhibition) in juvenile rats. There are no AChE data from peripheral tissues. Lack of peripheral AChE data is typical of NMCs due to the rapid reactivation of AChE. As a matter of science policy, the Agency typically uses AChE data from blood, particularly RBCs, as a surrogate measure for the peripheral nervous system (Refs. 76, 87). In the case of carbofuran, RBC AChE data from two separate studies submitted by FMC are considered unreliable and unusable in human health risk assessment (Ref. 83). Data from EPA's ORD includes high quality RBC AChE data, but only high doses were used in the ORD studies. Data at the low end of the dose response curve are not available for assessing the effects in juvenile rats, which are the doses relevant for human health risk assessment. Thus, because reliable data are available to assess affects on the CNS and some surrogate data are available to assess the PNS, the Agency believes that the children's safety factor can be reduced. However, this factor cannot be completely removed since the available carbofuran data show that RBC AChE inhibition in pups is more sensitive than brain AChE inhibition.

Given that (1) data from other AChE inhibiting pesticides show that direct measures of peripheral nervous system (*e.g.,* lung, heart, and liver AChE) can be more sensitive than brain AChE inhibition; (2) a surrogate measure of the peripheral nervous system (RBC AChE) is more sensitive in juvenile rats to carbofuran; and (3) clinical signs consistent with toxicity to the peripheral nervous system were seen at very low doses, the Agency can not be confident that assessing risk using brain AChE inhibition is protective of potential effects in the peripheral nervous system for infants and children. For example, in the first FMC-sponsored comparative ChE studies (Ref. 4) every pup at the 0.3 mg/kg dose group exhibited tremors. The range-finding portion of the second FMC-sponsored comparative ChE study (Ref. 1) resulted in tremors in rats exposed to 0.3 mg/kg carbofuran (2/5 males and 2/5 females) within 15 minutes post-dosing.

Additional evidence for sensitivity of the PNS comes from carbofuran data in pregnant rats that showed clinical signs that may be indicative of peripheral toxicity. The California Department of Pesticide Regulation (CDPR) has calculated a BMD_{10} and $BMDL_{10}$ of 0.04 and 0.03 mg/kg/day, respectively, for mouth smacking and chewing in pregnant rats exposed to carbofuran. These signs are early indicators of toxicity from some cholinesterase inhibitors (Ref. 56). This is notable for two reasons. First, cholinergic toxicity (*e.g.,* tremors, miosis, salivation) may be observed following inhibition of blood, but not brain, cholinesterase. This was the case with fenamiphos (an OP pesticide), even up to maximally tolerated doses (Ref. 53). Second, the $BMDL_{10}$ from the mouth smacking and chewing in pregnant rats is similar to that being used by EPA for brain AChE in juveniles. The similarity of the CDPR BMD in adults and EPA's BMD in juveniles is striking because all of the available data show that pups are more sensitive than adults to carbofuran toxicity. This therefore suggests that behavioral effects and/or clinical signs may be occurring in juvenile animals at lower doses, but which cannot be detected, in part due to the challenges

with assessing clinical signs in juvenile rats. As noted by the SAP, this ''limitation reflects the limited range of toxic signs detectable in very young pups (p. 54).'' This provides further support that the lack of pup data at lower doses is significant, because the Agency cannot fully evaluate the behavioral effects on juvenile animals.

Further support for the Agency's concern comes from other clinical reports of the effects of carbamate poisoning in children. For example, Lifshitz reported that all children presented with CNS symptoms (coma, stupor), but CNS symptoms were observed in only 54% and 23% of children as reported by Zweiner and Ginsburg (1988) and El-Naggar *et al.* 2009 (Refs. 91, 26). Peripheral muscarinic symptoms were the most commonly reported (73% and 100%) signs of toxicity in these latter two reports. These markedly different findings emphasize that conclusions cannot be unequivocally drawn from only one study.

In addition, Petitioners' own data show that effects can differ significantly between high and low doses. In Chen, for example, the data from Hoberman showed that at the lowest doses the levels of inhibition were higher in the PNS than in the brain, but at higher doses, the levels were higher in the brain.

Thus, for a number of reasons, the Agency has concerns that children's PNS may be more sensitive to the effects of carbofuran than the CNS. This concern is the basis for retention of a portion of the children's safety factor.

The carbofuran RBC data in adult animals does not resolve this question. There can be substantial differences in response between pups and adults, and, as noted, the data show clearly that pups are more sensitive to the effects of carbofuran. It is not unusual for juvenile rats, or indeed, for infants or young children, to be more sensitive to chemical exposures as metabolic detoxification processes in the young are still developing. Because pups are more sensitive than adult rats, data from pups provide the most relevant information for evaluating risk to infants and young children and are thus used to derive the PoD. In addition, typically (and this is the case for carbofuran) young children (ages 0–5) tend to be the most exposed age groups because they tend to eat larger amounts of food per their body weight than do teenagers or adults.

b. Objection/hearing request subissue: Reliance on RBC AChE inhibition data as a surrogate for PNS effects. This objection also challenges EPA's decision to retain some portion of the presumptive 10X children's safety factor, rather than remove it entirely. As explained above, EPA retained a portion of the presumptive 10X children's safety factor because of the absence of sufficient data on PNS effects in juveniles and the uncertainty created by the limited data relevant to the PNS that showed greater sensitivity in juveniles. In the previous subissue, Petitioners argued that in fact there is no uncertainty created by the lack of low dose RBC data and the finding of sensitivity in the RBC AChE data because brain AChE data is protective of PNS effects. In this subissue, Petitioners attempt to buttress their first argument by claiming that RBC AChE data are not an ''appropriate surrogate'' for PNS effects, and should not have formed the basis for retention of any portion of the children's safety factor.

Petitioners do not argue that RBC data are entirely irrelevant, but rather that brain data are ''preferred.'' They raise several points in support of this contention; first, that ''RBC AChE inhibition data are only preferred for risk assessment purposes in two circumstances: (1) Where the PoD is set using data from human studies where only RBC data are available or (2) where data from the relevant target tissues are unavailable.'' They allege that, despite the absence of carbofuran data in the PNS tissues, brain is preferred in this case because the brain is ''target tissue'' from the nervous system, and because brain data are a ''better predictor'' of PNS effects than RBC. As further evidentiary support, they cite to evidence from OP studies that RBC AChE can ''in some cases'' be inhibited to a greater degree than either PNS or brain AChE, and therefore reliance on RBC AChE data can overstate potential PNS effects. They also argue that RBC AChE is more variable and less reliably measured at low response levels, such as 10% AChE inhibition. The evidence in Exhibits 4 and 6 is also proffered in support of this objection.

i. Background. EPA's well-established policy when evaluating cholinesterase-inhibiting compounds is to rely on data in the target tissue where it is available (Ref. 76). As noted in the preceding section, measures of AChE inhibition in the PNS are rarely collected for NMC pesticides. And in fact, there are no carbofuran data measuring effects in PNS tissues. But in the absence of target tissue data, as a matter of science policy, EPA typically uses RBC AChE inhibition data as an indicator of possible effects on AChE in the PNS for number of reasons. (Ref. 76 at 32). Although RBC AChE inhibition is not adverse in itself, it is a surrogate for inhibition in peripheral tissues. As such, RBC AChE inhibition provides an indirect indication of adverse effects on the nervous system (Id.).

Petitioners raised many of the same issues raised in the objections in their comments on the proposed rule. For example, they argued that, ''as a matter of science policy, brain AChE inhibition is the preferred endpoint over RBC AChE inhibition.'' They also argued that no physiological function has been demonstrated for RBC, and RBC AChE inhibition is not itself an adverse effect.

In the final rule, EPA responded to each of their comments, but concluded that no information had been submitted to justify altering the Agency's general policy that reliance on RBC is appropriate as a surrogate for PNS effects in the absence of direct measurements in PNS tissues.

ii. Denial of hearing request. This subissue does not raise a dispute of material fact. There is no dispute regarding many of the facts raised in this objection: When data in the target tissue are available, it is preferred over a surrogate. RBC AChE can be more variable and less reliably measured at low response levels than brain AChE. RBC AChE inhibition can, in some cases, be more extensive than PNS AChE inhibition. Equally, there is no dispute that no physiological function has been demonstrated for RBC, and RBC AChE inhibition is not itself an adverse effect. All of these points are explicitly recognized in EPA's Cholinesterase policy and in the tolerance revocation rulemaking record, and relate purely to the ease or wisdom of relying on these measures rather than others, as opposed to the scientific invalidity of such data. The only point on which there is a dispute is, given that there is no data in the target tissues of the PNS, which data—brain or RBC—is ''preferred.'' The Petitioners expressly acknowledge this to be the issue: ''There are other surrogate measures of PNS AChE that could have been selected by OPP, such as brain AChE'' (Exhibit 4 at 5). This is clearly a question of scientific policy, since both EPA and the Petitioners agree on the scientific validity and relevance of RBC AChE inhibition data. As they expressly acknowledged in their comments, the choice of which surrogate to use is a matter of ''science policy'' (Ref. 18). Indeed, Petitioners explicitly concede the propriety of relying on RBC data ''where data from the relevant target tissues are unavailable, or when relying on human data, where RBC AChE inhibition data are the only data available (Obj at 13). Hearings are not

appropriate for debating questions of policy (40 CFR 178.32(b)(1)).

Nor does the proffered evidence present any other issue that would warrant a hearing. The evidence submitted in Exhibits 4 and 6 on this point only relates to the question of whether brain data can sometimes correspond more closely with PNS effects than RBC AChE data, rather than the question of whether the RBC data are scientifically invalid. Or in other words, the submitted materials relate only to the point that reliance on RBC data is unnecessarily conservative, because sometimes it overestimates the potential PNS effects, rather than to the factual question of whether RBC data bears no relation whatsoever to PNS effects. Unless Petitioners can show that RBC AChE is not related to CNS effects generally or specifically for carbofuran, or that brain AChE is protective of CNS effects generally or specifically for carbofuran, then the mere fact that RBC AChE may be a conservative, or even very conservative, indicator of PNS effects is simply immaterial to the question of whether there are ''reliable data'' to justify removing the presumptive 10X children's safety factor in the absence of sufficient RBC AChE data. As shown in the discussion of subissue 1, the Petitioners' evidence does not demonstrate that reliance on juvenile brain data as a surrogate for effects in the juvenile PNS will guarantee that the levels chosen on that basis will be predictive of all PNS effects from carbofuran, because the PNS effects occur only at the same or higher doses than those that produce effects on the brain AChE—*i.e.,* that the brain data ''bound'' all potential PNS effects. Nor, as discussed below, does any of Petitioners' evidence support a conclusion that RBC AChE is unrelated to PNS effects.

Indeed, much of the evidence in the Exhibit 4 and 6 Reports is ultimately an irrelevance, and thus fails to present a material factual dispute. Instead of focusing the stated objection—RBC AChE is inappropriate marker for CNS effects—the Reports attempt to link EPA's children's safety factor decision to findings concerning chlorpyrifos (Exhibit 4 at 4). In fact, a fair portion of the Report in Exhibit 6 is dedicated to a rebuttal of EPA's conclusion that the majority of the more recent and more relevant chlorpyrifos evidence did not support Petitioners' contention. EPA, however, has been clear throughout the rulemaking that the basis for retention of a children's safety factor has been the absence of carbofuran data to determine the levels of exposure that will be protective of children's PNS, in the context of a statutory provision that expressly requires EPA to account for missing data. EPA's point in discussing the chlorpyrifos data—which Petitioners initially raised as relevant—was simply that it showed that because peripheral tissues can be more sensitive than central nervous system tissues, the absence of data addressing carbofuran's effects on the PNS is highly relevant. Whatever the chlorpyrifos data show cannot resolve the extent of carbofuran's risks. As the Petitioners' experts themselves point out, ''Even conceding that [EPA's conclusion in the final rule that peripheral tissues are often shown to be more sensitive than brain tissue following exposure to chlorpyrifos] may be true, it is still unclear how this would be relevant to carbofuran * * *'' (Exhibit 6 at 3). Accordingly, this evidentiary submission fails to demonstrate that a dispute exists on a question of material fact.

Finally, their submission provides an inadequate basis on which to grant a hearing; because evidence is not proffered on critical points, the objection ultimately rests on allegation, speculation, and general denials (40 CFR 178.32(b)(2)). As discussed in preceding section, the majority of the evidence comes from adult data, which are of limited relevance. Further, and more significantly, the evidence fails to demonstrate that brain data always—or even more frequently than not—correlates more closely with PNS effects than RBC AChE data. Instead, the proffered evidence only demonstrates that whether brain or RBC data correlate better with actual PNS effects can vary depending on the chemical. This, therefore, cannot resolve the question as to whether, in the case of carbofuran, brain AChE data will necessarily correspond more closely with the PNS. Finally, as also discussed in the preceding section, Petitioners' argument is internally inconsistent, because they rely on carbofuran adult RBC AChE data to support their argument that exclusive reliance on the brain data will be protective of potential PNS effects in pups. No hearing is appropriate where the proffered evidence fails to prove the points for which it is offered, or offers merely equivocal support (See, 73 FR 42705 (July 23, 2008) (hearing denied because published articles focus on an issue not applicable to the facts of the case at hand); 68 FR 46405–46406 (August 5, 2003) (a hearing was denied because the cited studies only contained equivocal statements)).

A detailed examination of Petitioners' evidence follows below:

(a) Exhibit 4. As discussed in the previous objection, this exhibit consists of a report, along with published studies. The Report criticizes EPA for assuming that RBC AChE inhibition provides ''a stronger and more quantitative concordance with the sensitivity of AChE of the PNS to inhibition by carbofuran,'' on the ground that EPA failed to cite to evidence to support this inference (Exhibit 4 at 5). In the absence of such evidence, the report concludes that, ''one cannot discount the plausibility that brain AChE may be a more quantitative and representative surrogate measure of PNS sensitivity'' (Id). To support this allegation, the report argues that the cited NMC data show that the difference in sensitivity between brain and RBC shown with NMC chemicals is less than the differences seen with OP chemicals, citing studies by Padilla *et al.* (Ref. 62) and McDaniel *et al.* (Ref. 54). In this regard, the Report actually misquotes McDaniel *et al.* The Report claims that the paper concluded that there was a stronger correlation between brain AChE inhibition and motor activity. The study actually concluded that there was little difference between brain AChE inhibition and RBC AChE inhibitions (''higher correlation for brain and motor activity compared to RBC were not significantly different.'') (Ref. 54). In any event, the Report's equivocal conclusion that ''one cannot discount the plausibility'' that brain AChE might be the most representative measure of PNS effect is, on its face, insufficient grounds to overcome the statutory presumption for retention of the additional 10X children's safety factor in the face of the evidence of children's additional sensitivity to carbofuran, and the lack of carbofuran data in PNS tissues or in a surrogate for such tissues, RBC AChE.

Chen *et al.* (Ref. 17), which was discussed at length in the earlier objection, evaluated whether plasma or RBC AChE should be used to establish a regulatory endpoint; it did not evaluate whether brain AChE would be an appropriate surrogate for PNS effects. It is true that the authors conclude that ''[i]nhibition of RBC AChE activity is consistently exhibited at lower dosages of chlorpyrifos than those required to result in clinical symptoms of OP toxicity, or alterations in cognitive functional responses.'' However, since the study authors ultimately concluded that, ''inhibition of RBC AChE activity is an appropriate surrogate for measurement of chlorpyrifos exposure and provides a conservative endpoint for establishing appropriate margins of

safety for both adults and infants,'' it is difficult to see how this could be argued to provide unequivocal support for Petitioners' objections.

Exhibit 6. This exhibit consists of a report by Lucio Costa, PhD, entitled, ''Expert Report: Carbofuran's FQPA Safety Factor and Interspecies Uncertainty Factor,'' as well as published literature studies. The report discussed the results of several published studies that they claim demonstrate that ''where available, brain AChE inhibition data provide a superior surrogate'' to RBC data because ''in some cases RBC AChE may overestimate PNS AChE inhibition, while in other cases * * * RBC AChE inhibition may underestimate actual AChE inhibition in the PNS.'' In support of this allegation, the report references data from several studies conducted with chlorpyrifos and disulfoton, both OP pesticides, and a single study with propoxur, an NMC pesticide (Refs. 16, 19, 20, 21, 41, 52, 61, 64, and 71). According to the Report, these studies generally show that there was similar or greater AChE inhibition in brain than in the PNS tissues of heart, ileum, or the diaphragm, which Petitioners claim proves that reliance on carbofuran pup brain AChE inhibition data is more predictive of all effects in the PNS. The exhibit also references a human incident study (Ref. 50) of carbamate poisoning in early childhood and in adults, claiming that, ''Lifshitz * * * showed that signs of adverse effects in the CNS, rather than PNS, prevailed in young children at the low dose levels covered by the paper.''

In its denial of the hearing request on the previous issue, EPA examined the results of the studies in this exhibit at length, and demonstrated that the results of the studies failed to support a conclusion that brain data correlate more closely to PNS effects than RBC data. Indeed, in most of these studies, brain AChE inhibition poorly reflected the AChE inhibition in PNS tissues. For example, the Carr *et al.* study results, reproduced in Table 1 of Exhibit 6, showed that for PND 10, 16, and 20 rat pups, the heart tissue had the greatest levels of inhibition, and that PND 16 and 20 rat pups had greater levels of inhibition in lung tissue than in the brain (Ref. 16 at 3). Further, since the study was conducted with serum, which contains no RBC, it is unclear how this study could prove that brain data are a better indicator of PNS effects than RBC data.

The remainder of the report consists of criticisms of EPA's conclusions, and contentions that EPA was inconsistent, without citation to biological evidence to support these claims. For example, the Report addresses EPA's rejection of the Bretaud study in goldfish on the grounds that the ''distribution of carbofuran across fish and mammalian tissues may be quite different,'' by criticizing EPA for failing to provide ''evidence or a citation to support this point'' (Exhibit 6 at 1). But they cite to nothing demonstrating the similarity of fish and mammalian tissues or otherwise supporting their proposed extrapolation across taxa; at this stage of the administrative process the obligation is on the Petitioners to come forward with evidence to call EPA's conclusions into question. *See,* 73 FR 42683, 42706, July 23, 2008 (''NRDC does no more than state 'we are aware of no statistical test' which would support EPA's use of the Gledhill data. As EPA's regulations make clear, a mere 'denial' of an EPA position is not enough to satisfy the standard for granting a hearing.''); 53 FR 53176, 53199, December 10, 1982 (''Rather than presenting evidence, [the objector] asserts that FDA did not adequately justify its conclusions. Such an assertion will not justify a hearing.''). The report also attempts to dismiss EPA's conclusions by complaining that EPA's assessment fails to include ''any analysis of the relationship between RBC AChE and PNS AChE.'' This also, cannot justify a hearing. As has been previously noted, FMC, who bears the statutory burden for producing such data, has failed to provide data in the PNS that would allow EPA to make the suggested comparison (*See,* 73 FR 42683, 42699, July 23, 2008 (hearing denied where NRDC made no evidentiary proffer supporting its claim that each of the factors cited in EPA's risk assessment ''poses a serious risk of understating the risks''); 70 FR 21619, April 27, 2005 (objector questioned exposure assessment and studies relied on for assessment; hearing denied because no information presented); 72 FR 39557, 39560, July 19, 2007 (''Although Public Citizen alleged that the studies that FDA evaluated do not support the safety of x-rays of 10 MeV or lower used for inspection of cargo containers that may contain food, Public Citizen did not present any evidence that would have led to a different conclusion concerning the safety of the subject additive.'').

iii. Denial of Objection. EPA's well-established policy when evaluating blood cholinesterase inhibition is to use RBC AChE data as an indicator of possible effects on AChE in the PNS; EPA adopted this policy for a number of reasons (Ref. 76 at 32). EPA's reasoning here is straightforward. As a biomarker of exposure, blood AChE inhibition can be correlated with the extent of exposure. There is often a direct relationship between a greater magnitude of exposure and an increase in incidence and severity of clinical signs and symptoms as well as blood AChE inhibition. In other words, the greater the exposure, the greater the amount of AChE inhibition that will be present in the blood and the greater the potential for an adverse effect to occur. RBC measures of AChE inhibition also provide: (1) Pharmacokinetic evidence of absorption of the pesticide and/or its active metabolite(s) into the bloodstream and systemic circulation; and (2) pharmacodynamic evidence of binding to AChE, the neural form of the target enzyme. Because the interaction with AChE is widely accepted as a key event of the mechanism of toxicity for anticholinesterase pesticides, inhibition of this AChE in the blood creates the presumption that a chemical also is causing inhibition of neural AChE. Chemicals are absorbed into the blood and transported to the PNS. Pharmacokinetically, the blood compartment and the PNS are ''outside of'' the central nervous system, *i.e.,* separated from the CNS by the blood-brain barrier. Thus, RBC measures of AChE activity are viewed as a better surrogate for the effects on AChE in the peripheral nervous system than are enzyme changes in the CNS. Because data on AChE inhibition in the PNS have rarely been gathered in animals, blood AChE inhibition measures are generally the only information available to assess the potential of chemicals to inhibit AChE in the peripheral nervous system.

Finally, based on the record, FMC seemingly intended in the past for RBC AChE to be used as a surrogate for peripheral AChE inhibition. In 2005, FMC submitted a time course study with plasma and RBC AChE inhibition following acute exposure to carbofuran in adult rats. The title of this study is ''The toxicokinetics of peripheral cholinesterase inhibition from orally administered carbofuran in adult male and female CD rats (Ref. 5).'' Although this study is entitled ''peripheral cholinesterase inhibition,'' there are no actual measures of peripheral toxicity (*e.g.,* liver, lung, heart). Instead, RBC and plasma ChEs are the only measures included. That report states that ''carbofuran reversibly inhibits cholinesterase activity by binding to acetycholinesterase in red blood cells * * * Carbamylation of cholinesterase after the association of carbofuran leads

to an accumulation of acetylcholine and inhibition of nerve function at the neuronal and neuromuscular synapse.'' Based on this statement, FMC assumed at the time of conducting and submitting this study that measures of RBC AChE were relevant for predicting neurotoxicity and for use in risk assessment. For all of these reasons, the Petitioners' objection is denied.

c. *Objection/hearing request subissue: ''Lip-smacking'' as CNS effect.* Petitioners object that EPA's evidence of ''lip smacking'' in a carbofuran adult developmental rat study does not support concern for potential PNS effects because lip smacking is more properly correlated to CNS, rather than PNS inhibition. In support, the Petitioners proffer testimony that relies on four published studies, none of which was conducted with carbofuran. The papers describe pharmacological and physiological analyses of the bases of ''purposeless chewing movements'', ''chewing jaw movements'', ''chewing motions and tongue protrusions'', and ''tongue protrusion and gaping'' seen in rats dosed with either cholinergic or dopaminergic drugs.

i. Background. In the proposed rule, in addition to the data in pups showing frank PNS effects (tremors), EPA discussed the results of another carbofuran study that appeared to be a possible consequence of PNS inhibition, to provide further explanation of the basis for EPA's concern that carbofuran could cause adverse PNS effects. The proposed rule stated that ''[t]here is indication in a toxicity study where pregnant rats were exposed to carbofuran that effects on the PNS are of concern; specifically, chewing motions or mouth smacking was observed in a clear dose-response pattern immediately following dosing each day'' (73 FR 44873, July 31, 2008). EPA explained that the California Department of Pesticide Regulation calculated a BMD_{05} and $BMDL_{05}$ of 0.02 and 0.01 mg/kg/day, and established the acute PoD based on this study. The Agency also explained that ''[t]hese BMD estimates are notable as they are close to the values EPA has calculated for brain AChE inhibition and being used as the PoD for extrapolating risk to children'' (73 FR 44873, July 31, 2008). The similarities of the BMDs in adult and juvenile rats suggests that toxicity may be occurring in juvenile animals which cannot be detected due to the challenges with assessing clinical signs in juvenile rats.

The Petitioners did not raise the allegation contained in their objections as part of the Petitioners' comments. The context in which ''lip smacking'' was addressed was a sentence that states, ''One issue raised at the FIFRA SAP meeting was whether 'lip smacking' observed in the adult females in the developmental toxicity study were the result of PNS or CNS AChE inhibition'' (Ref. 18 at 82). In a footnote to this allegation, the Petitioners stated ''Moreover, it is impossible to tell from the study data whether this ''lip smacking'' was a PNS or a CNS effect.'' (Ref. 18 at 82). The Petitioners' comments focused instead on the contention that the study was irrelevant because the dose levels in the study were higher than the dose levels at which EPA was regulating for AChE inhibition (Ref. 18 at 82).

EPA did not respond to the Petitioners' description of the discussion at the SAP, since it correctly characterized the discussion. However EPA responded fully to the Petitioners' comment regarding the dose levels in the final rule and response to comments.

ii. Denial of hearing request. There can be no legitimate argument that this comment raised the issue in sufficient detail to allow Petitioners to object that ''lip smacking'' is more properly correlated with CNS inhibition, and to supplement the objection with the published literature studies they cite here. *See, e.g., Forest Guardians v. US Forest Service,* 495 F.3d 1162, 1170–1172 (10th Cir. 2007) (Claim held waived where comments ''failed to present its claims in sufficient detail to allow the agency to rectify the alleged violation''); *National Association of Manufacturers v. US DOI,* 134 F.3d 1095, 1111 (DC Cir. 1998) (''We decline to find that scattered references to the services concept in a voluminous record addressing myriad complex technical and policy matters suffices to provide an agency like DOI with a 'fair opportunity' to pass on the issue.'') For the reasons discussed in Unit VI.C, EPA considers the objection and evidence untimely, and therefore waived. As such, this objection does not warrant a hearing.

But in any event, this issue is not material. EPA's decision to retain a 4X children's safety factor did not rest exclusively, or even significantly—on the effects observed in this developmental study. Rather, EPA retained the children's safety factor based on the lack of data in the PNS and/or a surrogate at the low end of the response curve, and the fact that the available pup RBC data at higher doses affirmatively indicate that the PNS appears to be significantly more sensitive than the CNS (73 FR 44871–44872; 74 FR 23073–23075). Indeed, it is clear from both the proposed and final rules that the results of this study merely supplemented the Agency's bases for concern (73 FR 44871–44872; 74 FR 23073–23075). The Petitioners' complaint that the effects occurred at dose levels three times higher than PoD and therefore do not quantitatively support the 4X children's safety factor is equally immaterial. The record is clear that EPA relied on comparisons between the BMD_{50} estimated for pup brain and RBC AChE inhibition to derive the 4X (73 FR 44871–44872; 74 FR 23073–23075). A hearing can only be based on a genuine issue of disputed fact. Where a party's factual allegations are contradicted by the record, there is no genuine dispute (40 CFR 178.32(b)(1)) (*See,* 73 FR 42683, 42701 July 23, 2008; 57 FR 6667, 6672, February 27, 1992) (''A hearing must be based on reliable evidence, not on mere allegations or on information that is inaccurate and contradicted by the record.'').

iii. Denial of objection. The carbofuran developmental study does not definitively resolve whether the effects described were the product of PNS or CNS AChE inhibition; because only RBC AChE inhibition data were collected it is not possible to determine the degree of CNS inhibition. However, as the Petitioners acknowledge, chewing or oral fasciculations, which are the movements EPA described at the SAP meeting and in the proposed and final rules, have often been reported as an early sign of toxicity produced by carbamates and OPs in rats (Exhibit 5 at 2). Petitioners also acknowledge that ''oral fasciculations'' are indeed a peripheral neuromotor response (Id.) (''some of the toxicity is peripherally mediated or an effect on the PNS (for example, muscle fasiculations and tremors are due to inhibition of AChE at the motor endplate of the muscle)''). Nevertheless, Petitioners attempt to confuse the issue by providing several different descriptions of oral movements, from lip-smacking to mouth smacking to mouth movements to chewing movements, and claiming that it is clear that these are all CNS effects. As an initial matter, it is unclear whether all of the study authors in Petitioners' cited literature are referring to the same phenomenon. It is therefore unclear whether the oral movements from the carbofuran developmental study (which EPA described as ''lip-smacking'' and ''fasiculations'') are the same responses described as ''tongue protrusion,'' ''gaping,'' ''yawning,'' and ''chewing movements'' in the pharmacology papers Petitioners reference. It is not unlikely that all of

the different papers refer to somewhat different actions; Rupniak *et al.* (Ref. 68) were able to produce ''chewing jaw movements'' by chronic treatment with haloperidol, a dopaminergic receptor antagonist, which suggests that the movements studied in that paper are not purely cholinergic. The fact that anticholinergics could block the haloperidol-induced dopaminergic movements shows that this is not a straightforward physiological response dealing only with the cholinergic system. For the same reason, this calls into question the contention that the effects are exclusively CNS-related.

Similarly, the claim that the ''the masticatory response'' is clearly a CNS effect is equally misleading and inaccurate. The report in Exhbit 5 claims that ''[t]he masticatory response is considered a preliminary index of convulsive activity and convulsions have been demonstrated to be caused by changes in brain chemistry.'' None of the papers the Petitioners cited describe this ''masticatory response'' in that way. Instead, those papers all state that this response is seen at relatively low doses of these anticholinesterases. By way of contrast, convulsions are seen at high doses. The Exhibit also implies that the ''masticatory'' response and convulsions are a continuum of the same phenomemon; however EPA is aware of no scientific support for this claim, and Petitioners have provided none.

Petitioners' objection on this issue is therefore denied.

The Exhibit also implies that the ''masticatory'' response and convulsions are a continuum of the same phenomemon; however EPA is aware of no scientific support for this claim, and Petitioners have provided none.

d. *Objection/hearing request subissue: EPA's analysis does not rely on Good Laboratory Practice (GLP)-compliant studies.* Petitioners object that EPA's reliance on the ORD data is problematic because the data were not conducted in accordance with EPA's GLP regulations at 40 CFR part 160.

i. Background. The only data available on the effects of carbofuran on the pup PNS are RBC AChE inhibition data from two studies conducted by EPA–ORD. These data unequivocally show that pup RBC AChE is more sensitive than pup brain AChE. EPA also used these data in its calculations supporting the 4X children's safety factor. In their comments on the proposed rule, Petitioners alleged that, ''the Moser study may not meet minimum criteria for scientific acceptability.'' They based this on a claim that critical data were unavailable for this study, including: A complete protocol, analysis of dosing solutions, clinical observations, standardization of brain and RBC AChE results in terms of amount per unit of protein, and quality assurance records of inspections for the carbofuran portion of the study. However, no more specific explanation was provided as how this purportedly missing data rendered the data scientifically deficient. EPA responded in full to these allegations in the final rule and response to comments document.

EPA's regulations at 40 CFR part 160 establish a set of principles that provides a framework within which laboratory studies are planned, performed, monitored, recorded, reported, and archived. GLP helps assure EPA that the data submitted are a true reflection of the results obtained during the study and can therefore be relied upon when making risk/safety assessments. The regulations are applicable only to studies that support, or are intended to support applications for ''research or marketing permits'' for pesticides regulated under FIFRA (40 CFR 160.1(a)).

ii. Denial of hearing request. On several grounds, a hearing on this subissue is not warranted. First, this objection fails to identify a dispute of material fact. There is no dispute that the EPA–ORD studies were not conducted in strict accordance with EPA's GLP regulations. Nor have Petitioners identified a substantive flaw in those studies that they believe resulted from the lack of compliance with the regulations, or otherwise challenged the scientific validity of those studies. Thus, the only issue presented is whether EPA should rely on otherwise scientifically valid studies that were not conducted in accordance with its GLP regulations. This is clearly a legal or policy issue. Hearings are not appropriate on such issues; issues of fact, not of law or policy are required to justify a hearing (40 CFR 178.32(b)(1)).

A further defect is that Petitioners have submitted no evidence on this point. In fact, this claim consists of nothing more than the bare statement that EPA's analysis does not rely on GLP-compliant studies. A hearing will not be granted on ''mere allegations'' or ''general contentions'' (40 CFR 178.32(b)(2)). To the extent the Petitioners are relying on the information submitted as part of their comments on the proposed rule, this does not cure the defect, since no substantiating information or other evidence was presented in support of their comments. Nor can simple reiteration of a comment made on the proposed rule justify a hearing. EPA responded to these comments in the final rule, and by ignoring the EPA's final rule on this subissue, Petitioners have failed to lodge a relevant objection. Both EPA and FDA precedent make clear that when the agency substantively responds to comments on the proposal, the commenter may only keep that issue alive in its objections by addressing the agency's substantive response. *See, e.g.,* 73 FR 42701 (denying hearing because NRDC merely repeated its assertion that the study was not representative from its petition, rather than objecting to the basis EPA asserted in its petition denial for concluding that the study was representative).

Indeed, this entire objection is not material. The EPA–ORD data are the only valid pup RBC data using carbofuran; in the absence of these data, EPA would have no data that would provide relevant information on carbofuran's effects on children's PNS. Under such circumstances, EPA would be required to retain the statutory default 10X, because there would be no ''reliable data'' on which to base any other factor.

iii. Denial of objection. The mere fact that a study is not conducted in accordance with EPA's GLP regulations does not mean that the study is scientifically invalid, or that EPA is prohibited from considering the study. The GLP regulations do not apply to EPA–ORD generated data, but rather to studies conducted to ''support applications for research or marketing permits for pesticide products'' (40 CFR 160.1(a)). Moreover, the regulations establish general practices; they do not identify the only good laboratory practices that will result in scientifically valid data. Other laboratory protocols, such as that used by EPA–ORD are equally valid. In recognition of this fact the regulations do not prohibit EPA from considering studies that were not conducted in accordance with EPA's GLP regulations, but merely provide that EPA may refuse to consider such studies to be ''reliable'' (40 CFR 160.17(a)).

Nor does compliance with EPA's GLP regulations guarantee the validity of the study's results. The RBC data from FMC's carbofuran CCA studies, which were conducted in accordance with EPA's GLP regulations, were unanimously determined to be scientifically invalid by the FIFRA SAP (Ref. 36).

Any claim that the conduct of the EPA–ORD studies raised questions as to their scientific validity is equally baseless. EPA's ORD data were reviewed by the FIFRA SAP, which concluded that, ''EPA–ORD has provided excellent

data regarding RBC AChE inhibition by carbofuran'' (Ref. 36 at 55).

As EPA explained in response to the Petitioners' comments, all of the information the Petitioners claimed was missing had been previously made publically available as part of the SAP review of the carbofuran NOIC, and was provided again in response to FMC's FOIA request. A complete study protocol, as well as a report of the quality assurance (QA), technical, and data reviews of the study, were available, which demonstrated that the procedures and documentation are in accordance with the National Health and Environmental Effects Laboratory (NHEERL)/ORD Quality Assurance Management Plan. Concerning standardization of brain and RBC AChE in terms of protein concentration, the Agency notes that this analysis has not been performed or provided in all the studies on the record, including those sponsored by FMC. However, in the Moser study (Ref. 56), the AChE activity was standardized in terms of tissue weight per ml, so the amount of protein was consistent across samples, which is an acceptable and widely used practice. Further, abnormal (or ''clinical'') observations were recorded when they occurred, although the animals could not be watched while they were in the motor activity chambers. Finally, the registrant is correct that the dosing solutions for the comparative ChE study were not analyzed, but ORD performed this analysis for the adult studies in McDaniel *et al.* (Ref. 54), and the preparation and stability of the carbofuran samples were confirmed therein. For these reasons, this objection is denied.

e. Objection/hearing request subissue: Consistency of EPA's approach to deriving the carbofuran children's safety factor—i. Background. The Petitioners argue that EPA's approach to deriving carbofuran's children's safety factor is inconsistent with that Agency's approach in deriving the safety factors for other NMC chemicals. Specifically, they point to carbaryl, which had a safety factor of 1X.

Petitioners raised this issue in their comments on the proposed rule. In the final rule, EPA explained at length, the basis for its conclusion that the available data using carbaryl, provided by the carbaryl registrant, supported a finding that a 1X children's safety factor would be ''safe'' (74 FR 23058 and Ref. 85). EPA explained that the different safety factors established for carbaryl and carbofuran resulted from differences in the chemicals themselves, as reflected by the available data (Id).

ii. Denial of hearing request. A hearing is not appropriate on this objection because it raises a legal or policy claim, rather than a dispute as to a material issue of fact. The claim that EPA acted inconsistently in assessing different pesticide chemicals is purely a legal issue. There is no factual dispute that EPA established a children's safety factor of 1X for carbaryl, and a safety factor of 4X for carbofuran. The only dispute concerns whether EPA's basis for distinguishing between the two is reasonable, and this is a legal claim, on which a hearing is not appropriate (40 CFR 178.32(b)(1)).

In addition, the Petitioners make no claim other than to reiterate the allegation made in their comments on the proposed rule, that EPA's assessment of carbofuran is inconsistent with its assessment of carbaryl. Consequently, Petitioners' objection on this subissue is irrelevant, and therefore immaterial, with regard to EPA's final tolerance revocation regulation because Petitioners ignored EPA's extensive analysis of this issue in the final rule and refiled their comments on the proposal as if EPA's determination in the final rule did not exist. By ignoring the EPA's final rule on this subissue, Petitioners have failed to lodge a relevant objection. Nor have they proffered any evidence in support of this claim. When EPA responds to a comment in the final rule, mere reiteration of the comment in objections does not present a live controversy unless the objector proffers some evidence calling EPA's objection into question (*See, e.g.*, 73 FR 42700–42701).

iii. Denial of objection. Carbaryl was evaluated no differently than carbofuran. The different children's safety factors applied to each chemical reflects the differences in the chemicals themselves, as reflected by the data.

It is typical EPA practice to use the central estimate on the BMD as an appropriate measure for comparing chemical potency and the lower limit on the central estimate (*i.e.*, BMDL) as an appropriate measure for extrapolating risk. In the case of carbaryl, the Petitioners inappropriately focused on the $BMDL_{10}$, instead of the BMD_{10}. The more appropriate comparison is between the BMD_{10}; the carbaryl brain BMD_{10} is 1.46 mg/kg compared with the RBC BMD_{10} of 1.11 mg/kg. As such, the brain to RBC ratio is 1.3X. Therefore, for carbaryl, the brain and RBC AChE data are similarly sensitive. When the tissues are similarly sensitive, the Agency prefers to use data from the target tissue (*i.e.*, central or peripheral nervous system) rather than data from a surrogate tissue (*i.e.*, RBC). EPA's hazard identification for carbaryl states:

> ''Although the RBC $BMDL_{10}$ for the more sensitive PND 11 rat is numerically the lowest (0.8 mg/kg) of the two compartments, biologically the RBC $BMDL_{10}$ is similar to the brain $BMDL_{10}$ (1.1 mg/kg). Since the brain is the target tissue for the NMCs, and the brain $BMDL_{10}$ 1.1 mg/kg is also protective of the surrogate and often more variable RBC ChE measurements ($BMDL_{10}$ 0.8 mg/kg), then the brain $BMDL_{10}$ of 1.1 mg/kg is the appropriate PoD for both children and adults in the carbaryl risk assessment (Ref. 82).''

Thus, for carbaryl, biologically the RBC and brain AChE inhibition were basically equivalent where brain AChE inhibition is a direct measure in a target tissue and RBC AChE inhibition is used as a surrogate for the peripheral nervous system. This is quite different from the situation with carbofuran where a significant difference was noted between RBC and brain AChE inhibition, showing that RBC AChE inhibition (used as a surrogate for the PNS) is more sensitive.

The approach used for carbaryl—*i.e.*, relying on the central estimate for purposes of comparison across age groups, and using biological compartments and the lower limits for use as PoDs—is being used by EPA in its carbofuran risk assessment. In addition, this approach was used in the NMC cumulative risk assessments (CRA) and single chemical risk assessments for multiple OPs. Thus, the Agency is, in fact, being consistent in its hazard identifications among the AChE-inhibiting pesticides.

With regard to the carbaryl children's safety factor, the available brain and RBC dose-response data in PND11 pups include data from the lower end of the dose-response curves. ORD's comparative ChE data with carbaryl show that at the lowest dose at or near 20% inhibition in brain and RBC AChE were observed. Although not ideal, the carbaryl data provide information closer to the benchmark response of 10%, and therefore allow for a reasonable estimation of the BMD_{10} and $BMDL_{10}$. This is distinctly different from ORD's data with carbofuran in PND11 and PND17 pups where the 50% or greater RBC AChE inhibition was observed at the lowest dose. Accordingly, the objection is denied.

2. EPA's Mathematical Modeling Underlying the Calculation of a 4X Children's Safety Factor. Petitioners argue that EPA committed numerous errors in calculating the 4X children's safety factor. First, Petitioners allege that, even assuming that RBC values are relevant, EPA's conclusion that the RBC-related effects in the relevant

studies were four times more sensitive than brain effects is not mathematically supportable. Referencing statistical analyses performed by a contractor, they claim that ''[a]t most, the data support a 2X safety factor, based on actual difference between brain and RBC (ranging between 1 and 1.9).''

Second, the Petitioners claim that there are several technical errors in the way EPA conducted the statistical modeling that formed the quantitative support for the 4X children's safety factor. They also object that the mathematical assumptions underlying EPA's modeling are not justified and fail to support the 4X children's safety factor. In this regard, they allege that EPA's children's safety factor was based on calculations that (i) are not based on ''within animal comparisons;'' (ii) have been applied incorrectly and inconsistently to the data, which exaggerated the difference; (iii) overstate the evidence for higher relative RBC sensitivity; and (iv) treated carbofuran inconsistently as compared to other NMCs. They claim that by removing the inconsistencies from EPA's data, the data yield a brain/RBC ratio of 1.3, which confirms Petitioners' approach. These five allegations are addressed separately below.

In support of these claims, the Petitioners offer allegations on the points above, referencing two memoranda from Drs. R. Sielken and C. Valdez-Flores (Exhibits 7, 8, 9) that generally describe and summarize the analyses and modeling they conducted. The full analyses underlying these memoranda were not included with the objections.

a. Objection/Hearing Request Subissue: Use of Within-Animal Brain to RBC Inhibition Comparisons To Derive the Children's Safety Factor

i. Background. In the proposed rule, EPA explained its approach to deriving an alternate to the default 10X children's safety factor. This safety factor was calculated using the ratio of RBC and brain AChE inhibition, using the data on administered dose for the PND11 animals from the EPA–ORD studies and the FMC studies combined. In other words, EPA estimated the BMD_{50} for PND11 animals for RBC and brain from each quality study and used the ratio from the combined analysis, resulting in a BMD_{50} ratio of 4.1X. EPA estimated the RBC to brain potency ratio using EPA's data for RBC (the only reliable RBC data in PND11 animals for carbofuran) and all available data in PND11 animals for brain. EPA's approach yields a ratio of about 4 fold.

EPA also compared the BMD_{50} ratios for PND17 pups (who are slightly less sensitive than 11-day olds) in the EPA–ORD study, to confirm that the observed differences in sensitivity between RBC and brain were not unique to the PND11 data. The result of EPA's modeling showed a BMD_{50} ratio of 3.3 [13] between brain and RBC in the PND17 pups.

In their comments on the proposed rule, Petitioners presented essentially the same arguments raised in this objection. They argued that a more plausible and straightforward approach would be to compare the RBC and brain AChE levels at the same time in the same rat when these rats are exposed to carbofuran. The comments claimed that a statistical evaluation of the experimental data on AChE inhibitions in RBC and brain in rats due to carbofuran exposure had been performed by Sielken & Associates, which showed that the percentage inhibition of RBC AChE in a rat is almost the same as the percentage inhibition of brain AChE in the rat. Although the results of the statistical analyses were summarized in the comments, the underlying analyses were not submitted.

In the final rule, EPA provided a detailed explanation of its rationale for rejecting the Petitioners' approach (74 FR 23055; Ref. 85).

ii. Denial of hearing request. EPA is denying Petitioners' request for a hearing on this objection for two reasons. First, as in its comments, Petitioners failed to submit the underlying modeling conducted in support of its assertions. Petitioners' consultant merely asserts that the results are as presented in his summarized testimony. In the absence of the underlying scientific analyses, these are effectively no more than mere allegations or general contentions. Hearings will not be granted on this basis alone. (40 CFR 178.32(b)(2); see also 73 FR 42702 (July 23, 2008)(denying NRDC's hearing request on objection that EPA's risk assessment was inadequate because EPA lacked data on how pest strips were used in their homes, because ''NRDC provided no factual information to support its claim''); 68 FR 46403, 46406–46407 (August 5, 2003) (FDA denied a hearing involving a challenge to FDA's reliance on consumption pattern data because the objector ''did not present any specific information to dispute P & G's consumption pattern data; instead, [objector] simply asserted that other consumption patterns were likely.''); *accord Community Nutrition Institute* v. *Novitch*, 773 F.2d 1356, 1363 (DC Cir. 1985) (''Mere differences in the weight or credence given to particular scientific studies * * * are insufficient [to show a material issue of fact for a hearing].'')).

Second, Petitioners' hearing request is inadequate because they do not object to the basis EPA asserted in the final rule for rejecting this approach. Specifically, Petitioners do not challenge EPA's conclusion that their suggested approach is fundamentally flawed in several regards, nor proffer evidence in support of that challenge. Petitioners also do not challenge EPA's analyses, showing that the results of their suggested approach are in fact consistent with EPA's conclusions. As a consequence, Petitioners' objections are irrelevant, and therefore immaterial, with regard to EPA's final tolerance revocation regulation. The statute, however, requires that objections be filed on the final rule not the proposal. By ignoring the EPA's final rule on this subissue, Petitioners have failed to lodge a relevant objection. Prior FDA decisions under its regulations are instructive here. Objections and hearing requests were filed in response to a food additive regulation covering the irradiation of poultry. (62 FR 64102 (December 3, 1997)). The objector argued that the addition of an anti-oxidant (ethoxyquin) to irradiated chicken prior to the chicken's use in animal feeding studies compromised the studies because the ethoxyquin would have decreased the level of lipid peroxides in the chicken to levels found in chicken that had not been irradiated. The FDA noted, however, that it had considered the question of ethoxyquin's effect on lipid peroxide levels in the final rule and determined that while ethoxyquin can retard the normal oxidation of chicken fat to peroxides, ethoxyquin cannot reverse oxidation that has already occurred. FDA denied the hearing request reasoning that because the objector did ''not dispute FDA's explanation in the final rule as to why addition of ethoxyquin did not compromise the CIVO studies, and provided no information that would have altered the agency's conclusion on this issue * * * there is no factual issue that can be resolved by available and specifically identified reliable evidence'' (62 FR 64105). *See also* 53 FR 53176, 53191 (December 30, 1988) (FDA denied a hearing request noting that given FDA's prior conclusion that the studies relied upon by the objector were unreliable, the ''burden shifted to [the objector] to maintain the viability of its

[13] EPA corrected a technical error identified in Petitioners' comments, which resulted in a revised ratio of 2.6X, for the final rule.

objection by proffering some information that called into question the agency's conclusion on this matter.'')). Similarly, here, Petitioners have not challenged the basis EPA asserted for rejecting their suggested within-animal analyses, nor have they proffered any information calling into question EPA's conclusion.

iii. Denial of objection. EPA notes that the Petitioners recommended this approach of comparing the degree of inhibition for each animal as part of their presentation to the carbofuran SAP. EPA also addressed this approach, comparing RBC to brain in the same animals, at the SAP and in the responses to the SAP report (Ref. 83). It is notable that the SAP did not endorse this approach (Id.).

EPA's analyses of the Petitioners' approach identified several significant deficiencies. First, the comparison suggested by the Petitioners would require that EPA ignore existing data. This is because only EPA's study of PND 11 animals contains both brain and RBC data, so the comparisons suggested by the commenter can only be made using that dataset. However, the dose levels in that study were so high that the lower portion of the dose-response curve was missed. At these higher doses, there is little difference between the levels of brain and RBC inhibition. This phenomenon—*i.e.*, that the relative sensitivity of RBC compared to brain appears smaller at higher doses—is also shown in multiple chlorpyrifos studies where blood or peripheral measures of AChE inhibition are more sensitive than brain at low to mid doses, but the tissues appear to be similar at higher doses.

Second, the Petitioners' approach is fundamentally flawed. The Petitioners' suggested alternative relies exclusively on comparisons between the degree of inhibition in the treated animals without any regard to the doses at which the effects occurred. For example, one animal may have shown, on average, 10% inhibition in the brain, when it demonstrated 20% RBC inhibition. Under this approach, what would be relevant would simply be the ratio of 1:2. But the Agency believes it is critical to focus on the ratios of potency, which is the ratio of the doses in the data that cause the same level of AChE inhibition. The Agency's approach of comparing potencies is more directly relevant for regulatory purposes than comparisons of average inhibition. This is because dose corresponds more directly to potential exposures, which is what EPA regulates (*i.e.*, how much pesticide residue does a child ingest). By comparison, the Petitioners' suggested reliance purely on the average degree of inhibition provides no information that corresponds to a practical basis for regulation.

Finally, the range of ratios of effects that the Petitioners propose as an alternative is consistent with range of potencies that EPA has calculated *at these higher doses*, so the Petitioners' results do not ultimately contradict EPA's assessment, which is intended to account for the effects at lower doses. Briefly, if the dose-responses for RBC and brain inhibition were linear, ratios of inhibition would equal ratios of BMDs. However, these dose-responses are not at all linear; rather the available data demonstrate that brain and blood dose-responses have somewhat different shapes. Thus, estimates of relative effects at particular, relatively high, doses will not determine the estimated ratios at lower doses. This is because the dose-response curves begin to level off as they reach maximal inhibition (*i.e.*, no more inhibition is possible), so, at high doses, there is almost no difference between the ratio of brain and RBC inhibitions. Except at the lowest dose, which produced 50% AChE inhibition, where the ratio is slightly greater than 2, the remaining ratios are only slightly greater than 1. Given the inevitable statistical noise in these measures, it is clear that the ratios expected from EPA's modeling are substantially similar to the results the Petitioner finds in its comparison between individuals. Accordingly, the Petitioners' suggested comparisons at higher doses provide no evidence of what occurs at lower doses; and thus provides no evidence that demonstrates that EPA's modeling results at lower doses is inaccurate.

b. Objection/hearing request sub issue: Scientific validity of EPA's approach. The Petitioners object that EPA's approach has not been established as scientifically valid. They claim that data for other carbamates suggests that BMD_{50} s for the carbamates tend to diverge more than the dose levels used to select the PoD (*i.e.*, the BMD_{10} s). In addition, they criticize EPA's approach for incorrectly assuming that the relationship between BMD_{50} s and BMD_{10} s is linear, which they claim overstates the potential differences. They claim that these issues could be avoided by adopting their suggested approach of using within-animal comparisons to determine the relative sensitivity of RBC and brain AChE. The evidence submitted in support of this subissue is the summary presented in the objection.

i. Background. In the proposed rule, EPA explained that its comparisons of the BMD_{50} s for brain and blood relied on an assumption that the magnitude of the difference between RBC and brain AChE inhibition is constant across dose. In other words, EPA assumed that the RBC and brain AChE dose curves are parallel, even though there are no data to test this assumption (73 FR 44873). In their comments, the Petitioners criticized EPA for this assumption, and recommended using ''within animal comparisons'' to avoid having to make this assumption. In the final rule, EPA explained that its decision to rely on comparisons of BMD_{50} s rather than BMD_{10} s was because the RBC data for 10% inhibition levels was insufficient to allow the Agency to generate the necessary estimates. EPA agreed that the dose-response curves were not parallel at these lower doses, (*i.e.*, that the relationship between BMD_{50} s and BMD_{10} s was not linear) but that EPA lacked any data that would allow it to make any other assumption. EPA nevertheless rejected the Petitioners' suggested approach of relying on within-animal comparisons, because, as described in the preceding objection, it is intrinsically flawed and scientifically invalid.

ii. Denial of hearing request. A hearing on this subissue is not appropriate because Petitioners' request is based on mere allegations, general contentions, and speculation (40 CFR 178.32(b)(2)). No evidence has been submitted on any of the issues raised in this objection. Petitioners have provided no evidence that supports their assertion that EPA's assumption that the dose-response curves will remain parallel at lower doses overestimates the ratios. In the absence of data at the low end of the dose-response curve, which Petitioners were required to have developed, there is just as great a likelihood that EPA's assumption underestimates the ratios. Petitioners have not cited to any data from other carbamates to support their contention that BMD_{50} s tend to diverge more than BMD_{10} s; the objection fails to even identify the carbamate chemicals that purportedly support this claim. Further, the claim is untimely, as it was not raised as part of their comments on the proposed rule. For the reasons discussed in Unit VI.D, EPA will not consider such information in support of a request to justify a hearing.

In addition, a hearing on this objection is denied on the ground of materiality (40 CFR 178.32(b)(1)). In the absence of EPA's assumption, EPA would have no basis for deriving an alternate children's safety factor. Thus, EPA would have to raise the children's safety factor from 4X to the statutory

default of 10X, rather than to lower the factor as the Petitioners seek. As discussed at length in the preceding objection subissue, the Petitioners' suggested alternative of within-animal comparisons is scientifically invalid, and provides no useful basis for regulatory action. Accordingly, if Petitioners establish that available information does not support EPA's assumption that the dose-response curves are parallel, then EPA is left with no valid scientific information to determine the correct dose-response curve at lower doses, or to establish a BMD_{10} (21 U.S.C. 346a(b)(2)(C)). Because deviation from a 10X children's safety factor requires some ''reliable data'' on the shape of the dose response curve for RBC AChE, Petitioners' objection on EPA's low dose-response curve assumptions, in combination with the failure to provide a valid alternate approach would result in a higher children's safety factor, and a conclusion that EPA has underestimated carbofuran's risks.

iii. Denial of objection. EPA disagrees that its approach is not scientifically valid. The models used to develop the BMD estimates have been repeatedly reviewed and approved by the SAP (Refs. 34, 35). The most recent occasion was the February 2008 carbofuran SAP, which concluded that ''[t]he dose-response analysis done by the Agency for the EPA–ORD PND11 study was appropriate and led to a very uncertain BMD_{10} * * * This [assumed dose-response] curve fit well in the region where there were data, but there was no way to validate it at low doses'' (Ref. 36 at 54).

EPA acknowledges that it lacks information to confirm its assumption that the dose-response curves remain parallel at lower doses. EPA believes this is the most reasonable assumption, given the absence of information at low doses, since it neither presumes that RBC inhibition will increase or decrease at lower doses. Contrary to Petitioners' naked assertion that EPA's approach overestimates the difference, there is no inherent reason to expect that EPA's assumption would overestimate or underestimate the difference between BMD_{50} s and BMD_{10} s. If indeed data were to show that EPA's assumption overestimated the difference—and Petitioners have submitted none—it would only be as a result of the animal biology, as there is no indication in the mathematical modeling that it overestimates the difference in any way. The mathematical relationship between BMD_{50} s and BMD_{10} s certainly provides no hint that there might be a bias. In this regard, it is notable that the February 2008 SAP concluded that '[w]hat the Panel observed at the low end [of the dose-response curve] made it tempting to assume linearity at this part of the dose-response curve'' (Ref. 36 at 55).

Regarding the Petitioners' claim that data for other carbamates suggests that BMD_{50} s for the carbamates tend to diverge more than the dose levels used to select the PoD (*i.e.*, the BMD_{10} s). EPA cannot confirm the accuracy of this allegation, as Petitioners have provided neither data nor any explanation of a biological basis to support this claim. Nor is EPA able to substantiate this claim based on the information currently available. However, there is no *a priori* reason to expect such a systematic divergence between ratios of BMD_{50}'s and ratios of BMD_{10} s for blood and brain, based either on biology or the mathematical relationship between BMD_{50}'s and BMD_{10} s. It is actually far more probable that the variation from chemical to chemical (due both to real variation among chemicals and to statistical sampling noise) would be large enough to make a conclusive determination from data difficult.

c. *Objection/hearing request sub issue: Combining data from different toxicological studies—i. Background.* In its risk assessment, EPA relied on all of the valid data from the available studies to calculate the estimates that served as the PoD, and to calculate the estimates of BMD_{50} s that serves as quantitative support for derivation of the 4X children's safety factor.

For purposes of the PoD, the Agency used a meta-analysis that combined valid data from all available studies to calculate the BMD_{10} and $BMDL_{10}$ for pups and adults; this analysis includes brain data from studies where either adult or juvenile rats or both were exposed to a single oral dose of carbofuran. The quality brain AChE data from the three studies (2 FMC, 1 EPA–ORD) conducted with PND11 rats, in combination, provides data to describe both low and high doses. By combining the three studies in PND11 animals together in a meta-analysis, the entire dose-response range is covered.

EPA also combined studies in calculating the 4X children's safety factor. EPA derived the ratio of RBC and brain AChE inhibition using the data on administered dose for the PND11 animals from the EPA–ORD studies and the FMC studies combined. In other words, EPA estimated the BMD_{50} for PND11 animals for RBC and brain from each quality study and used the ratio from the combined analysis, resulting in a BMD_{50} ratio of 4.1X. EPA estimated the RBC to brain potency ratio using EPA's data for RBC (the only reliable RBC data in PND11 animals for carbofuran) and all available data in PND11 animals for brain.

In their comments on the proposed rule, Petitioners claimed that EPA's decision to combine data for different strains of rats, sexes, experiments, laboratories, dates, dose preparations, rat ages, and times between dosing and AChE measurement, is problematic, claiming that these differences in study design severely limit the validity of EPA's comparisons. Further, they alleged that differences in data and methods EPA used to estimate its BMD_{50} (brain) and BMD_{50} (RBC) caused EPA to overestimate the difference between brain and RBC, and thereby invalidating any comparison of the estimates. Specifically, Petitioners were concerned that the datasets from the six studies EPA used for brain differ not only because they were from different studies, but also because the data were taken at different times ranging from 15 minutes to 4 hours after dosing.

EPA responded to these comments in full during the rulemaking (74 FR 23055–23057 (May 14, 2009); Ref. 85). Petitioners referenced these comments in their objections, but presented no further argument or evidence on any of these points. Because Petitioners originally raised this claim also with respect to the derivation of EPA's PoD, even though they only raise it in this objection here, the Agency responds to both points below.

ii. Denial of hearing request. The Petitioners have not met the requirements for a hearing on this subissue. Petitioners have not challenged the basis EPA asserted for rejecting their suggested within-animal analyses, and have therefore failed to lodge a relevant objection. Both EPA and FDA precedent make clear that when the agency substantively responds to comments on the proposal, the commenter may only keep that issue alive in its objections by addressing the agency's substantive response (40 CFR 178.32(b)(3)). Nor have they proffered any evidence that calls the substance of EPA's conclusions into question. A hearing is not warranted on the basis of mere denials or contentions (40 CFR 178.32(b)(2)). S*ee* 73 FR 42698–42699 (When an objector does not challenge EPA conclusions in the section 408(d)(4)(iii) order but rather challenges some prior conclusion that was superseded by the section 408(d)(4)(iii) order, the objector has not raised a live controversy as to an issue material to the section 408(d)(4)(iii) order); 53 FR 53176, 53191 (December 30, 1988) (FDA denied a hearing request noting that given FDA's prior conclusion that the

studies relied upon by the objector were unreliable, the ''burden shifted to [the objector] to maintain the viability of its objection by proffering some information that called into question the agency's conclusion on this matter.'')).

Second, this objection is not material. In the case of carbofuran, EPA used a sophisticated analysis of multiple studies and datasets to develop the PoD for the carbofuran risk assessment. Instead of this analysis, EPA could simply have followed the general approach laid out in its BMD policy (Ref. 100), which is used in the majority of risk assessments. Under this general approach, EPA would regulate using the most sensitive effect, study, and/or dataset. If the Agency chose not to combine the data in its analyses, as the commenters' suggested, data collected at or near the peak time of effect (*i.e.*, 30 minutes) would in fact provide the more relevant datasets. If this more simple approach were taken, in accordance with BMD guidance, EPA would select the lowest $BMDL_{10}$. Assuming the commenters' values were used, EPA would have selected a PoD of 0.009 mg/kg/day, instead of the 0.03 mg/kg/day that EPA is currently using in its risk assessment. A lower PoD of 0.009 mg/kg/day would significantly increase carbofuran's level of estimated risk.

iii. Denial of objection. In general, EPA believes that consideration of all available data is the scientifically more defensible approach, rather than the selective exclusion of reliable data. The Agency's Draft BMD Guidance says the following: ''Data sets that are statistically and biologically compatible may be combined prior to dose response modeling, resulting in increased confidence, both statistical and biological, in the calculated BMD'' (Ref. 76). The SAP has reviewed and approved EPA's practice of combining data from studies numerous times (Refs. 34, 35, 36). Most recently, as part of the carbofuran SAP, the SAP was fully aware that the Agency was planning to derive BMD estimates from data sets using different strains of rats (Ref. 36). Accordingly, the Agency's carbofuran analysis has included all available, valid data in its analysis.

By contrast, the Petitioners' suggested analysis ignores relevant, scientifically valid data. Their analysis left out the 30-minute data from MRID no. 47143705 (Ref. 2), but provided no rationale as to why it would be appropriate to selectively exclude data from the time frame in this study most relevant to the risk assessment (*i.e.*, peak AChE inhibition). The Petitioners' analysis of the individual datasets from this study showed that at 30 minutes the females and males provide $BMDL_{10}$ s of 0.009 mg/kg/day and 0.014 mg/kg/day, respectively. When the datasets were combined, inclusion of the 30-minute timepoint from MRID no. 47143705 decreased the $BMDL_{10}$ from 0.033 mg/kg/day to 0.030 mg/kg/day.

Although the Petitioners complain that EPA's approach of combining data across multiple studies is scientifically inappropriate, the Petitioners themselves combined the results of analysis from four datasets in the information presented with their comments and referenced in their objections. Indeed, it is notable that most of the criticisms raised by the Petitioners also apply equally to the Petitioners' own analysis, as described in more detail in EPA's Response to Comments document (Ref. 85).

The Petitioners are also incorrect that differences in the data available for brain and RBC are so great as to invalidate comparisons of the BMD estimates. EPA used all the data available in each case, and used a hierarchical model to account for variability of the BMD among laboratories for the brain endpoint, which the SAP has explicitly reviewed and approved numerous times (Refs. 34, 35, 36).

The Petitioners are correct that data from both sexes were combined for brain but only male data were used for RBC. However, EPA first performed an evaluation of the differences between the sexes. EPA combined data from males and females only after showing that they did not respond differently.[14] The only remaining study to examine AChE activity in RBC in PND11 animals, after FMC's flawed studies were eliminated, contained only male animals. Both BMD_{50} s for brain and RBC in adults were based on 15 minutes, the minimum time interval after dosing when a sample was taken, in each dataset.[15] This is also true for the brain endpoint in PND11 animals. However, the only study available of the RBC endpoint in PND11 animals was conducted at 40 minutes after dosing, and did not include a recovery time course study.

EPA believes that its decision to combine data for purposes of its BMD_{50} estimates supporting the children's safety factor is equally appropriate, and any differences in the way in which the studies were conducted did not impact the validity of EPA's analyses. For example, one of Petitioners' complaints was that it was inappropriate to combine studies because the data in the studies were taken at different times, ranging from 15 minutes to 4 hours after doses. EPA responded to the allegation that this was problematic by conducting the analysis that the Petitioners claimed should have been done to support this. As explained in the final rule, although EPA disagreed with the Petitioners' contention that this was necessary or appropriate, EPA conducted the Petitioners' suggested analysis, and used the dose-time-response model to extrapolate BMD_{50} s to develop a common point of comparison between all studies. Specifically, EPA extrapolated the PND11 brain analysis to estimate BMD_{50} for 40 minutes after dosing for comparison with the existing PND11 RBC BMD_{50}, and extrapolated the PND11 RBC BMD_{50} to 15 minutes after dosing for a range of assumed recovery half-lives, for comparison to the existing PND11 brain BMD_{50}. The results are provided in (Refs. 24, 25). In either approach, the estimate of the RBC to brain potency ratio in PND11 animals is increased, and EPA's safety factor would correspondingly increase to reflect that larger difference. For example, when the PND11 brain BMD_{50} is extrapolated to 40 minutes, the RBC to brain potency ratio grows to 4.7 (Ref. 24 at 46), and when the PND11 RBC BMD_{50} is extrapolated to 15 minutes, using a range of estimates for the recovery half-life of the RBC endpoint, the RBC to brain potency ratio ranges from 4.2 to 4.6 (Ref. 24). The Petitioners' approach would therefore support a children's safety factor of 5X rather than the 4X EPA is currently applying in its risk assessments. Nevertheless, EPA continues to believe that its current use of a 4X factor reflects the most reliable interpretation of existing quality data.

Although it is true that EPA's BMD_{50} for brain was based on data from 6 datasets while the RBC BMD_{50} was based on a single study, this is because scientifically acceptable RBC data are only available from a single study. As discussed, the fact that EPA used all available data sets in its modeling does not affect the validity of its modeling (Ref. 76).

For all of the foregoing reasons, this objection is denied.

d. Objection/hearing request sub issue: Technical Flaws in EPA's statistical comparisons. In their objections, Petitioners claim to have found a number of technical errors and inconsistencies in how the modeling

[14] See pp. 34–35 in the brain document dated October 25, 2007 for adults, pp. 47–48 in the same document for PND11 animals; p. 15 in the RBC document dated October 23 for adults.

[15] See Oct. 5, 2007 reports, page 8 (for the values of the time interval) and page 63 (setting the parameter delta to the minimum non-zero value for that interval) in the RBC report, and page 9, and page 45 for the corresponding report for Brain.

was conducted. Correcting for these errors, they claim, shows that the BMDs for brain and RBC data are essentially the same, which was consistent with the results of modeling conducted by the Petitioners when evaluating the individual animal data. Specifically, Petitioners allege that the approach EPA used to estimate BMD_{50} s for carbofuran is inconsistent with its ''meta-analysis'' approach of combining studies. The Petitioners also argued that EPA's modeling failed to account for significant difference in study methodologies (*e.g.*, time to sacrifice following dosing). For example, EPA's BMD_{50} (Brain) is calculated at 15 minutes after exposure starts whereas EPA's BMD_{50} (RBC) is calculated at 40 minutes after exposure starts. EPA's BMD_{50} (brain) is based on 6 studies whereas EPA's BMD_{50} (RBC) is based on 1 study, and the dose-time-response modeling methodology for combined studies and EPA's BMD_{50} (brain) is different than the dose-time response modeling methodology for a single study and EPA's BMD_{50} (RBC). Petitioners also allege that EPA applied its dose-time-response model inconsistently between the brain and RBC calculations, alleging that the power was fixed to 1.00 for brain, but estimated for RBC.'' They also criticize the modeling on the grounds that EPA did not: (1) Account for differences between the combined datasets; (2) develop a protocol supporting its approach; (3) clearly document its method; (4) accurately document model parameters; (5) rely on a plausible dose-response model, or (6) report its data accurately or transparently. They further allege that ''removing all of these inconsistencies in methodology results in a ratio of 1.3, which corresponds with the ratio that the Petitioners claim to have obtained based on their within animal comparisons.

Petitioners have provided neither further details of their concerns than the explanation above, nor any other evidence to support this objection.

i. Background. EPA addressed all of the commenters' claimed inconsistencies in its final rule and Response to Comments document (74 FR 23055–23056; Ref. 85 at 61–62). For the majority of these claimed flaws and inconsistencies, EPA explained that the Petitioners had misunderstood EPA's analyses, or that the Petitioners' were incorrect. However in response to certain allegations, EPA conducted new analyses to determine whether the suggested alternative approaches would make any significant difference in EPA's modeling outcomes.

Petitioners have provided little detail in their objections on the issues they intend to raise in their testimony; in most instances, they simply allege that EPA's modeling was incorrect. But as the objections reference the Petitioners' comments on the proposed rule, EPA assumes that they intend to raise only the points previously discussed in their comments.

ii. Denial of hearing request. The Petitioners' request for a hearing on the issues raised in this objection is denied on two bases. First, Petitioners have not challenged the substance of EPA's response to their comments or submitted evidence that calls the substance of EPA's conclusions into question. As previously explained, their failure to challenge the actual basis of EPA's final rule affects the materiality of the objection and hearing request (40 CFR 178.32(b)(3)). *See* 73 FR 42698–42699 (When an objector does not challenge EPA conclusions in the section 408(d)(4)(iii) order but rather challenges some prior conclusion that was superseded by the section 408(d)(4)(iii) order, the objector has not raised a live controversy as to an issue material to the section 408(d)(4)(iii) order) 53 FR 53176, 53191 (December 30, 1988) (FDA denied a hearing request noting that given FDA's prior conclusion that the studies relied upon by the objector were unreliable, the ''burden shifted to [the objector] to maintain the viability of its objection by proffering some information that called into question the agency's conclusion on this matter.'')). Further, Petitioners have not rebutted, or even acknowledged, the additional analyses EPA undertook at their suggestion, and discussed in the final rule, which ultimately provided further support for EPA's position. For example, in response to the complaint that EPA should have generated a new dose-response model in order to calculate the BMD_{50} s for brain and RBC, EPA conducted the suggested calculation, and under that analysis, the result is the same as that EPA originally calculated. Similarly, in response to the complaint that EPA should have used the dose-time-response model to extrapolate BMD_{50} s to develop a common point of comparison between all studies, EPA conducted that analysis and described it in the final rule (74 FR 23055–23056 (May 15, 2009)). The result of this reanalysis supported a higher children's safety factor than EPA's 4X. But rather than challenge the new analysis, Petitioners simply repeat the assertions made in their comments. Because the objections on these points fail to account for EPA's analyses, the objections are contradicted by the record, and accordingly, fail to demonstrate a factual dispute (40 CFR 178.32(b)(1)). *See* 73 FR 42698–42699 (Denying NRDC hearing where objection reiterated claims premised on conclusions in EPA's preliminary risk assessment, rather than objecting to EPA's conclusions in the revised assessment prepared for the petition denial); 49 FR 6672 (February 22, 1984) (no hearing if claim based on demonstrably false premise); 57 FR 6667 (February 27, 1992) (''A hearing must be based on reliable evidence, not on mere allegations or on information that is inaccurate and contradicted by the record'').

Second, as in their comments, Petitioners failed to submit the underlying modeling they claim to have conducted in support of their objections. Petitioners' consultants merely assert that the results are as presented in their summarized testimony. In the absence of the underlying scientific analyses, these are effectively no more than mere allegation or general contentions. Hearings will not be granted on this basis. (40 CFR 178.32(b)(2); see also 68 FR 46403, 46406–46407 (August 5, 2003) (FDA denied a hearing involving a challenge to FDA's reliance on consumption pattern data because the objector ''did not present any specific information to dispute P & G's consumption pattern data; instead, [objector] simply asserted that other consumption patterns were likely.''); accord *Community Nutrition Institute* v. *Novitch*, 773 F.2d 1356, 1363 (DC Cir. 1985) (''Mere differences in the weight or credence given to particular scientific studies * * * are insufficient [to show a material issue of fact for a hearing].'').

iii. Denial of Objection. For all of the reasons discussed in the final rule and Response to Comments documents, this objection is denied. A summary of EPA's bases, which were discussed in detail in both the final rule and Response to Comments document, is presented below.

Consistency of EPA approach. In their comments, the Petitioners' explained that the alleged inconsistency with which they were concerned was that ''EPA attempts to extrapolate a BMD_{10} to a BMD_{50} without refitting the data. That is, EPA uses the dose-response model obtained for the BMD_{10} rather than obtaining a new model for BMD_{50}.'' They claimed this was ''especially troublesome since EPA has expressly stated that the model obtained for BMD_{10} (RBC) is unreliable.''

The Petitioners' allegation on this point is incorrect. The model itself does not need to change in order to develop a BMD_{50}. Whether one wants to estimate the BMD_{10} or the BMD_{50}, one would use the same underlying model. EPA simply developed a mathematical expression to adjust parameter values for that fitted model so that, for any given benchmark response level (in particular, for 10% or 50% inhibition), the corresponding BMD could be estimated as a parameter in that model. The same expression makes it possible to compute a BMD for any given response level from estimates based on any other response level. Mathematically, it is not necessary to refit the model to the data to estimate different BMD levels.

However in response to the comments, EPA conducted their suggested calculation, and the ratio of brain to RBC BMD_{50} s in this new analysis is the same as the ratio EPA calculated by using the mathematical expression (Refs. 24, 25). Both provide a ratio of brain to RBCs BMD_{50} of 4X. Specifically, in the just cited documents above, the values are for PND11 brain BMD_{50} are 0.35 (Ref. 24 at 40) and for RBC, 0.086 (Ref. 25 at 20), resulting in a ratio of 4.09.

With regard to the EPA's purported statement that the BMD_{10} model is unreliable, the Petitioners misconstrued EPA's statement. EPA stated that it cannot reliably estimate the RBC BMD_{10} and $BMDL_{10}$ in pups because it lacks data at low doses, not because its model is unreliable. Given the greater amount of data, the estimate for the BMD_{50} is substantially better supported, and thus, less uncertain, than the estimate of the BMD_{10}.

Differences in study methodologies. Both BMD_{50} s for brain and RBC in adults were based on 15 minutes, the minimum time interval after dosing when a sample was taken, in each dataset.[16] This is also true for the brain endpoint in PND11 animals. However, the only study available of the RBC endpoint in PND11 animals was conducted at 40 minutes after dosing, and did not include a recovery time course study.

As noted in the previous objection response, EPA used the dose-time-response model to extrapolate BMD_{50} s to develop a common point of comparison between all studies. Using that approach would support a children's safety factor of 5X rather than the 4X EPA has applied.

[16] See Oct. 5, 2007 reports, page 8 (for the values of the time interval) and page 63 (setting the parameter delta to the minimum non-zero value for that interval) in the RBC report, and page 9, and page 45 for the corresponding report for Brain.

Although it is true that EPA's BMD_{50} for brain was based on data from 6 datasets while the RBC BMD_{50} was based on a single study, this is because scientifically acceptable RBC data are only available from a single study. As discussed in the preceding objection response, the fact that EPA used all available data sets in its modeling does not affect the validity of its modeling (Ref. 76).

Inconsistent application of model. EPA did not apply its model inconsistently; the difference to which the Petitioners refers results from the differences between the available data. In order to generate an estimate of the power parameter, data at both extremes of the dose-response curve are necessary. Despite the comparatively greater amount of brain inhibition data, the brain data did not provide information at both extremes of the curve. A value of 1.00 is the standard default in this situation for all the NMC dose-response analyses. Moreover, despite the limited information at the extremes of the dose-response curve for estimating power in the brain data, a power parameter of 1.00 is consistent with the available brain data. By contrast, because the available RBC data provides the necessary information at higher doses, the power in the RBC data could be directly estimated and was significantly less than 1.0.

EPA is unable to comment on the analyses referenced in the Petitioners' objections as they failed to provide them. However, EPA has previously explained the reasons for rejecting the suggested analysis based on brain RBC comparisons within the same animal. This is discussed at length in the final rule and response to comments, as well as Unit V*I.E.*2.a of this Order.

f. Objection/hearing request sub issue: Consistency in approach between carbofuran and other NMC chemicals—i. Background. In their comments on the proposed rule, the Petitioners argued that EPA's approach to deriving carbofuran's children's safety factor was inconsistent with its approach to deriving the safety factors for other NMC pesticides. They identified only three specific chemicals: Aldicarb, oxamyl, and carbaryl. With respect to aldicarb they argued that although the relative potency of carbofuran is less than aldicarb, the uncertainty factors assigned by EPA presuppose that carbofuran is ten times more toxic that aldicarb. They claim that the aldicarb data show that by all objective measures of toxicity, aldicarb is nearly twice as acutely toxic as carbofuran across all species tested. They further claim that an alternative approach to relative rankings of carbamates proposed by the SAP in its assessment of the NMCs (which also considered the rate of recovery) also showed aldicarb having approximately twice the potency of carbofuran. They further alleged that the children's safety factor for carbaryl was inconsistent with the safety factor applied to carbofuran. Finally, the Petitioners compared the aPAD, aRfD, and uncertainty factors for oxamyl, aldicarb, and carbaryl, concluding that these were inconsistent with EPA's conclusions for carbofuran.

EPA responded to these comments in both the final rule and the accompanying response to comments document (74 FR 23058 (May 15, 2009)).

In their objections, Petitioners have not identified any specific facts that they believe demonstrate inconsistency. They merely allege that the ''relative potency of carbofuran as compared to other N-methyl carbamates does not correspond with OPP's aPAD for carbofuran relative to those same compounds.''

ii. Denial of hearing request. A hearing is denied on this subissue because there is no disputed factual matter for resolution at a hearing. There is no dispute concerning the children's safety factors that EPA applied to the other carbamates, nor how EPA derived those safety factors. Thus, the only question is whether it was reasonable for EPA to account for the fact that other chemicals had a greater amount of toxicity data, and therefore greater uncertainty, in determining the appropriate children's safety factor, when the statute requires EPA to account for ''the completeness of the data'' (21 U.S.C. 346a(b)(2)(C)). This question requires the application of a legal standard to undisputed facts. Hearings are not appropriate on questions of law or policy (40 CFR 178.32(b)(1)). *See*, 73 FR 42706–42707) (denying NRDC hearing request when the only question raised was whether a human study using only adult males met the regulatory requirement of ''scientifically valid and relevant data''. FDA has repeatedly confirmed that the application of a legal standard to undisputed facts is a question of law for which a hearing is not required. (*See*, *e.g.*, 68 FR 46403, 46406 n.18, 46408, 46409 (August 5, 2003) (whether facts in the record show there is a reasonable certainty of no harm is a question of law; whether a particular effect is a ''harm'' is a question of law)).

In addition, Petitioners have not challenged the substance of EPA's response to their comments, but simply reiterated their comments on the proposed rule. Accordingly, a hearing is

not warranted, as the objection is subissue is irrelevant, and therefore immaterial, with regard to EPA's final tolerance revocation regulation (40 CFR 178.32(b)(3)). *See* 73 FR 42698–42699 (July 23, 2008) (When an objector does not challenge EPA conclusions in the section 408(d)(4)(iii) order but rather challenges some prior conclusion that was superseded by the section 408(d)(4)(iii) order, the objector has not raised a live controversy as to an issue material to the section 408(d)(4)(iii) order; 53 FR 53176, 53191 (December 30, 1988) (where FDA responds to a comment in the final rule, repetition of the comment in objections does not present a live controversy unless the objector proffers some evidence calling FDA's conclusion into question)).

Nor have they submitted evidence that calls the substance of EPA's conclusions into question. Petitioner's entire argument concerning this issue is a single conclusory sentence. A hearing will not be granted on ''mere allegations'' or ''general contentions.'' (40 CFR 178.32(b)(2)) (See 53 FR 53176, 53199 (December 30, 1998)) (''Rather than presenting evidence, [the objector] asserts that FDA did not adequately justify its conclusions. Such an assertion will not justify a hearing.'').

iii. Denial of objection. Although it is unclear which precise chemicals the Petitioners believe demonstrate that EPA was inconsistent, the only ones on which any allegations were arguably presented were those identified in their comments on the proposed rule: aldicarb, carbaryl, and oxamyl. Accordingly, EPA denies this objection for the same reasons that EPA explained in its final rule and comment responses.

In their comments, the Petitioners provided information on the oral LD_{50} in rat and the $BMDL_{10}$ for AChE in rat brain or human RBC. The comments also provided uncertainty factors for the three NMCs, the respective aRfD [17] or aPAD [18] and the cumulative risk assessment oral potency factor. The LD_{50} and $BMDL_{10}$, values provided are not completely accurate.

The allegations and the supporting information contained in Petitioners' comments were inaccurate. For example, the LD_{50} values in the oxamyl RED were 3.1 mg/kg (male) and 2.5 mg/kg (female), rather than 30 mg/kg as the Petitioners claimed. Further, the Agency's recent hazard assessments of carbaryl and aldicarb are each consistent with EPA policies and practice, as well as with the Agency's approach to the assessment of carbofuran.

The Petitioners' assertions regarding aldicarb were based on an earlier assessment. At the time the Agency conducted the assessment to which the commenters refer, the Agency was unaware of the difference in sensitivity between PND17 and PND11 animals. Since EPA became aware of the differences, EPA has required the aldicarb registrant to conduct a CCA study in PND11 rats; the Agency anticipates the receipt of this study and the companion range-finding and time course studies in 2009. In the absence of these data, EPA will apply the statutory default children's safety factor to account for the additional sensitivity of PND11 animals, because the Agency lacks any ''reliable data'' that could be used to derive a reduced factor that EPA could determine will be ''safe for infants and children.''

With regard to the carbaryl children's safety factor, the available brain and RBC dose-response data in PND11 pups include data from the lower end of the dose-response curves. ORD's comparative AChE data with carbaryl show that at the lowest dose 20% or near 20% inhibition in brain and RBC AChE was observed. Although not ideal, the carbaryl data provide information closer to the benchmark response of 10%, which allows for a reasonable estimation of the BMD_{10} and $BMDL_{10}$. This is distinctly different from ORD's data with carbofuran in PND11 and PND17 pups where 50% or greater RBC AChE inhibition was observed at the lowest dose.

Petitioners' other comparisons are equally inapposite. The LD_{50}, $BMDL_{10}$, and relative potency factor from the cumulative risk assessment are each measures of chemical potency. Thus, these calculations provide reasonable comparisons of the relative potency of aldicarb, carbofuran, and oxamyl. However, the Petitioners' allegations were based on comparisons of the aPAD, aRfD, and uncertainty factors, which are not measures of potency and should not be interpreted as such (Ref. 79). The magnitude of the uncertainty factors is intended to account for uncertainty in the available data for a particular chemical. For example, it is standard practice to apply a 10X uncertainty factor for extrapolation from animals to humans when ethically and scientifically sound human data are not available for the pesticide of interest. And this explains the difference in the uncertainty factors applied to the three chemicals. Deliberate dosing studies in human subjects conducted with aldicarb and oxamyl were reviewed and accepted by the HSRB for both scientific validity and ethical conduct. This is not the case for carbofuran. As discussed below in Unit VI.G, the HSRB concluded that the carbofuran study was not sufficiently scientifically robust for use in the risk assessment. Therefore, there is less uncertainty in the aldicarb and oxamyl risk assessments since quality data are available in humans and the interspecies factor can be reduced or removed for these chemicals. There are no comparable data for carbofuran.

Accordingly, this objection is denied.

F. *Objections to EPA's Drinking Water Exposure Assessments.*

Petitioners raise separate objections to EPA's estimates of drinking water exposures from contaminated ground water and to the estimates from contaminated surface water. In each objection, Petitioners argue that, based on newly proposed restrictions submitted as part of their objections, the exposure estimates will be significantly lower than EPA's estimates in the final rule.

1. Objections relating to groundwater exposure estimates. Petitioners raise several challenges to the ground water concentration estimates in the final rule. They allege that EPA's estimates are not based on the best available data, but on obsolete data and overly conservative assumptions that are inappropriate because use has been prohibited in all areas like those seen in these data. The objection also claims that the requirements in the new registration proposals to require setbacks from all drinking water wells ranging between 100 and 1,000 feet will ensure that all potential groundwater exposures will be below the level of concern. In support of this objection three analyses were submitted in Exhibits 12, 13, and 14.

a. Objection/hearing request subissue: Reliance on the results of the prospective ground water study (PGW) and historical monitoring to validate groundwater exposure estimates. The Petitioners object that EPA should not have relied for validation on their PGW study or historical monitoring data. They argue that these data are from a period when use was an ''order of magnitude greater.'' Additionally they allege that all areas like those seen in the PGW have now been removed from the carbofuran label, and so the study results do not accurately reflect current risks. In support of this objection, Petitioners reference their comments on the proposed rule, and Exhibit 12.

i. Background. In the proposed rule, EPA relied on a drinking water assessment that used both monitoring data for carbofuran and modeling

[17] aRfD is the acute reference dose.

[18] aPAD is the acute RfD adjusted for the Children's Safety Factor.

methods (Refs. 13, 42, 44, 47, 67). Regarding the potential exposure from contaminated groundwater, the Agency concluded that drinking water taken from shallow wells is highly vulnerable to contamination in areas where carbofuran is used around sandy, highly acidic soil, although sites that are less vulnerable (*e.g.,* deeper aquifer, higher organic matter) could still be prone to have concentration exceeding acceptable exposures. EPA concluded that the results of its modeling were consistent with the results of the available monitoring data, including a PGW study conducted by FMC in the 1980s, when scaled to reflect the current lower rates of application (73 FR 44881).

In their comments, the Petitioners complained that EPA's reliance on the PGW was inappropriate because that study no longer reflected current conditions. Petitioners also summarized the results of their ''National Leaching Assessment'' which used PRZM and ''databases specifically created to provide access to all necessary inputs for a national scale PRZM modeling.'' They claimed that after accounting for the use prohibitions on their September 2008 label, the maximum 1-in-10 year peak concentrations in all potential carbofuran use areas is 1.2–1.3 ppb, while expected concentrations in most areas covered by this assessment are below 1.0 ppb. Neither the ''National Leaching Assessment'' nor the ''National Pesticide Assessment Tool'' upon which the assessment appears to have been based, were submitted to EPA as part of the Petitioners' comments.

In the final rule, EPA revised the assessment conducted for the proposed rule in response to the FMC comments submitted during the comment period, which requested cancellation of the use on a number of crops and imposed a number of restrictions intended to address the potential for groundwater contamination. These restrictions included use prohibitions in certain states, and well setbacks. Taking these into account, ground water concentrations were estimated for all remaining crops on carbofuran labels, using two new Tier 2 scenarios. Based on a new corn scenario in Wisconsin, representative of potentially vulnerable areas in the upper Midwest where use remained, EPA estimated one-in-ten year concentrations for ground water source drinking water of 16 to 1.6×10^{-3} ppb, for pH 6.5 and 7, respectively. Well setback prohibitions of 50 ft were proposed on the new label for the flowable and granular formulations in select counties in Kentucky (7 counties), Louisiana (1 county), Minnesota (1 county), and Tennessee (1 county). Analysis of the impact of these setbacks for the use on corn indicated that the setbacks would not reduce concentrations significantly at locations where exposure to carbofuran in ground water is of concern because at acid pHs, carbofuran does not degrade sufficiently during the travel time from the application site to the well to substantially reduce the concentration.

EPA concluded that the results of the revised corn modeling were consistent with the PGW. Using higher use rates than currently permitted, the peak concentration measured in the PGW study was 65 ppb; when scaled to current use rates, the estimated peak concentration was 11 ppb. The final rule explained that EPA's modeling is also consistent with a number of other targeted groundwater studies conducted in the 1980s showing that high concentrations of carbofuran can occur in vulnerable areas; the results of these studies as well as the PGW study are summarized in References 13 and 67 (74 FR 23079).

ii. Denial of hearing request. For this hearing request, the Petitioners have failed to proffer evidence, which would, if established, resolve a material issue in their favor. First, Petitioners' evidentiary proffer does not support their contention, and consequently, EPA is unable to conclude that there is a reasonable possibility that the issue could be resolved in its favor (40 CFR 178.32(b)(2)). Petitioners' own experts relied on the PGW to validate the modeling submitted in support of this objection and to demonstrate the safety of the tolerances. The Executive Summary of the National Carbofuran Leaching Assessment states

> ''[a] model validation study was conducted in which the results of a prospective groundwater monitoring (PGW) study conducted for cabofuran in Maryland from 1981–1983 were compared to the model simulations that most closely matched the PGW study site in terms of location, soil texture, organic carbon content, and pH. The annual peak concentrations during the simulation are on the order of 9 to 11 ppb, which are similar to the measured concentrations in the PGW study (9 to 10 ppb after adjusting for application rate). The validation provides context that the model predictions are reasonable.''

(Exhibit 12 at 7). *See, e.g.,* 57 FR 33244 (July 27, 1992) (Studies cited by NRDC do not provide a basis for the hearing because they ''support the [FDA] conclusion in question.'').

Second, this objection is premised on inaccurate factual statements that are directly contradicted by the record. For example, the objection disregards the fact that EPA scaled the PGW modeling to reflect the lower current use rates. The Petitioners present no challenge to the methods EPA used to scale the study results; indeed, it is likely that their contractor used the same or similar methodology. Equally, the objection that EPA relied on ''historical monitoring data from a period when carbofuran use was an order of magnitude larger'' is simply incorrect (Ref. Obj at 40). The monitoring results EPA cited in the final rule were from the 1980s, but the targeted monitoring studies were conducted with the same or lower use rates as those permitted under the current labeling (74 FR 23085, May 15, 2009). Such a submission is insufficient to justify a hearing (*See,* 73 FR 42696 (July 23, 2008)(denying hearing where objector incorrectly claimed that EPA had failed to rely on DDVP-specific information in making its children's safety factor determination); 57 FR 6667 (February 27, 1992) (''A hearing must be based on reliable evidence, not on mere allegations or on information that is inaccurate and contradicted by the record.'')

Further, the Petitioners' misrepresentation of EPA's analyses also affects the materiality of the hearing request (40 CFR 178.32(b)(3)). Even if Petitioners were able to successfully refute the validity of the PGW study, it would not affect the validity of the additional monitoring data cited in the final rule (74 FR 23079 (May 15, 2009)), on which EPA also relied to validate its monitoring. *See,* 49 FR 6672 (February 22, 1984) (challenge to one of five related studies; in the absence of any additional data bearing on the clinical study, the objection constitutes nothing more than an allegation).

Finally, the evidentiary proffered with respect to the Petitioners' allegation that all areas with conditions similar to those found in the PGW have been removed from the label is insufficient to warrant a hearing (40 CFR 178.32(b)(2)). To the extent this allegation is based on the information presented as part of the 2008 comments, this claim was rebutted in EPA's final rule, by the modeling based on the Wisconsin corn scenario, and by the lack of any underlying analyses to support of Petitioners' comments. As explained in the final rule, the information provided is insufficient to allow EPA to confirm the Petitioners' contention that there is no overlap between use and all potentially vulnerable ground water (74 FR 23061–23062 (May 15, 2009)).

The evidence submitted along with this objection does not cure this defect. The only evidence proffered in this regard is the Petitioners' comments on

the proposed rule, and the new analysis submitted in Exhibit 12. As previously discussed, mere reiteration of comments made in response to the proposed rule does not provide an adequate basis for a hearing, unless the objector proffers some evidence calling EPA's conclusion into question. Consequently, Petitioners' submission on this issue is irrelevant and therefore immaterial, with regard to EPA's final tolerance revocation (40 CFR 178.32(b)(3)). The analysis in Exhibit 12 appears to be the National Leaching Assessment described in Petitioners' comments, but modified to account for the proposed amendments submitted as part of the objections. As noted previously, neither the National Leaching Assessment nor the model on which it was based was submitted as part of the comments. Because the National Leaching Assessment was available during the comment period but was withheld, this information is considered to be untimely and the Petitioners have waived the right to rely on it. For the reasons discussed in Unit VI.D, EPA therefore will not consider it as an appropriate basis for justifying a hearing on its final rule. *See* 73 FR 42683, 42696 (July 23, 2008); 72 FR 39318, 39324 (July 18, 2007). Further, for the reasons discussed in Unit VI.C, EPA has determined that objections and hearing requests based on the newly proposed amendments, as well as evidence or analyses premised on those amendments, are irrelevant, and therefore immaterial, to EPA's determination in the May 15, 2009 final rule that the carbofuran tolerances were unsafe and could not be sustained under FFDCA section 408. Petitioners are actually not objecting to the conclusions in EPA's final rule; rather, they are suggesting that EPA might reach a different result in a different factual scenario. Objections, however, must be directed ''with particularity [at] the provisions of the regulation or order deemed objectionable'' (21 U.S.C. 346a(g)(2)).

iii. Denial of objection. EPA denies this objection on several bases. Based on the information available, and even accounting for the September 2008 geographic restrictions, the Agency cannot confirm the Petitioners' claim that use has been prohibited in all areas with conditions similar to the PGW study. Based on the information that was timely submitted, the only information provided was in map format. While maps are useful for interpreting results, maps alone are insufficient for a thorough evaluation of the Petitioners' claim, in part because of the maps' spatial resolution. The maps submitted were all on a nation-wide scale, which does not provide the level of detail necessary to verify the combination of paramaters (*e.g.,* soil textures, pH) at locations identified as vulnerable. Further, the maps provided by the Petitioner do not represent all carbofuran use patterns. For example, Figure IV–2 on page 42 of the Petitioners' comments does not address the granular use patterns and proposed label prohibitions. In addition, as a general matter, none of the previously submitted assessments provided a comprehensive analysis of the distribution of soil and water pHs for the Midwest, Northwest or any other region of the country where carbofuran use would be permitted on the September 2008 label, or have the Petitioners provided such an analysis with their objections.

Further, the available scientific information does not support their contentions. EPA examined readily available data with respect to ground water and soil pH in order to evaluate the spatial variability of pH. Data from the USGS and other readily available sources do not necessarily encompass the entire range of ground water pH values present within a state. This is especially true for shallow ground water systems, where local conditions can greatly affect the quality and characteristics of the water. Also, pH in a water body can be higher or lower than the tabulated average values. In addition, average ground water pH values for a given area do not truly characterize the area's temporal and especially spatial heterogeneity. This can be seen by comparing differences in pH values between counties within a state, and by the fact that even within a county individual wells will consistently yield ground water with either above- or below-average pH values for that county. The ground water simulations in Reference 84, Appendix I reflect variability in pH by modeling carbofuran leaching in four different soil and subsurface pH conditions (pH 5.25, 6.5, 7.0, and 8.7), representing the range in the aquifer system in that area. This range also approximates the pH range of natural waters in general. The results of the ground water simulations for corn use showed that a relatively small (0.5) decrease in pH from 7 to 6.5 resulted in an increase in the 1-in-10-year peak concentrations of carbofuran in ground water of 4 orders of magnitude.

The results of EPA's revised corn modeling, based on a new scenario in Wisconsin, are consistent with the results of the PGW study developed by the registrant in Maryland in the early 1980s. Using higher use rates than currently permitted, the peak concentration measured in the PGW study was 65 ppb; when scaled to current use rates, the estimated peak concentration was 11 ppb. EPA's modeling is also consistent with a number of other targeted ground water studies conducted in the 1980s showing that high concentrations of carbofuran can occur in vulnerable areas; the results of these studies as well as the PGW study are summarized in References 13 and 67. For example, a study in Manitoba, Canada assessed the movement of carbofuran into tile drains and ground water from the application of liquid carbofuran to potato and corn fields. The application rates ranged between 0.44–0.58 pounds a.i./acre, and the soils at the site included fine sand, loamy fine sand, and silt loam, with pH ranging between 6.5–8.3. Concentrations of carbofuran in ground water samples ranged between 0 (non-detect) and 158 ppb, with a mean of 40 ppb (Refs. 13 and 67).

Finally, as discussed above, to the extent this objection relies on untimely information and analyses, and on the newly submitted registration amendments, the objection is denied as irrelevant and immaterial.

b. Objection/hearing request subissue: Accounting for FMC's label mitigation measures. Petitioners object that EPA's risk assessment relies on ''unrealistic and overly conservative assumptions about potential concentrations,'' and fails to account for FMC's label mitigation measures. They claim that maximum concentrations of carbofuran in groundwater are expected to be below 1.1 ppb, based on the new proposed geographic restrictions and well setbacks. They allege that, ''only permeable soils (*e.g.*, greater than 90% sand and less than 1% organic matter) with acidic soils and water conditions, and shallow water tables (*e.g.*, less than 30 feet) are vulnerable to carbofuran applications.'' They also claim that vulnerable groundwater only exists along eastern seaboard, and in select counties in the United States, where use has already been prohibited. They argue that further confirmation is provided by the available NAWQA data, which show that detections of carbofuran are rare, and occur only at low levels except in areas where use is now prohibited. Finally, Petitioners allege that in the specific regions where carbofuran will continue to be used under the revised label, groundwater pH data collected under the USGS NAWQA program demonstrate that the average pH is approximately 7.25, and in most regions, moving two standard deviations

away from average, which they claim would capture 95% of all observed values, results in pHs that are still greater than 6.0. According to the Petitioners, under such conditions the combination of hydrolysis and drinking water well setbacks would ensure that any carbofuran that might reach ground water sources would degrade to only *de minimis* concentrations less than or equal to 1.1 ppb.

In support of this objection, Petitioners cite the analyses submitted as part of their comments, and the new analyses in Exhibits 12, 13, and 14. Exhibits 12 and 13 contain the revised modeling of the estimated groundwater concentrations from carbofuran use, based on the label restrictions proposed as part of the objections. Exhibit 14 consists of a statistical summary of groundwater pH statistics from the USGS NAWQA database. Means, standard deviations, and numbers of groundwater measurements in the database are summarized by state and land use within each state.

i. Background. In the proposed rule EPA concluded that drinking water taken from shallow wells is highly vulnerable to contamination in areas where carbofuran is used around sandy, acidic soil, although sites that are less vulnerable (*e.g.*, deeper groundwater, less coarsely textured soils) could still be prone to have concentrations exceeding acceptable exposures (73 FR 44881–44883 (July 31, 2008)). EPA also described the available NAWQA monitoring data, and explained the reasons that the monitoring data tends to underestimate exposure for acute risks, such as those carbofuran presents, and so are not sufficiently robust to be used as an input into a quantitative risk assessment or to serve as a lower bound (73 FR 44880–44881 (July 31, 2008)).

As part of their comments on the proposed rule, FMC requested that EPA amend their registration to include a number of geographic use restrictions and migitation measures intended to address the risks to groundwater. In their comments, Petitioners claimed that ''[g]roundwater sources are vulnerable to carbofuran leaching only under certain conditions, namely where permeable soils (*e.g.*, areas with soils greater than 90% sand and less than 1% organic matter), acidic soil and water conditions, and shallow water tables predominate (*e.g.*, where ground water is less than 30 feet).'' The commenters claimed that these conditions are rare in areas where carbofuran would be used under the new label proposed as part of their comments. They further asserted that in ''most states where carbofuran is used, less than 2% of the entire surface areas possess sandy soil texture'' and that ''low pH conditions are not found in carbofuran use areas allowed under the registrant's amended label'' (Ref. 18 at 33–34). They described, but did not submit analyses they claimed to have conducted to demonstrate this. The summary consisted primarily of maps depicting areas identified as vulnerable.

On December 24, 2008, FMC again requested that EPA amend their registration to include additional restrictions intended to further mitigate carbofuran's risks to groundwater.

In response to the September 2008 proposed label restrictions submitted as part of the comments, EPA revised its risk assessment to take into account the new geographic restrictions, as well as the proposed risk mitigation measures. Based on its revised assessment, EPA explained in the final rule that it disagreed that the criteria on the September 2008 label defined 100% of the conditions where ground water sources would be vulnerable to carbofuran leaching. EPA noted that no comprehensive analysis had been provided that evaluated how the Petitioners had reached this conclusion. As discussed in greater detail in EPA's Response to Comments, the information provided as part of the Petitioners' comments—primarily maps depicting areas identified as vulnerable—was not sufficient to allow the Agency to evaluate their claim (Ref. 84).

EPA also disagreed that the commenters provided sufficient information to support their general claim that only high pH conditions (pH above 7) existed in all the areas in which carbofuran could be used under FMC's September 2008 revised label. EPA presented its assessment of the newly submitted label in its Response to Comments document and these issues were addressed in substantial detail there (Ref. 84).

EPA did not evaluate the mitigation measures proposed in the December 24, 2008 submission. The mitigation measures in that submission were incorporated into the measures proposed by the Petitioners as part of their objections on June 30, 2009.

ii. Denial of hearing request. EPA is denying the hearing requested on this objection because, in large measure, if not entirely, it rests on the newly submitted mitigation measures accompanying Petitioners' objections. As discussed in Unit VI.C, EPA has determined that these objections do not warrant a hearing because they are irrelevant, and therefore immaterial, to EPA's determination in the May 15, 2009 final rule that the carbofuran tolerances were unsafe and could not be sustained under FFDCA section 408 (40 CFR 178.32(b)(3)). Petitioners are actually not objecting to the conclusions in EPA's final rule; rather, they are suggesting that EPA might reach a different result in a different factual scenario. Objections, however, must be directed ''with particularity [at] the provisions of the regulation or order deemed objectionable'' (21 U.S.C. 346a(g)(2)). In addition, for the reasons discussed in Unit VI.D, EPA has determined that the new risk mitigation measures are not appropriately considered at this stage of the administrative process, and will not grant a hearing on this basis.

Petitioners' objections provide no further clarification as to what is meant by their claim that EPA's assessment relied on ''unrealistic and overly conservative assumptions.'' Therefore, this objection, and the attendant hearing request, is denied based on Petitioners' failure to state with ''particularity * * * the basis for the objection * * *'' (40 CFR 178.25(a)(2)). As Petitioners raised similar allegations in their comments, EPA has assumed that they intended to incorporate all of the issues raised in the comments on the proposed rule.

To the extent this objection relies on the September 2008 mitigation measures, EPA denies the hearing request because the evidentiary proffer in support of this objection is insufficient to warrant a hearing. The record is clear on its face that EPA did account for the mitigation measures in its revised risk assessment supporting the final rule. A hearing can only be based on a genuine issue of disputed fact (40 CFR 178.32(b)(1)). Where a party's factual allegations are contradicted by the record, there is no genuine dispute (73 FR 42701–42702 (July 23, 2008) (Denying NRDC's hearing request where EPA had revised its residential exposure assessment to address the issue complained of); 57 FR 6667, 6668 (February 27, 1992) (''A hearing must be based on reliable evidence, not on mere allegations or on information that is inaccurate and contradicted by the record.'')).

The objection also suffers from a further defect; many of the allegations in this objection merely reiterate points Petitioners had raised in their earlier comments. For example, EPA addressed the claim that the NAWQA data from 1993–2006 rarely show detections of carbofuran, and that in ''almost every instance'' the observed concentrations are low. EPA also addressed the claim that only areas with permeable soils (*e.g.*, areas with soils greater than 90% sand and less than 1% organic matter), acidic soil and water conditions, and

where shallow water tables predominate (*e.g.*, where ground water is less than 30 feet) present significant risks of leaching. As previously discussed, mere reiteration of comments made in response to the proposed rule does not provide an adequate basis for a hearing, unless the objector proffers some evidence calling EPA's conclusion into question (40 CFR 178.32(b)(3)). *See, e.g*, 73 FR 42701–42702 (July 23, 2008); 53 FR 53176 (December 30, 1988).

The evidence submitted in Exhibits 12–14 does not cure these defects. As a preliminary matter, much of this evidence is untimely. The analyses in Exhibits 12 and 13 appear to be the National Leaching Assessment described in Petitioners' comments, but modified to account for the proposed amendments submitted as part of the objections. As noted previously, neither the National Leaching Assessment nor the model on which it was based was submitted as part of the comments. Certainly, there is no justification for Petitioners' refusal to provide the analyses that were available during the comment period. Because the National Leaching Assessment was available during the comment period but was withheld, this information is considered to be untimely and the Petitioners have waived the right to rely on it. Accordingly, as discussed in Unit VI.D, because this evidence was not presented as part of the Petitioners' comments, EPA considers that the evidence submitted in support of this objection is not appropriately considered as a basis for justifying a hearing on the final rule. *See* 73 FR 42683, 42696 (July 23, 2008); 72 FR 39318, 39324 (July 18, 2007). And in the absence of this evidence, this portion of the objection consists of mere allegations and denials, which do not warrant a hearing (40 CFR 178.32(b)(2)).

But even assuming that the evidence was appropriately considered, the evidence is insufficient, even if established, to justify the factual determination urged (40 CFR 178.32(b)(3)). Nothing in Exhibits 12–13 provides any information that substantively differs from the information summarized in the comments. Second, even assuming that the analysis in Exhibit 14 is valid, on its face the submission states that the analysis only addresses 95% of the samples chosen by the study; no information was provided to explain how the samples relate to the state or other geographic area in which carbofuran would be used. This is important because NAWQA samples were not evenly distributed across most states, but tended to be concentrated in particular regions; in statistical parlance, the samples were not collected randomly. The maps in Exhibit 14 clearly demonstrate that the study samples were not randomly distributed across the state but were primarily in the southern and eastern portions of each state, even though carbofuran use is not restricted to those portions of the states. In other words, no evidence was provided that would allow the Agency to determine the percentage of the carbofuran use area represented by the 95% of the samples the Petitioners' analysis addressed. Nor was any information provided to document the significance of the remaining 5% of the samples that were not captured by their analysis; for example, although this may have only represented 5% of the samples, it is not clear whether this 5% relates to only 5% of the areas where carbofuran may be used, or whether it actually represent a far greater percentage of the use area.

iii. Denial of objection. EPA denies this objection on several bases.

The contention that the NAWQA monitoring data—or indeed any available carbofuran monitoring data—provide an adequate basis for concluding that concentrations will remain low in the areas where use is now permitted is incorrect. The NAWQA program focuses on ambient water rather than on drinking water sources, is not specifically targeted to the high use area of any specific pesticide, and is sampled at a frequency (generally weekly or bi-weekly during the use season) insufficient to provide reliable estimates of peak pesticide concentrations in surface water. For example, significant fractions of the data may not be relevant to assessing exposure from carbofuran use, as there may be no use in the basin above the monitoring site. Unless ancillary usage data are available to determine the amount and timing of the pesticide applied, it is difficult to determine whether non-detections of carbofuran were due to a low tendency to move to water or from a lack of use in the basin. As a consequence, the data do not support relying on the non-detections as a lower bound, or relying on the detections as an upper bound. The program, rather, provides a good understanding on a national level of the occurrence of pesticides in flowing water bodies that can be useful for screening assessments of potential drinking water sources, especially for those assessments concerned with chronic, rather than acute toxicants.

While there have been additional groundwater monitoring studies that included carbofuran as an analyte, there has been no additional monitoring targeted to carbofuran use in areas where aquifers are vulnerable, and the locations of sampling and the sampling frequencies generally are not sufficient to capture peak concentrations of the pesticide in a watershed or aquifer where carbofuran is used. Capturing these peak concentrations is particularly important for assessing risks from carbofuran because the toxicity end-point of concern results from single-day exposure (acute effects). Pesticide concentrations in ground water are generally the result of longer-term processes and less frequent sampling can often adequately characterize peak ground water concentrations. However, such data must be targeted at vulnerable aquifers in locations where carbofuran applications are documented in order to capture peak concentrations. As a consequence, monitoring data tends to underestimate exposure for acute endpoints.

EPA also disagrees that the Petitioners' criteria of soils composed of 90% sand and less than 1% organic matter, and wells of less than 30 feet define all of the conditions under which ground water sources are vulnerable to carbofuran leaching. No comprehensive analysis was provided evaluating how they reached this conclusion. Although the Petitioners proposed these criteria as restrictions on the carbofuran label, the spatial extent of the label restrictions was not provided. Moreover, as discussed in greater detail in EPA's Response to Comments, the information provided as part of the Petitioners' comments (primarily maps depicting areas identified as vulnerable) was not sufficient to allow the Agency to evaluate their claim (Ref. 84). For example, the percent sand, one of the criteria used in this analysis, varies significantly across a field and the whole range of soil textures may occur at a county-level. The national map provided purports to represent this parameter and several others aggregated together to identify vulnerable locations. This national-scale map does not provide the level of detail needed to verify the combination of paramters at locations identified as vulnerable.

While the assertion that soils with 90 percent sand are the most vulnerable to leaching is in part true, it is misleading. While many states have only small areas of sandy soils, several of the states in which carbofuran would continue to be used under the Petitioners' proposals have quite extensive areas. For example, according to the Petitioners' own assessment of states with high amounts of carbofuran application (Ref. 6), Texas had 4.2% of soils classified ''as sand'', Michigan had 21.3% and Nebraska had

26.3%. In addition, the Petitioners' statements imply that soils that are sandy textured define the universe of soil textures that are vulnerable to leaching. It is possible that more fine-textured soils, for example sandy loams or silt loams, could also be sufficiently permeable to result in carbofuran leaching as it has not been established how much of a reduction in leaching might occur as texture becomes finer. Furthermore, finer textured soils tend to have more cracks and root channels and thus are more prone to preferential flow.

Petitioners' claims regarding pH concentrations are also incorrect. As an initial matter, their analysis fails to prove that pH values in all use areas will ensure that concentrations are below the level of concern because the analysis in Exhibit 14 is based on a flawed statistical analysis. The methodology on which the Petitioners relied—the use of the mean minus two standard deviations—to estimate the 5th percentile (*i.e.,* 95% of the samples above the value) of the distribution of ground water pHs in a state depends strongly on the shape of the distribution. This method relies on three assumptions: 1) That the data is randomly sampled, 2) that the samples are normally distributed (*i.e.,* a bell-shaped distribution), and 3) that the samples are independent (*i.e.,* the sampling locations do not share common characteristics and are not clustered). The maps in Exhibit 14 clearly demonstrate that the study samples were not randomly collected across each state but were primarily in the southern and eastern portions of the states, even though carbofuran use is not restricted to those portions of the states. For example, Figure 1 in Exhibit 14 clearly shows that the vast majority of the wells sampled in North Dakota and South Dakota are in the eastern half of the state, and in Nebraska in the southern and eastern parts. Therefore the wells sampled will not be representative of the full distribution of wells in the state. On the second assumption, the analysis provided by the Petitioners did not determine whether the distribution was normal; the accuracy of percentiles at the tails of the distribution, such as the 95th percentile, are very sensitive to the accuracy of this assumption. Environmental data are usually not normally distributed; log-normal distribution is more typical (Ref. 60). If the shape of the distribution is not known, a non-parametric or 'empirical' estimation of the percentiles is better because it does not depend on the same assumption of normal distribution. Finally, the pH in various wells may or may not be statistically independent. Samples taken across the landscape are usually spatially correlated up to a certain distance. Beyond that distance, they are statistically independent. Unfortunately, this was not determined as part of this analysis. While pH is clustered across the state, there is considerable spatial variability in pH conditions for both the subsurface and surface environments. This is especially true for shallow ground water systems, where local conditions can greatly affect the quality and characteristics of the water. This can be seen by comparing differences in pH values between counties within a state, and noting that even within a county individual wells will consistently yield ground water with either above- or below-average pH values for that county. Furthermore, even if the statistical calculations was correct, by definition this evidence would not support a determination that groundwater concentrations would never exceed 1.1 ppb, as 5 percent of the samples would result in concentrations that are higher.

In conducting its modeling for the final rule, EPA examined readily available data with respect to ground water and soil pH to evaluate the spatial variability of pH in Wisconsin. As part of the final rule, EPA explained that ground water pH values can span a wide range; this is especially true for shallow ground water systems, where local conditions can greatly affect the quality and characteristics of the water (higher or lower pHs compared to average values). As noted even within counties in the same state, wells will consistently yield ground water with either above- or below-average pH values for that county. Thus, EPA concluded that average ground water pH values for a given area do not truly characterize the (temporal and especially spatial) heterogeneity common in most areas. The actual significance of using a single pH even if it is a 95th percentile value, which as described above was not demonstrated to be accurately calculated, is not clear. For this reason, EPA bracketed potential exposure using a range of pH values.

As further explained in the final rule, the considerable spatial variability in pH conditions for both the subsurface and surface environments is significant because the pH has a large effect on the persistence of carbofuran. This is demonstrated by the results of the ground water modeling simulations from the South-Central Wisconsin scenario, which show that what might appear as relatively small variations in soil pH can have a significant impact on estimates of carbofuran in ground water. Under more acidic conditions, the hydrolysis half-life increases from 28 days at pH 7 to years or more at pHs less than 6. Further, the results of EPA's corn ground water simulations (bounded by the high and low pH values of the aquifer system underlying the scenario location) showed that a relatively small (0.5) decrease in pH from 7 to 6.5 resulted in an increase by 4 orders of magnitude in the 1-in-10-year peak concentration of carbofuran.

The ground water simulations reflect variability in pH by modeling carbofuran leaching in four different pH conditions (pH 5.25, 6.5, 7.0, and 8.7), representing the range in the Wisconsin aquifer system. The upper and lower bound of pH values that EPA chose for this assessment were measured values from the aquifer, and the remaining two values were chosen to reflect common pH values between the measured values. Estimated 1-in-10-year peak ground water concentrations at pH 7 are 1.6×10^{-3} ppb; however, the estimated 1-in-10-year peak ground water concentration at pH 6.5 is 16 ppb, nearly 4 orders of magnitude greater. EPA explained that, because of carbofuran's sensitivity to pH, the Agency had concerns that any given set of mitigation measures would not successfully protect groundwater source drinking. Data indicate that pH varies across an agricultural field, and also with depth (Ref. 49). In particular, the pH can be different in groundwater than in the overlying soil. The upper bound of the carbofuran concentrations estimated by EPA at pH 6.5 is much greater than the concentrations the Petitioners reported in their objections. EPA's complete assessment of the 2008 revised label can be found in its Response to Comments document and these issues were addressed in more detail there (Ref. 84).

For all of these reasons, the objection is therefore denied.

c. Objection/hearing request subissue: Consistency with groundwater concentration in NMC–CRA. Petitioners object that EPA's estimates in the final rule are inconsistent with the groundwater concentration estimates EPA developed for the NMC (CRA). However, they do not identify any specific inconsistency, they simply make the general allegation. They allege that, by contrast, their assessment, which estimated maximum concentrations of 1.1 ppb, is consistent with the NMC CRA.

i. Background. The NMC CRA examined carbofuran at two sites, northeastern Florida and the Delmarva Peninsula. In Florida, concentrations

were found to be below levels of concern because of high pH, but in Delmarva, both in corn and in melon scenarios EPA estimated that 90% of daily concentrations could be as high as 20.5 and 25.6 ppb, respectively. In the proposed and final rules, EPA cited the modeling conducted for the NMC to support its estimates. In addition, EPA used the same methodology used to develop the estimates for the NMC CRA, to conduct the modeling for the additional crops and locations on which carbofuran use occurs.

Although the Petitioners alleged that their estimates were consistent with the NMC CRA in their comments on the proposed rule, they did not identify any specific inconsistency between EPA's groundwater estimates for the proposed rule and its estimates for the NMC CRA.

ii. Denial of hearing request. EPA denies the request for a hearing on this subissue because there is no disputed factual matter for resolution. There is no dispute as to the methodology EPA used to conduct its modeling in either assessment. Petitioners have not identified any specific inconsistency between EPA's groundwater exposure assessment conducted for this rule and the assessment conducted for the NMC CRA. Instead, they rely on mere allegations and denials. As EPA's regulations make clear, a mere ''denial'' of an EPA position is not sufficient to satisfy the standard for granting a hearing (40 CFR 178.32(b)(2)). Moreover the question of whether EPA's assessments are consistent requires the application of a legal standard to undisputed facts, and is thus a legal or policy question. Hearings are not appropriate on questions of law or policy (40 CFR 178.32(b)(1)). (73 FR 42696–42697) (denying a hearing on EPA's decision to reduce the children's safety factor, in the absence of data from the endocrine screening program, on the ground that the objection constituted a legal issue). FDA has repeatedly confirmed that the application of a legal standard to undisputed facts is a question of law for which a hearing is not required. (*See, e.g.,* 68 FR 46403, 46406 n.18, 46408, 46409 (August 5, 2003) (whether facts in the record show there is a reasonable certainty of no harm is a question of law; whether a particular effect is a ''harm'' is a question of law)).

Neither does the claim that their modeling is consistent with the NMC CRA justify a hearing on this question. As EPA explained in the final rule, the values estimated in the modeling conducted for the NMC CRA are greater than the 1 ppb that FMC claims is the maximum expected 1-in-10-year peak concentration. A hearing is not warranted where the claim is clearly contradicted by the record (40 CFR 178.32(b)(2)). *See, e.g.,* 57 FR 6667 (February 27,1992) (''A hearing must be based on reliable evidence, not on mere allegations or on information that is inaccurate and contradicted by the record.''); 49 FR 6672 (February 22, 1984) (hearing denied where claim was based on demonstrably false premise).

iii. Denial of objection. As discussed in the final rule and response to comments document, the Petitioners' results are not consistent with the estimates developed for the NMC CRA. The NMC CRA examined carbofuran at two sites, northeast Florida and the Delmarva Peninsula. In Florida, concentrations were found to be below levels of concern because of high pH, but in Delmarva, both in corn and in melon scenarios EPA estimated that 90% of daily concentrations could be as high as 20.5 and 25.6 ppb, respectively. These values are greater than the 1 ppb that Petitioners claim is the maximum expected 1-in-10-year peak concentration.

2. Objections relating to surface water exposure estimates—a. Objection/ hearing request subissue: Use of percent of the crop treated (PCT) in surface water modeling. The Petitioners object to the assumption in the surface water assessments in the final rule that 100% of the crops in a watershed will be treated with carbofuran. The Petitioners argue that actual carbofuran sales data on a county basis from 2002-present demonstrate that the current carbofuran PCT is less than 4.25%. Using this PCT, and taking into account the recently submitted ''no application buffers,'' the Petitioners allege that the modeling in Exhibit 15 demonstrates that carbofuran concentrations in surface water will not exceed 1.1 ppb, ''which is below the level of concern.''

In support of this objection, the Petitioners reference county level sales data that were submitted to the Agency on November 7, 2008, after the close of the comment period. They also reference the use tracking system proposed in their recent registration amendments (Exhibit 2) and the modeling contained in Exhibit 15.

i. Background. To conduct an assessment of a pesticide's potential to contaminate surface water, EPA estimates the percentage of farmland in a watershed on which a particular crop is grown (*e.g,* corn); this is referred to as the percent cropped area (PCA). EPA then assumes that 100% of the cropped area is treated with the pesticide that is the subject of the assessment. In the proposed rule, EPA explained that the reason for its assumption that 100% of PCA in a watershed is treated is due to the large uncertainties in the actual PCT on a watershed-by-watershed basis. EPA developed an extensive discussion of the uncertainties in PCT and how they impact drinking water exposure assessment in its proposed rule (73 FR 44885 (July 31, 2008)), and in a background document previously provided to the SAP considering the draft carbofuran NOIC (Ref. 45). The data are generally not available on the scale necessary to allow for reliable estimates of pesticide use in a watershed. Such data are generally available only on a statewide basis, and if such estimates are used to account for PCT, it will underestimate the risks for some drinking water facilities in the state, as these estimates represent only a state-wide average. In some cases this underestimate can be substantial, because usage may not be evenly distributed across the landscape; due to differences in factors like pest pressure, local consultant recommendations, and weather, it may be much higher in some areas. Further, temporal uncertainties can result in changes in use that might be driven by weather, changes in insect resistance over time, and changes in agronomic practices. To date, methods that account for this uncertainty, given the nature of the available data, have not been developed. EPA explained that as a consequence, the Agency could not accurately estimate a drinking-water watershed scale PCT that, when used in a quantitative risk assessment on a national or regional basis, standing alone, provides the necessary level of certainty to allow the Agency to confidently conclude that exposures will meet the FFDCA section 408 safety standard. EPA also described the results of a sensitivity analysis conducted using a low PCT estimate.

In their comments on the proposed rule, the Petitioners criticized the Agency for this assumption, arguing that because carbofuran is used on such a low percentage of crops nationally that it is unrealistic to assume that such a large percentage of any individual watershed would be treated. To support their claims that the PCT would generally be below 4%, they referenced county-level ''use'' data, but failed to provide either the data or methodology on which they relied until after the close of the comment period.

In the final rule, EPA explained at length the reasons that the information provided during the comment was insufficient to allow the Agency to reliably estimate a lower PCT for carbofuran. EPA did not review the information submitted after the close of

the comment period. However, based on the information that could be gleaned from the description in the comments, EPA explained that the data on which they relied did not appear to be ''use'' data, but sales data, and that both the data and methodology failed to support the claims made in the Petitioners' comments. The Agency also described the results of a sensitivity analysis conducted to determine the impact that PCT could have on the risk assessment, which demonstrated that even assuming that a low percentage of a watershed is treated with carbofuran, exposures will still be unsafe for infants.

ii. Denial of Hearing Request. To the extent Petitioners' objection is limited to EPA's refusal to use a 4% PCT in estimating drinking water concentrations, EPA has concluded that the objection does not warrant a hearing because the Petitioners' objection on this subissue is irrelevant, and therefore immaterial, with regard to EPA's final tolerance revocation. The Petitioners have not responded to EPA's explanation in the final rule of the reasons that the information and methodology on which they relied to estimate a 4% PCT was flawed. As discussed in the final rule, EPA had assumed that the data on which they were relying was sales data, and so the resubmission of the information sent in after the close of the comment period only confirms that the Agency's analysis was correct; it does not rebut EPA's substantive concern that such information is insufficient to support the conclusions the Petitioners assert. In essence, the Petitioners ignored EPA's extensive analysis of this issue in the final rule and simply refiled their comments on the proposal as if EPA's determination in the final rule did not exist. The statute, however, requires that objections be filed on the final rule not the proposal. By ignoring EPA's final rule on this issue, Petitioners have failed to lodge a relevant objection. When an objector does not challenge EPA's conclusions in the final rule, but merely reiterates comments made on the proposed rule, without submitting some evidence that calls EPA final rule conclusions into question, the objector has not raised a live controversy as to an issue material to the final rule (*See* 73 FR 42698–42699 (July 23, 2008) (denying several NRDC hearing requests because the objections were based on EPA's preliminary DDVP risk assessment, rather than the revised risk assessment published with the final order); 53 FR 53176, 53191 (December 30, 1988) (where FDA responds to a comment in the final rule, repetition of the comment in objections does not present a live controversy unless the objector proffers some evidence calling FDA's conclusion into question)).

An additional flaw in this objection is that the proffered evidence is untimely and insufficient. Neither the proposed registration amendments nor the evidence submitted as part of this objection, including the modeling in Exhibit 15, was provided to the Agency during the comment period. The modeling in Exhibit 15 was available, because it was summarized in Petitioners' comments; however the underlying modeling was withheld. Equally, there is no evident reason that the sales data could not have been submitted as part of the Petitioners' comments. Petitioners relied on this data to perform analyses completed in 2006–2007, for purposes of the January 2008 SAP review of the draft carbofuran NOIC, so the information was available long before their comments needed to be filed. Accordingly, as discussed in Unit VI.D, this information is not appropriately considered as a basis for justifying a hearing on its final rule. Moreover, as explained below, because no evidence was submitted in support of the newly proposed use tracking system, reliance on that proposal to support a low PCT constitutes nothing more than an allegation. This is not an adequate basis on which to grant a hearing (40 CFR 178.32(b)(2)). Finally, to the extent this objection relies on Petitioners' recently proposed risk mitigation measures, as discussed in Units VI.C and D, objections and hearing requests based on these new risk mitigation measures are not appropriately considered at this stage of the administrative process, and are denied as immaterial (40 CFR 178.32(b)(3)).

iii. Denial of objection. While the Agency typically uses PCT in developing estimates of pesticide residues in food, this is entirely different than developing estimates of the percent of a watershed that is treated for purposes of estimating drinking water exposures. Food is generally randomly distributed for sale across the nation without regard to where it is grown. This tends to even out any PCT variations that may arise on local levels. By contrast, the source of water consumption (and consequently exposure) is localized, either in a private well or a community water system. The PCT in any watershed will therefore directly impact the residues to which people living in that watershed will be exposed.

For this reason, among others, for drinking water exposure estimation, the Agency assumes that 100% of the cropped area (or 100% PCT) is treated with the pesticide. EPA also makes this assumption due to the large uncertainties in the actual PCT on a watershed-by-watershed basis. EPA included an extensive discussion of the uncertainties in PCT and how they impact drinking water exposure assessment in its proposed rule (73 FR 44834) and in a background document provided to the SAP considering the draft carbofuran NOIC (Ref. 45). Because usage is often not evenly distributed across the landscape, due to differences in factors like pest pressure, local consultant recommendations and weather, it may be much higher in some areas. Further, temporal uncertainties can result in changes in use that might be driven by weather, changes in insect resistance over time, and changes in agronomic practices. To date, methods that account for this uncertainty, given the nature of the available data, have not been developed. Consequently, EPA cannot accurately estimate a drinking-water watershed scale PCT that, when used in a quantitative risk assessment on a national or regional basis, standing alone, provides the necessary level of certainty to allow the Agency to confidently conclude that exposures will meet the FFDCA section 408 safety standard.

In most cases, EPA agrees that it is unlikely that 100% of the crop will be treated with a single pesticide in most watersheds, particularly in larger watersheds. However, for small watersheds, it is reasonable to assume that an extremely high percentage of the crops in the watershed may be treated.

Moreover, EPA has an obligation to evaluate all legally permitted use practices under the label, and to ensure that all such use meets the requisite statutory standards, not simply to base its decisions on the practices the majority might typically use. The September 2008 proposed label, submitted during the comment period, imposes no restriction on the application of carbofuran related to whether a particular percent of the watershed has been treated. Thus, even with the restrictions on FMC's September 2008 labels, it remains legally permissible for 100% of the watershed to be treated with carbofuran.

Nor is EPA aware of an enforceable mechanism to ensure that farmers applying pesticide to their individual fields will have the ability to indendently determine whether a particular percentage of the watershed has been treated. There are significant practical difficulties inherent in implementing such label directions, as

they force individual growers to have continual knowledge of the variances of the behavior of other farmers across the entire watershed. While for small watersheds that involve only one or two farms it might be feasible for neighbors to independently coordinate applications with respect to adjacent fields, for larger watersheds or for smaller watersheds with multiple farms, the practical difficulties increase significantly. And as explained below in Unit VI.F.2.D, significant questions remain regarding the efficacy of Petitioners' proposed use tracking system.

However, in the final rule, EPA conducted a sensitivity analysis to explore the impact of the PCT assumption on dietary risk using an assumed 10% PCT, a figure proposed previously by FMC (74 FR 23065–23066). The results of that analysis demonstrated that even at these low percentages, which may significantly underestimate exposures, particularly in small watersheds, carbofuran exposures from drinking water contribute significantly to children's dietary risks. EPA conducted a similar sensitivity analysis for the final rule, discussed below in Unit VI.F.3, which demonstrates that even assuming that a low percentage of a watershed is treated, exposures will still be unsafe for infants.

Since EPA's 2006 determination that carbofuran does not meet the safety standard, FMC has submitted three assessments that relied in part on what they refer to as ''county-level usage data'' (Refs. 29, 74, and 89). Based on the information provided with the objections, the original source of the ''county-level usage data'' is sales data, apparently collected at the distributor level. The Petitioners claim to have augmented these sales data in an unspecified manner, by incorporating information from the distributors, which was used to allocate carbofuran usage at the county level. In their comments on the proposed rule, the Petitioners provided maps representing county level and watershed-scale use estimates, but did not provide the actual usage estimates in any clearly understandable format.

The Petitioners did submit these sales data as part of their objections, but have provided only a limited description of how these data were collected and no description of how they were actually analyzed or validated; what was characterized as ''careful and proven techniques to capture this data'' were not described. The method used to attribute carbofuran sales to counties was not described. Nor have they explained what is meant by negative usage estimates.

The Agency agrees that county-level use data would be useful in generating reasonable estimates of PCT that might be appropriately used in drinking water assessments. However, no usage data have been provided. Rather, the Petitioners only provided county-level use estimates for Illinois, although they have not submitted the analyses that presumably are the basis for the estimates. County-level estimates to support other risk assessments have not been submitted by the Petitioners. Further, the Petitioners have provided limited characterization of the source data, noting that these data were derived from FMC billings and ''EDI data'', but they did not provide either the billings or the EDI data, nor explain how they were collected.

There are two major problems in equating sales information with use information: (1) Mapping the point and time of sale to the point and time of use and (2) allocating the amount sold across the crops on which it can be used. The submission did not explain how either of these two problems was resolved.

The first problem is highlighted by the fact that for some county/crop/year combinations in the submitted tables, estimated usage is negative. Use of a pesticide clearly cannot be negative, but sales at a particular point and time can be negative because buyers can return unused product. The fact that some usage estimates are negative suggests that buyers are returning carbofuran product purchased in an earlier time period or from another location. But if farmers are returning carbofuran purchased in a previous time period, any assessment must also account for the possibility that they also could use stocks purchased previously. Thus, use in a given year may be greater than sales in that year. Similarly, if farmers are returning carbofuran purchased in another location, it must be recognized that they could be using carbofuran purchased in another location. Thus, use in any given county or watershed could be greater than sales in that locality. That is, regardless of whether the issue is use over space, time, or both, the results are that usage will be underestimated in some localities. Further, zeroing out the negative values will not result in appropriate estimates; the negative usage estimates merely make the problem manifest. Even total sales at a point in time may underestimate actual use.

The second problem arises with the allocation of product sales across the crops on which it can be used. The data provided as part of the objections were aggregated for all crops, including crops on which use is no longer allowed, such as cotton or alfala; the data were not collected based on the individual crops. No explanation is provided to indicate how the Petitioners divided the quantity sold between the amount used on cotton, on alfalfa, and on all other crops. Since part of the purpose of the Petitioners' assessment is presumably to show that eliminating the use on the cancelled crops, such as alfalfa, will sufficiently reduce any risks, it is critical to know how they determined the amount used on alfalfa as opposed to other crops, and it is difficult to imagine how this could be done with any accuracy. For example, one could assume that the chemical is used on equal proportion of all crops, but there is no basis for such an assumption. It might not matter if all EPA were interested in was the total amount used in an area, but this is not useful for purposes of assessing the risk on a smaller scale, such as in the present case.

The method the Petitioners used to generate use estimates from the sales data does not account for the uncertainties described above nor for the potential for use to be locally concentrated due to pest pressures. The method that is summarily described as having been used to allocate county-level usage estimates to watersheds appears to be similar to a method that has been used by others to calculate ''best-estimate'' county-level PCT (Ref. 73) to map nationwide pesticide usage. However, these methods are not appropriate for calculating PCTs for surface drinking water sources or watersheds that drain to community water systems, because they do not adequately account for the uncertainty in the data at the appropriate spatial scale. This methodology produces an estimate that is a measure of central tendency and, as such, roughly half the estimated values will underestimate the PCT. Furthermore, because pesticide use varies from year to year, and can in some cases be patchy, with high levels of use in small areas and little use in most areas, the underestimates of PCT can be substantial in small watersheds. As previously noted, methods for calculating PCT that account for these uncertainties have not been developed. Accordingly, EPA denies this objection.

b. Objection/hearing request subissue: Results of FMC modeling. The Petitioners claim that the prior surface water assessments submitted to the Agency demonstrated that carbofuran concentrations in surface water were not expected to exceed 1.1 ppb. They claim

that these studies provide further confirmation of the results of the new modeling conducted to support their objections, which also concluded that concentrations would be less than 1.1 ppb. In support of this objection, the Petitioners reference the previously submitted studies, along with the modeling provided in Exhibit 15. The modeling in Exhibit 15 appears to be the modeling that was originally summarized in their comments, but that the Petitioners withheld. The modeling was also supplemented to account for the newly proposed registration amendments submitted as part of the objections.

i. Background. In their comments, the Petitioners alleged that the results of their modeling showed that concentrations of carbofuran in surface water would not exceed 1.1 ppb. The comments referenced two surface water assessments that they had submitted to the Agency prior to the proposed tolerance revocation: a surface water assessment based on an Indiana Community Water System (CWS) (Refs. 89 and 90) and an assessment based on the Watershed Regressions for Pesticides (WARP) model. They also summarized additional surface water modeling that had been conducted to support their comments on the proposed rule, a Nationwide Community Water System Assessment (Ref. 57), but did not submit the actual modeling, or identify or describe in detail the model on which they relied.

In the final rule, EPA explained the flaws in all of the Petitioners' assessments that caused the Agency to reject the studies' conclusions. For the two assessments that had actually been submitted to the Agency, EPA was able to definitively explain the flaws. With respect to the Nationwide CWS modeling that was summarized in their comments, EPA evaluated the modeling based on the information it was able to glean from the description provided in the comment discussion.

ii. Denial of hearing request. A hearing is denied on this subissue because EPA has concluded that Petitioners' objection on this issue is irrelevant, and therefore immaterial, with regard to EPA's final tolerance revocation regulation (40 CFR 178.32(b)(3)). In the final rule, and in other rulemaking documents, EPA provided a detailed explanation of the bases for its conclusions that the previously submitted assessments were invalid (74 FR 23062–23064 (May 15, 2009)). Petitioners have not challenged EPA's explanation, nor explained how the resubmission of the same studies addressed the substantive issues EPA raised. Because Petitioners ignored EPA's extensive analysis of this issue in the final rule, they have essentially refiled their comments on the proposal as if EPA's determination in the final rule did not exist. The statute, however, requires that objections be filed on the final rule, not on the proposal (21 U.S.C. 346a(g)(2)). By ignoring the EPA's final rule on this subissue, Petitioners have failed to lodge a relevant objection. Petitioners' resubmission of the exact same information does nothing to call EPA's conclusion into question, which is what is required to maintain their claim at this stage of the proceeding. When an objector does not challenge EPA conclusions in the final rule, but merely reiterates comments made on the proposed rule without submitting some evidence that calls EPA final rule conclusions into question, the objector has not raised a live controversy as to an issue material to the final rule. (See 73 FR 42700–42701 (July 23, 2008) (hearing request denied where NRDC failed to challenge EPA's conclusion that challenged study is consistent with several other studies, but merely reiterated assertions from its original petition that the study is not representative); 53 FR 53176, 53191 (December 30, 1988) (where FDA responds to a comment in the final rule, repetition of the comment in objections does not present a live controversy unless the objector proffers some evidence calling FDA's conclusion into question)).

With respect to the modeling submitted in Exhibit 15, this evidence is untimely. The modeling submitted in Exhibit 15 appears to be a fuller description of Petitioners' National CWS Assessment, which was described but not provided as part of their comments on the proposed rule. The modeling also has been revised to account for the newly proposed risk mitigation measures. However, even with the greater detail provided, the information contained in Exhibit 15 still fails to address many of the deficiencies EPA identified in the final rule. For example, although some further detail has been provided of how the Petitioners modeled the vegetated buffer strip, the complete information EPA would need to assess the modeling was not provided; the material provided is insufficient to understand how the simulations were performed or how the simulations were parameterized. Nor have the Petitioners submitted the inputs used in modeling estimated concentration from spray drift. As discussed in Unit VI.D, because the modeling in Exhibit 15 was not provided during the comment period, and to the extent that the detailed information EPA identified as lacking in the final rule has still not been provided, the evidence submitted in Exhibit 15 is not appropriately considered as a basis for justifying a hearing on its final rule. And in the absence of this evidence, this objection consists of mere allegations and general denials, which are inadequate to justify a hearing (40 CFR 178.32(b)(2)).

Further, to the extent that this objection relies on the ''no application buffers,'' or the proposed use tracking system newly submitted as part of their objections to support the models' assumption of a low PCT, the hearing request is denied as irrelevant, and therefore immaterial, to EPA's determination in the May 15, 2009 final rule, for the reasons discussed in Unit VI.C. Petitioners are actually not objecting to the conclusions in EPA's final rule; rather, they are suggesting that EPA might reach a different result in a different factual scenario. Objections, however, must be directed ''with particularity [at] the provisions of the regulation or order deemed objectionable'' (21 U.S.C. 346a(g)(2). And, as explained below, because no evidence was submitted in support of the newly proposed use tracking system, reliance on that proposal to support a low PCT constitutes nothing more than an allegation. This is not an adequate basis on which to grant a hearing (40 CFR 178.32(b)(2)).

iii. Denial of objection. To the extent this objection relies on Petitioners' newly submitted registration amendments, the objection is denied as immaterial. EPA also denies the remaining objections because, based on its review of the submitted modeling, EPA has concluded all of the modeling has substantial flaws that render the model results invalid. EPA has previously reviewed these assessments, and provided a detailed explanation of the reasons for the Agency's conclusions, most recently, in the final rule and the associated response to comments (74 FR 23060–23064, Ref. 84). EPA's reasoning is summarized briefly below.

Indiana CWS Assessment

EPA has previously reviewed the Indiana surface water assessment, and has provided comments on that submission (Ref. 45), many of which were reiterated at length in the final rule and response to comments documents (74 FR 23062–23064, Ref. 84). The Petitioners originally submitted this study to demonstrate that ''EPA's standard index reservoir scenario

overestimates surface water concentrations compared with expected concentrations in actual Indiana CWS where carbofuran is used.'' The Index Reservoir is designed to be used as a screen, and as such, represents watersheds more vulnerable than most of those that support a drinking water facility. It is thus protective of most drinking water on a national basis. That, however, does not mean that EPA believes this scenario overestimates concentrations for all drinking water reservoirs. EPA agrees that it is an appropriate refinement to simulate local and regional watersheds, and has in fact done so (Refs. 44, 46, 47, 48, and 84). However, for the reasons discussed below, EPA does not believe that the Petitioners' assessment demonstrates that carbofuran concentrations will not exceed 1.1 ppb in Indiana surface water sources of drinking water. Even accepting the Indiana surface water assessment at face value, the estimated 1-in-10-year peak concentrations at some facilities were as high as 6.88 µg/L, and these concentrations substantially exceed the 1.1 ppb concentration the Petitioners now claim represent reasonable estimates.

The study also fails to support the Petitioners' other conclusions. The study was originally intended to demonstrate two points: (1) That the vulnerability of the Indiana CWS ''brackets'' the Index Reservoir, and (2) that the concentrations they estimated for these locations are significantly less than EPA estimates. Regarding the vulnerability of the CWS, the assessment describes their approach for modifying the parameters of the Index Reservoir scenario to represent 15 reservoir-based watersheds in Indiana cropped in corn. The study indicates the Petitioners have included data that, based on EPA's review of these submissions, are not available at the appropriate scale to determine all site-specific parameters. The Petitioners modified some of the parameters based on available data to represent more localized conditions that are more or less vulnerable than for the Index Reservoir. From the description, the Petitioners' approach is similar to the methods that EPA uses to develop new scenarios, in that soil and weather data are varied in order to represent different locations. However, for other parameters, EPA believes the modifications are inconsistent with fundamental assumptions upon which the modeling is based. In previous submissions to the Agency, FMC has described that they have made modifications to scenarios to reflect local conditions of each CWS in Indiana by modifying the soil and weather data and altering the ratio of watershed drainage area to the reservoir capacity (Ref. 89). EPA agrees that soil and weather data can be modified to reflect conditions at local watersheds. However, EPA disagrees that altering the ratio of watershed drainage area to the reservoir capacity (*i.e.*, the DA/NC) is a reasonable modification.

The DA/NC parameter is associated with increased concentrations in drinking water reservoirs to a certain point. The Petitioners adjusted their EDWCs for each drinking water facility by a factor representing the ratio of the DA/NC for each reservoir divided by the DA/NC for the Index Reservoir (which is 12). EPA does not believe this is appropriate for two reasons. First, the relationship between concentrations and the DA/NC is not strictly linear. Small DA/NCs imply a small watershed combined with a large reservoir. As the DA/NC increases, the relative watershed size increases, and thus the runoff volume going into the reservoir also increases. This is also means the reservoir's ability to dilute the runoff decreases; the result is that concentrations increase with an increase in the DA/NC. However, at some point, the runoff volume exceeds the reservoir capacity, and rather than increasing the pesticide concentration, the excess runoff flows out of the reservoir, carrying the pesticide with it. Thus, because pesticide concentrations are not linearly related to the DA/NC, it is not appropriate to multiply the model output by a linear DA/NC adjustment factor. Secondly, the PRZM model, which is used to simulate the watershed for the Index Reservoir, is a field-scale model. As the watershed size (and the DA/NC) increases, assumptions upon which PRZM relies (namely: uniformity of soils, equal and simultaneous movement of runoff to the reservoir, and uniform weather across the watershed) no longer hold and the model becomes less valid for simulating the runoff processes. The geometry of the Index Reservoir was chosen partly to avoid these two limitations (Ref. 43).

The study authors also calculated their own PCA values [19] for this assessment. EPA uses the maximum PCA calculated for any HUC8 (8-digit hydrologic unit code) watershed in exposure estimates. HUC8s are cataloging units for a watershed developed by the USGS and are used as surrogates for drinking water watersheds. The process by which PCAs were developed and how they are used by the Agency has been vetted with the FIFRA SAP (Refs. 30 and 31). The Agency has developed PCAs for four major crops—corn, soybeans, wheat, and cotton—and uses a default PCA based on all agricultural land for characterizing other crops. The Agency has also calculated regional default PCAs for use in characterizing regional differences in drinking water exposure. EPA limited further development of PCAs for additional crops in response to the FIFRA SAP peer review, which concluded that the data were not available at the appropriate scale to do so. The Petitioners' assessment estimated PCAs for specific watersheds in Indiana, but did not provide sufficient detail in their descriptions of how they calculated those PCAs to enable EPA to assess their validity.

Regarding the statement that the concentrations estimated for the study locations in Indiana are significantly less than EPA estimates, EPA has determined that the Petitioners included an adjustment factor to account for the percent of a crop that is treated with carbofuran. As previously discussed, EPA does not believe that it is appropriate to base its aggregate risk estimates on PCT within watersheds. This is because data and/or methods are not available that would allow EPA to develop PCT at the watershed scale with the necessary level of confidence to allow EPA to make a safety finding. The PCT factors that the Petitioners applied would generate significantly lower concentrations than those estimated by EPA.

WARP Assessment

EPA has reviewed the WARP assessment previously and has provided comments on the submission (Refs. 45 and 86). The WARP model has not been fully evaluated for quantitative use in exposure estimation by the Agency, although it has been preliminarily reviewed by the SAP (Ref. 32). EPA used WARP to select monitoring sites for the herbicide atrazine, based on predicted vulnerability of watersheds to atrazine runoff within the corn/sorghum growing regions. EPA presented its approach to the FIFRA SAP in December 2007. The SAP report concluded that ''WARP appears to be a logical approach to identify the areas of high vulnerability to atrazine exposure,'' endorsing EPA's use of this tool only for atrazine, and for the limited purpose of designing a monitoring program. The SAP noted that the most important explanatory variable with WARP was use intensity, which underscores the

[19] The PCA is the fraction of the drinking water watershed that is used to grow a particular crop.

importance of having the most accurate data for this parameter.

WARP is a regression model developed by the USGS to estimate concentrations of the pesticide atrazine in rivers and streams. As a regression model, it is based on monitoring data from 112 USGS NAWQA monitoring locations. WARP does not directly estimate daily concentrations, but predicts the percent of the time in a randomly selected year that concentrations of the pesticide are less than a specified value, with a specified level of confidence. USGS attempted to develop an approach to estimate annual time series for other pesticides, and concluded that ''further data collection and model development may be necessary to determine whether the model should be used for areas for which fewer historical data are available * * * Because of the relative simplicity of the time-series model and because of the inherent noise and unpredictability of pesticide concentrations, many limitations of the model need to be considered before the model can be used to assess long-term pesticide exposure risks'' (Ref. 92).

The Petitioners had previously relied on their WARP assessment to support the conclusion that the ''maximum 1-in-10-day estimated concentrations of carbofuran at the 90th percentile level in Illinois, Indiana, Iowa, and Nebraska * * * will be less than or equal to 0.3687 ppb.'' This is erroneous. WARP does not provide direct estimates of return frequency, *i.e.*, 1-in-10 days, but rather percentiles of the expected distribution of measurements. This may be similar but not identical to the return frequency expressed as a percentile, depending on the number of measurements used to support the regression. EPA lacked the information necessary to determine whether the contractor calibrated the model correctly. However, taking the conclusion at face value, the value the Petitioners predicted using WARP, 0.3687 ppb, appears to represent the maximum of the estimated values of the annual 90th percentile among all the sites evaluated. Such a site would be expected to have higher concentrations than 0.3687 ppb about 37 days a year (10% of the year). Generally, the 90% prediction intervals tend to be about plus or minus an order of magnitude. Thus, roughly 5% of such sites could have about 37 days a year greater than about 3.7 ppb, or over 3-fold higher than the 1.1.ppb concentrations the Petitioners now claim will be the maximum concentrations in surface water.

The Agency also disagrees that the differences between the Petitioners' and EPA estimates are only due to Petitioners' use of county-level use estimates. Most importantly, the Petitioners relied on estimates of 1-in-10-day concentrations, rather than the 1-in-10-year peak concentrations estimates used routinely by EPA. 1-in-10-day concentrations are not the measurement endpoint EPA uses for human health risk assessment and are not appropriate for estimating drinking water exposure. The Agency uses 1-in-10-year peak concentrations for screening level assessments, and the full time series (typically 30 years) of daily concentration values for refined assessments. EPA's reliance on the 1-in-10-year peak concentration has been reviewed and approved by the FIFRA SAP (Ref. 30).

A concentration that occurs 1-in-10 days occurs 350 times as often as a 1-in-10-year event. Using this value instead of the one EPA used would result in significantly lower estimates of pesticide water concentration and human exposure. For example, EPA's estimate of the 1-in-10-year peak concentration from the simulation of corn in Kansas with a 300 ft buffer was 31.8 ppb. By contrast, EPA's estimate of the 1-in-10-day concentration from the same simulation was 4.5. Use of the 1-in-10 day concentration to assess dietary risk would be inconsistent with the SAP's advice and EPA's typical practice, as well as with EPA's statutory requirement to protect human health.

EPA disagrees with the Petitioners' claim that ''the extreme nature of a 1-in-10-year event would result in dilution effects that cancel out any increased loading.'' The Index Reservoir scenario has been validated against monitoring collected at the site it was designed to represent, Shipman City Lake in Illinois (Ref. 43). This assessment showed that the 1-in-10-year event EPA modeled was similar in magnitude to the peak value of the pesticide concentrations shown in 5 years of monitoring data collected at that site. The 1-in-10-year peak concentration calculated for that pesticide (not carbofuran), using the Index Reservoir was 33 ppb, while the peak value from 5 years of monitoring was 34 ppb.

EPA cannot determine the validity of the use intensities assumed for the Petitioners' assessment. The source of county level use data appears to have been sales data at the distributor level, similar to the data provided in the Petitioners' November 7, 2008 submission. However, as previously explained, the method chosen to estimate county level use estimates from the sales data was not provided. The county level estimates used in the assessment for 2002 to 2004 for Illinois were provided in a table. These estimates for each county were averaged over the 3 years for input to the model. A summary description of how watershed-scale use estimated from county level use data was provided, but because the sales data for the individual crops and the method that was used to generate county level estimates were not available, the validity of this assessment cannot be evaluated.

Nationwide CWS Assessment

EPA has previously reviewed the Petitioners' ''Nationwide CWS Assessment'' and provided a response to the submission as part of the final rule and Response to comments (Ref. 45). As a preliminary matter, this assessment only included use intensity for reservoir-based systems, and excluded use intensity for all stream- or river-based systems from their assessment. Therefore, this assessment provides no evidence to demonstrate that carbofuran can be safely used in stream or river-based community water systems.

Similar to the Indiana CWS study discussed above, this study relied on county-level usage estimates to estimate use intensity. The National CWS Assessment concluded that a use intensity below 2.1 lbs a.i/mi^2 would assure that surface water concentrations will be below the level of concern.

To evaluate the study, it is therefore important to understand how the use intensities were derived. The Petitioners' methods have been poorly described, but EPA has been able to piece together a general sense of the methods from the various reports provided to EPA. To summarize, the Petitioners relied on sales data to generate the use intensity estimates, but the method used to generate the county-level use estimates from the sales data is not described. The actual county level use estimates used in the use intensity calculations were not provided. There is a limited description indicating only that the county level use estimates were apportioned to different crops, but the method used to do this was not provided. The Petitioners appear to have used an objective method to group the county-level use estimates into 5 classes, but the method is only briefly described. Thus, because EPA cannot determine how use intensity was estimated, the Agency cannot determine if the conclusions made in the National CWS Assessment are justified by the underlying data.

In the absence of this information, EPA is unable to substantiate the study conclusion that 75% of the permissible use areas have a carbofuran use intensity below 2.1 lbs a.i/mi²—even assuming that reliance on only 75% of the use areas would be protective, and nothing has been submitted to substantiate that conclusion. Use intensity maps that were provided with the Petitioners' comments appear to indicate that carbofuran use varies year by year, and it is not clear for which year or years, the Petitioners are relying to support their claim that use intensity will be below 2.1 lbs a.i/mi². No further support for this claim was provided with the Petitioners' objections, even though EPA presented its conclusions in the final rule.

As noted, the National CWS Assessment assumed that a use intensity below 2.1 lbs a.i/mi² would assure that surface water concentrations will be below the level of concern. EPA agrees that using lower rates of carbofuran will result in lower exposure. But EPA does not agree that it has been demonstrated that a use intensity below 2.1 lbs a.i./mi² will assure that surface water concentrations will be below the applicable level of concern. The National CWS Assessment does not justify such a finding, nor has any other assessment that has been submitted to date. The Agency modeled use rates for carbofuran on corn based on the label proposed in September 2008, which are the rates at which farmers are legally allowed to apply carbofuran, and the results clearly demonstrate that estimated exposures will substantially exceed safe levels. The results of EPA's assessments are described in more detail in Unit V.E. of this order, the final rule and in Reference 111.

EPA is equally unable to confirm the study's claim that the no-application buffers on the September 2008 labels will adequately mitigate the risks ''in areas with historical use intensities greater than 2.1 lbs a.i./sq. mi.'' On the September 2008 labels, FMC included buffers of 300 feet on water bodies in Kansas, and 66 feet around water bodies in other places, but EPA cannot evaluate how these buffers relate to areas where carbofuran use intensities exceeded a specific value, for all of the reasons stated above. EPA did, however, model the effects from the buffers proposed on the September 2008 labels and found that these buffers reduce exposure by 5.1% (33.5 to 31.8 ppb) for corn in Kansas with a 300-foot spray drift buffer and 4.7% (29.9 to 28.5 ppb) for corn in Texas with a 66-foot spray drift buffer. However, even with the buffers, EPA's analyses clearly demonstrate that estimated exposures will substantially exceed safe levels. These results are described in more detail in Unit V.E. of this order, the final rule, and Reference 84, Appendix I. For all of these reasons, the objection is denied.

c. Objection/hearing request subissue: Challenges to EPA use of NAWQA monitoring data. The Petitioners object to EPA's discussion in the final rule of the extremely high concentrations detected in Zollner Creek in Oregon. They argue that reliance on these concentrations to confirm the results of EPA's modeling is not supportable because Zollner Creek is a small isolated creek, not a drinking water source, and that because of its size, is not representative of potential drinking water anywhere else. They also argue that the majority of the concentrations in the NAWQA data, including those detected at Zollner Creek, are extremely low—below the 1.1 ppb they claim is supported by their modeling. They also contend that the higher observed concentrations in the NAWQA monitoring data are the result of use patterns that are no longer permitted, and that allowed a much higher use rate than is currently permitted.

i. Background. In the proposed rule, EPA described the available monitoring data that characterized carbofuran concentrations in surface water. EPA described that the highest concentrations of carbofuran are reported from a sampling station on Zollner Creek, which EPA acknowledged ''is not directly used as a drinking water source'' (73 FR 44883). USGS monitoring at Zollner Creek from 1993 to 2006 detected carbofuran annually in 40–100% of the samples. EPA stated that although the majority of the concentrations detected were in the sub-part per billion range, concentrations have exceeded 1 ppb in 8 of the 14 years of sampling (Id.). The maximum measured concentration was 32.2 ppb, observed in the spring of 2002. EPA compared its modeling results to the concentrations seen in all of the USGS monitoring, Safe Drinking Water Act (SDWA) monitoring, and to the results of the available field scale studies. EPA concluded that the concentrations estimated in its modeling were consistent with the results of all of the available monitoring and studies (73 FR 44883–44884).

In their comments on the proposed rule, the Petitioners alleged that comparisons between EPA's modeling concentrations and Zollner Creek detections were inappropriate because they were based on ''older data [that] are not reflective of future carbofuran use areas and/or intensities'' (Ref. 18 at 55). In support, they claimed that ''carbofuran was once used at several nurseries and strawberry farms in the Zollner Creek watershed at estimated application rates of up to 15 lbs. a.i./acre (5 times higher than the maximum rate on the current label, and 15 times higher than the most common use rates)'' (Id at 56).

In the final rule, EPA explained that it had not relied solely on Zollner Creek concentrations to validate its modeling. EPA again described the results of all available modeling, which included the detections at Zollner Creek, but also included results from all other NAWQA sites, SDWA post-treatment monitoring, and the results of field studies. Based on all of these data, EPA concluded that the results of the revised modeling conducted for the final rule was consistent with the available monitoring data.

ii. Denial of hearing request. This subissue does not meet the standard for a hearing. The objections regarding Zollner Creek are not material. EPA did not rely in on the concentrations detected at Zollner Creek to provide significant support its assessment.

In the final rule, EPA was clear that it considered the levels seen at Zollner Creek to be a rare circumstance:

> While available monitoring from other portions of the country suggests that the circumstances giving rise to high concentrations of carbofuran may be rare, overall, the national monitoring data indicate that EPA cannot dismiss the possibility of detectable carbofuran concentrations in some surface waters under specific use and environmental conditions.

(74 FR 23081). The final rule was clear that EPA placed greater reliance on the concentrations detected in Safe Drinking Water Act (SDWA) post-treatment monitoring, showing concentrations ranging between 4 and 7 ppb (74 FR 23079–23080). EPA also discussed the results of the UK tile drain studies as supplemental confirmation of its modeling (74 FR 23082).

Petitioners' contentions regarding the NAWQA monitoring also fail to present a genuinely-disputed issue of material fact. In both the proposed and final rules, EPA acknowledged the large percentage of non-detections and low concentration levels in the majority of the NAWQA monitoring data, and repeatedly explained the reasons that these data cannot serve as lower or upper bounds (73 FR 44882–44883; 74 FR 23081). Petitioners do not dispute those conclusions, or submit evidence to rebut them. When an objector does not challenge EPA conclusions in the final rule, but merely reiterates

comments made on the proposed rule, without submitting some evidence that calls EPA final rule conclusions into question, the objector has not raised a live controversy as to an issue material to the final rule. (See 73 FR 42700–42701 (denying hearing request where NRDC failed to object to the basis EPA asserted in its petition denial for rejecting their original challenge). Finally, no evidence has been submitted to support the contention that all of the higher concentrations exclusively result from uses or higher use rates that are no longer permitted. Hearings will not be granted on mere allegations (40 CFR 178.32(b)(2)).

iii. Denial of objection. Data compiled in 2002 by EPA's Office of Water show that carbofuran was detected in treated drinking water at a few locations. Based on samples collected from 12,531 ground water and 1,394 surface water source drinking water supplies in 16 states, carbofuran was found at no public drinking water supply systems at concentrations exceeding 40 ppb (the MCL). Carbofuran was found at one public ground water system at a concentration of greater than 7 ppb and in two ground water systems and one surface water public water system at concentrations greater than 4 ppb (measurements below this limit were not reported). Sampling is costly and is conducted typically four times a year or less at any single drinking water facility. The overall likelihood of collecting samples that capture peak exposure events is, therefore, low. For chemicals with acute risks of concern, such as carbofuran, higher concentrations and resulting risk is primarily associated with these peak events, which are not likely to be captured in monitoring unless the sampling rate is very high.

Unlike drinking water derived from private ground water wells, drinking water from public water supplies (surface water or ground water source) will generally be treated before it is distributed to consumers. An evaluation of laboratory and field monitoring data indicate that carbofuran may be effectively removed (60–100%) from drinking water by lime softening and activated carbon; other treatment processes are less effective in removing carbofuran (Ref. 81). The detections between 4 and 7 ppb, reported above, represent concentrations in samples collected post-treatment. As such, these levels are of particular concern to the Agency. An infant who consumes a single 8-ounce serving of water with a concentration of 4 ppb, as detected in the monitoring, would receive approximately 130% of the aPAD from water consumption alone.

To further characterize carbofuran concentrations in surface water (*e.g.,* streams or rivers) that may drain into drinking water reservoirs, EPA analyzed the extensive source of national water monitoring data for pesticides, the USGS NAWQA program. The NAWQA program focuses on ambient water rather than on drinking water sources, is not specifically targeted to the high use area of any specific pesticide, and is sampled at a frequency (generally weekly or bi-weekly during the use season) insufficient to provide reliable estimates of peak pesticide concentrations in surface water. For example, significant fractions of the data may not be relevant to assessing exposure from carbofuran use, as there may be no use in the basin above the monitoring site. Unless ancillary usage data are available to determine the amount and timing of the pesticide applied, it is difficult to determine whether non-detections of carbofuran were due to a low tendency to move to water or from a lack of use in the basin. The program, rather, provides a good understanding on a national level of the occurrence of pesticides in flowing water bodies that can be useful for screening assessments of potential drinking water sources.

The national monitoring data indicate that EPA cannot dismiss the possibility of detectable carbofuran concentrations in some surface waters under specific use and environmental conditions. Even given the limited utility of the available monitoring data, there have been relatively recent measured concentrations of carbofuran in surface water systems at levels above 4 ppb and levels of approximately 1 to 10 ppb measured in streams representative of those in watersheds that support drinking water systems (Ref. 81). Based on this analysis, and since monitoring programs have not been sampling at a frequency sufficient to detect daily-peak concentrations that are needed to assess carbofuran's acute risk, the available monitoring data, in and of themselves, are not sufficient to establish that the risks posed by carbofuran in surface drinking water are below thresholds of concern. Nor can the non-detections in the monitoring data be reasonably used to establish a lower bound of potential carbofuran risk through this route of exposure. Nevertheless, these results are consistent with the results of EPA's surface water modeling (Refs. 12, 47, 67). For all of these reasons, the Petitioners objection is denied.

d. Objection/hearing request subissue: New label restrictions and revised terms of registration. As discussed in Units VI.C and D, FMC submitted a request to amend its existing registration to incorporate a requirement intended to ensure that no more than 2% of any watershed will be treated with carbofuran. Petitioners allege that these new use restrictions will ensure that drinking water concentrations will not exceed 1.1 ppb. In support, the objection presents a June 30, 2009 letter describing the restrictions, along with proposed revisions to the carbofuran labels.

i. Background. On June 30, FMC requested that EPA amend its registration to incorporate a requirement that, within five days of applying the product, all applicators report to FMC the following information: the location that the product will be used; crop, use rate, application method, acreage, and quantity applied. Based on this information, FMC would track the percentage in each watershed. ''Whenever it appears that carbofuran has been applied to 1.75% of any watershed,'' the registrant would report that information immediately to EPA, ''cease further sales in any county that overlaps with such a watershed for that use season, and shall attempt to recall all unused carbofuran within such counties by offering to repurchase such unused product'' (Exhibit 3). In addition, FMC requested that its registration be amended to require that ''based on watershed boundaries, FMC * * * prior to each uses season, allocate to its distributors in a manner which will attempt to ensure that no distributor receives more for carbofuran for sale than can be accommodated by the 2% watershed area cap in any watershed supplied by that distributor.''

ii. Denial of hearing request. EPA denies this hearing request on two grounds. First, discussed in VI.C, Petitioners' objections and hearing requests are denied as irrelevant, and therefore immaterial, to EPA's determination in the May 15, 2009 final rule that the carbofuran tolerances were unsafe and could not be sustained under FFDCA section 408. Petitioners are actually not objecting to the conclusions in EPA's final rule; rather, they are suggesting that EPA might reach a different result in a different factual scenario. Objections, however, must be directed ''with particularity [at] the provisions of the regulation or order deemed objectionable'' (21 U.S.C. 346a(g)(2)). Further, as discussed in Unit VI.D, this objection is untimely, because it was not raised in comments. Neither this specific proposal, nor any other proposal regarding a potential tracking system, was presented to EPA by the close of the September 29, 2008 comment period. EPA therefore

considers this issue waived, and will not consider this as an appropriate basis for justifying a hearing on its final rule.

However, there is a further equally material defect in this hearing request. The Petitioners have submitted no evidence to support their allegation that these proposed requirements would be effective in ensuring that carbofuran would be applied to no more than 2% of any watershed. The only submission was the description provided in the June 30 letter (Exhibit 3), and repeated above. However, this vague description leaves several critical questions unanswered. For example, the critical component of this proposal is a post-use reporting scheme, with a five-day delay between use and reporting. Even assuming that one accepts that reporting an address would allow for complete identification of the location within an individual watershed—a point on which no evidence has been submitted—no evidence, or even an explanation, has been provided to demonstrate how this after-the-fact reporting requirement will prevent application to greater percentages of the watershed. For smaller watersheds, as discussed in the final rule, application to only one or two farms may be sufficient to substantially exceed 2% of the watershed. In such cases, since applicators are only required to report within five days after application, it is likely that FMC would not be informed until after the 2% cap had been exceeded. Further, there will inevitably be some delay between FMC's attempt to repurchase the product and the reports suggesting (or confirming) that the cap either has been or will shortly be exceeded. Given the inevitable delay, it is not unlikely that further application would occur before FMC could even attempt to repurchase the product. No details whatsoever have been provided regarding the timing or mechanism by which this would occur. Further, this program operates in the absence of any enforceable use restriction, and no description of the means by which this would be enforced is provided. Although the company would ''attempt to recall the product'' or make it less available by ''attempting'' to direct sales to particular distributorships, in the absence of some mechanism to prevent sales or use, such as a permitting process, there is no real assurance that these voluntary measures would be effective (Exhibit 3). This is further complicated by the extremely low percentages contemplated by this proposal.

Additionally, this scheme rests on a variety of assumptions that no evidence has been submitted to substantiate. For example, the proposal to restrict sales to distributors in particular watersheds rests on an assumption that farmers always purchase products from a distributor within their watershed. It also assumes that growers and distributors will accept FMC's offer to repurchase unused stock of the products, rather than seeking to stockpile the product for use in the next growing season.

In the absence of any evidence to demonstrate the efficacy of these proposed restrictions, any objection based on these proposed amendments constitute no more than mere allegations or denials. Hearings will not be granted on such a basis (40 CFR 178.32(b)(2)).

iii. Denial of objection. For the reasons discussed above, even if it were appropriate to consider the proposed registration amendments, EPA is unable to conclude that those amendments would ensure that concentrations of carbofuran in drinking water derived from surface water will not exceed 1.1 ppb. Accordingly, the objection is denied.

e. Objection/hearing request subissue: Consistency with NMC surface water estimates. Petitioners object to EPA's surface water exposure estimates on the ground that they are inconsistent with the estimates EPA developed for purposes of the NMC CRA. Petitioners further claim that their revised surface water assessment is consistent with the EPA estimates in the NMC cumulative risk assessment. The evidence proffered for this objection consists of the modeling in Exhibit 15.

i. Background. In comments on the proposed rule, the Petitioners complained that as part of the NMC CRA, EPA relied on actual ''county-or multi-county level pesticide use information, based on agricultural chemical use surveys'' to develop its estimates of potential exposure, rather than assuming 100% PCT.'' In the final rule, EPA provided a lengthy and detailed explanation of the reasons that its approach to assessing individual chemicals and its approach to assessing the cumulative risks of multiple chemicals differed (74 FR 23067–23068 (May 15, 2009)).

ii. Denial of hearing request. To the extent Petitioners base this objection on the concerns raised in their comments, EPA denies the hearing request on this subissue because there is no disputed factual matter for resolution at a hearing. There is no dispute that EPA assumed 100% PCT for carbofuran in its surface water modeling, nor that EPA developed lower estimates in the NMC CRA, that accounted for the percent of the crop that was likely to be treated with each individual NMC chemical in order to more accurately account for the likelihood of pesticide co-occurrence at a single drinking water facility. Thus, the only question is whether EPA's basis for adopting a different approach between the assessment of a single chemical's aggregate exposure and the assessment of the cumulative exposures from several chemicals is reasonable. This question requires the application of a legal standard to undisputed facts. Hearings are not appropriate on questions of law or policy (40 CFR 178.32(b)(1)); (73 FR 42706–42707 (July 23, 2008)). FDA has repeatedly confirmed that the application of a legal standard to undisputed facts is a question of law for which a hearing is not required. (*See, e.g.,* 68 FR 46403, 46406 n.18, 46408, 46409 (August 5, 2003) (whether facts in the record show there is a reasonable certainty of no harm is a question of law; whether a particular effect is a ''harm'' is a question of law)).

In addition, Petitioners have not challenged the substance of EPA's response to their comments or submitted evidence that calls the substance of EPA's conclusions into question (40 CFR 178.32(b)(3)). Consequently, the Petitioners' objection on this issue is irrelevant, and therefore immaterial, with regard to EPA's final tolerance revocation regulation because Petitioners ignored EPA's extensive analysis of this issue in the final rule and essentially resubmitted their comments on the proposal as if EPA's determination in the final rule did not exist. The statute, however, requires that objections be filed on the final rule, not on the proposal (21 U.S.C. 346a(g)(2)). By ignoring the EPA's final rule on this subissue, Petitioners have failed to lodge a relevant objection. Both EPA and FDA precedent make clear that when the agency substantively responds to comments on the proposal, the commenter may only keep that issue alive in its objections by addressing the agency's substantive response. *See* 73 FR 42698–42699 (When an objector does not challenge EPA conclusions in the section 408(d)(4)(iii) order but rather challenges some prior conclusion that was superseded by the section 408(d)(4)(iii) order, the objector has not raised a live controversy as to an issue material to the section 408(d)(4)(iii) order; 53 FR 53176, 53191 (December 30, 1988) (where FDA responds to a comment in the final rule, repetition of the comment in objections does not present a live controversy unless the objector proffers some evidence calling FDA's conclusion into question)).

To the extent this objection is simply an allegation that the results of the modeling are consistent with the surface water estimates in EPA's NMC risk assessment, the hearing request also suffers from a fatal flaw. The modeling is based on the assumption the recently proposed label restrictions are effective, and that the PCT will be 2%. Because the objection and hearing request are inextricably intertwined with the Petitioners' newly submitted proposed FIFRA registration amendments, the objection and hearing request are denied as irrelevant, as discussed in Unit VI.C. Further, as discussed, no evidence was submitted to support the assumption that the newly submitted use tracking proposal will be effective. The only evidence submitted in this regard is the results of the modeling in Exhibit 15, which as previously discussed is untimely, and therfore provides an inappropriate basis for a hearing. This evidence, therefore, on multiple grounds is insufficient to support a reasonable possibility that the issue will be resolved in the Petitioners' favor. No hearing is warranted under such circumstances (40 CFR 178.32(b)(2)).

iii. Denial of objection. While it is true that in the NMC assessment EPA used PCT numbers to estimate the cumulative exposure from the contamination of such pesticides in surface water, this was done in order to more accurately account for the likelihood of pesticide co-occurrence at a single drinking water facility. But this does not mean that use of PCT is appropriate in conducting an assessment of aggregate exposure from carbofuran residues in surface water. This difference in approach between the assessment of a single chemical's aggregate exposure, and the assessment of the cumulative exposures from several chemicals, stems from the differences in the purpose and scope of the two assessments. These differences inevitably require the application of different methodologies.

In evaluating the acute risks associated with a single chemical's contamination of drinking water, EPA must consider all of the variations permitted under the label. Drinking water exposures are driven by uniquely local factors; not only is the source of drinking water local (*i.e.,* a person drinks water from his or her local water system, not from a combination of water systems from across the United States), but the likelihood and degree of contamination of any particular, local drinking water source, whether it is a reservoir or well, varies widely based on local conditions (*e.g,* from local pest pressures, weather). Given this local variability, EPA must evaluate how all of the practices permitted under the label will affect drinking water exposures, because all are legally allowed, and farmers may choose any of them based on their particular individual local conditions. This means that even if growers, on a national or regional basis, do not frequently use a particular practice, EPA must still evaluate whether aggregate exposures from that practice would be safe because the practice is legally permissible and may be used due to local conditions. Thus, for example, even if most growers tend to apply the chemical only to a portion of the field, or typically only apply one-half of the maximum application rate, EPA must determine whether use by all or some growers on the entire field or at the maximum rate in a local watershed would result in unsafe drinking water concentrations.

By contrast, it is not feasible to conduct the identical analysis for a cumulative assessment of related chemicals. Since the potential combinations of variations in pesticide use practices for the group of pesticides to be assessed are essentially infinite, even with computer modeling it would be impossible to model or evaluate all of the combinations allowed under the labels. EPA therefore needed to narrow its evaluation of the possible combinations to those deemed ''likely'' to occur. In contrast to the single chemical assessment, a cumulative assessment is intended to develop a snapshot in time of what is likely occurring at the moment. Moreover, the purpose of a cumulative assessment is to identify major sources of risk that could potentially accrue due to the concurrent use of several pesticides that act through a common mechanism of toxicity. Thus, EPA is primarily interested in the subset of circumstances in which residues from such pesticides occur concurrently (or co-occur).

In addition, one of the important attributes of a cumulative risk assessment is that its scope and complexity can potentially lead to inflated estimates of risk due to compounding conservatisms, which would reduce the interpretability and ultimately the utility of the assessments. Because many data sets need to be combined, reducing the impact and likelihood of compounding conservative assumptions and over-estimation bias becomes very important in constructing a reasonable cumulative risk assessment.

When little or no information is available to inform potential sources of exposure, such as a reasonable or maximum watershed scale PCT, it is both scientifically and legally reasonable for a single chemical assessment to incorporate conservative assumptions to reflect reasonable worst-case exposure estimates. But in a cumulative risk assessment, the incorporation of such conservative assumptions would imply multiple simultaneous reasonable worst-case exposure estimates for each individual chemical. This is so unlikely that the results would no longer represent even a reasonable worst-case estimate of the likely risks. Consequently, some of the conservative assumptions appropriately used in the single chemical risk assessments are not appropriate or reasonable for use in a cumulative risk assessment, and vice versa.

As a result, EPA chose in the NMC to work with those data that most closely reflect ''representative'' exposures, and developed ''representative'' estimates of PCT in regional watersheds. However, to be clear, the PCT values used in the NMC assessment do not represent estimates of 50% of watersheds, or even the ''average'' watershed; rather, they represent values that are expected to be as likely to be accurate as not, based on a random selection of watersheds. A comparable example is the statistic that the average American family has approximately 2 children; this may or may not be true for any individual family, but there is an equally good chance that it will be accurate for any randomly selected family, as that it will not be accurate. For the cumulative assessment, EPA is able accept this level of uncertainty in these estimates, precisely because it has confidence that aggregate exposures from the individual chemicals will be safe, based on the level of conservatism in the single chemical assessments. But given the statute's mandate to ensure a ''reasonable certainty of no harm,'' EPA could not rely on the approach used under the cumulative assessment in the absence of the more conservative single-chemical assessment that evaluates the full range of exposures permitted by the registration.

Nevertheless, as discussed in the final rule, in response to FMC's concerns EPA performed a sensitivity analysis of an exposure assessment using a PCT in the watershed to determine the extent to which some consideration of this factor could meaningfully affect the outcome of the risk assessment. The results suggest that, even at levels below 10% CT, exposures from drinking water derived from surface waters can contribute significantly to the aggregate dietary risks, particularly for infants and children. Accordingly, these assessments suggest that use of a reasonably conservative PCT estimate,

even if one could be developed, would not meaningfully affect the carbofuran risk assessment, as aggregate exposures would still exceed 100% of the aPAD.

f. Objection/hearing request subissue: Natural surface water pH conditions. The Petitioners contend that the low PCT levels guaranteed by the recent proposed use tracking system, along with natural surface water pH conditions in the areas where use is permitted under the revised label will ensure potential exposures are *de minimis.* In support they reference the analysis in Exhibit 16, which they claim demonstrates that the NAWQA USGS data show that average surface water pH is above 7.5 and that ''in most regions, moving 2 standard deviations away from average (which would capture 95% of all observed values) results in pHs that are still greater than 7.5.''

i. Background. In the proposed rule, EPA explained that the variation in pH across the landscape was a significant uncertainty in EPA's analysis. The proposal stated, that ''while it is well established that carbofuran will degrade at higher rates when the pH is above 7, and lower rates when below pH 7, due to the high variation of pH across the country for many of the scenarios, a neutral pH (pH 7) default value was used to estimate water concentrations (73 FR 44883). Petitioners raised no issue regarding surface water pH in their comments.

ii. Denial of hearing request. EPA denies this hearing request because the objection, as well as the proffered evidence is untimely. EPA clearly described the potential impact that pH could have on its estimates, and noted that this was a significant uncertainty in its assessment. None of the analyses in Exhibit 16 were provided as comments on the proposed rule. Nor were any of the issues inherent in this objection raised as comments on the proposal. Since the proposed rule was clear that the issue was relevant, and the NAWQA data were available, Petitioners could have conducted these analyses and raised the issue as part of their comments. Consequently EPA has determined that the evidence submitted in support of this objection is not appropriately considered as a basis for justifying a hearing on its final rule. And in the absence of this evidence, the objection consists of mere allegations and general denials, which do not warrant a hearing (40 CFR 178.32(b)(2)). Further, to the extent the objection and the evidence in Exhibit 16 rely on use tracking system and risk mitigation proposals submitted as part of their objections, this hearing request is denied as irrelevant, and therefore immaterial, as discussed in Unit VI.C. Petitioners are actually not objecting to the conclusions in EPA's final rule; rather, they are suggesting that EPA might reach a different result in a different factual scenario. Objections, however, must be directed ''with particularity [at] the provisions of the regulation or order deemed objectionable'' (21 U.S.C. 346a(g)(2)). In addition, for the reasons discussed in Unit VI.D, any hearing request premised on the new mitigation measures is considered untimely, and not appropriately considered at this stage of the administrative process as a basis for granting a hearing under the FFDCA.

EPA is also denying the requested hearing on the grounds that the evidence, even if established, is insufficient to justify the action urged (40 CFR 178.32(b)(3)). The analyses presented in Exhibit 16, as the Petitioners explicitly acknowledge, only capture 95% of the values; five percent of exposures are not, *per se, de minimis.* Second, just as with the groundwater pH analyses presented in Exhibit 14, no information was provided to explain how the samples relate to the state or other geographic area in which carbofuran would be used. This is important because NAWQA samples were not evenly distributed across most states, but tended to be concentrated in particular regions; in statistical parlance, the samples were not collected randomly. In other words, no evidence was provided that would allow the Agency to determine the percentage of the carbofuran use area represented by the 95% of the samples the Petitioners' analysis addressed. Nor was any information provided to document the significance of the remaining 5% of the samples that were not captured by their analysis; for example, although this may have only represented 5% of the samples, it is not clear whether this 5% relates to only 5% of the areas where carbofuran may be used, or whether it actually represents a far greater percentage of the use area. Because this information, even if established, would provide an insufficient basis on which EPA could reasonably conclude that the drinking water exposures would be ''safe,'' this issue is not determinative.

iii. Denial of objection. For the reasons presented above, the Petitioners' objection is denied. Further, there are several significant defects with the analysis in Exhibit 16. First, the analysis was based on statewide averages, which ignores the fact that pH is not evenly distributed, but randomly clustered. Second NAWQA contained no data for Kansas (KS), Oklahoma (OK), and South Dakota (SD); Petitioners simply assert that the ''given the similarity between these states and the other High Plains states, it is reasonable to extend the observations from Colorado (CO), Nebraska (NE), and North Dakota (ND)'' (Exhibit 16 at 4). Although the 'High Plains' states all have extensive areas of grassland, they also have extensive geographic soil and climatic differences—*e.g.* the Black Hills and Badlands (SD), Sand Hills (NE), Flint Hills, Cheyenne Bottoms and Quivira wetlands (KS), Red Hills and Cross Timbers region (OK). These differences are not surprising since the distance from the Canadian border in ND to OK is over 1000 miles. Consequently it is not reasonable to extend observations from CO, NE, and ND to KS, OK, and SD.

g. Objection/hearing request subissue: Effect of existing drinking water treatment systems. The Petitioners contend that a review of drinking water treatment systems in areas under revised labels indicates that the majority of the ''total population in affected states obtain their drinking water from surface water sources subject to lime softening or activated charcoal filters. They allege that ''60% of the total population in affected states'' will have their water treated by methods that will substantially reduce or entirely remove carbofuran concentrations. For the remaining 40%, they claim that a significant portion use ground water sources, which are already protected by the Petitioners' other mitigation measures, and the remainder are protected by the Petitioners' proposed use reporting scheme. In support of this objection, Petitioners rely on the analysis in Exhibit 17.

i. Background. In the proposed rule, EPA explained that one of the more significant uncertainties in EPA's analysis was that EPA failed to account for the potential effect of treatment in removing carbofuran from finished drinking water before it is delivered to the consumer supply system. EPA explained that an evaluation of laboratory and field monitoring data indicate that carbofuran may be effectively removed (60–100%) from drinking water by lime softening and activated carbon; other treatment processes are less effective in removing carbofuran (Ref. 81). Although the Agency was aware of the mitigating effects of specific treatment processes, the processes employed at public water supply utilities across the country vary significantly both from location to location and throughout the year, and therefore EPA was unable to quantitatively incorporate this factor into its drinking water exposure

estimates. For example, lime softening would likely reduce carbofuran concentrations. That process is used in 3 to 21% of drinking water treatment systems in the United States (Ref. 14). Activated carbon has been shown to also reduce carbofuran concentrations, but is used in 1 to 15% of drinking water treatment facilities (Id.). Petitioners noted this discussion in their comments, and relied on it to support their argument that their drinking water exposure assessments were conservative, because they did not account for the effect of treatment (Ref. 18 at 46–55). However they submitted no comments raising any of the issues or evidence presented in this objection.

ii. Denial of hearing request. EPA denies this hearing request on the grounds that both the objection and the proffered evidence are untimely. EPA clearly described the potential impact that treatment could have on its estimates. None of the analyses in Exhibit 17 were provided as comments on the proposed rule. Nor were any of the issues inherent in this objection raised as comments on the proposal. Since the proposed rule clearly identified the issue, and the USGS data were available, the Petitioners could have conducted these analyses, or at least raised the issue, as part of their comments. Consequently, as discussed in Unit VI.D, EPA has determined that the evidence submitted in support of this objection is not appropriately considered as a basis for justifying a hearing on its final rule. In the absence of this evidence, the objection consists of mere allegations and general denials, which do not warrant a hearing (40 CFR 178.32(b)(2)). Further, to the extent the objection and the evidence in Exhibit 17 rely on the new registration proposals submitted in June 2009 as part of their objections, this evidence as well is deemed both immaterial and untimely. As discussed in Units VI.C and D, the new risk mitigation measures are not appropriately considered at this stage of the administrative process, and no hearing is warranted on this basis.

EPA is also denying this hearing request on the grounds the Petitioners' evidentiary proffer is insufficient to justify the factual issue urged (40 CFR 178.32(b)(2)). The analysis in Exhibit 17 is based on the percentage of the total population across all states combined, not the percentage of the local populations served by an individual surface water source—or even the percentage within each state. Even assuming that the 60% figure could legitimately be translated to a state-by-state basis, their own analysis shows that some percentage of the population in individual states will remain unprotected. In Colorado, only 24% of the population obtains their drinking water from groundwater, and in Illinois, only 33% of the population obtains their drinking water from groundwater. Sixteen percent of Colorado's population is not *de minimis.* Consequently, even if the analysis were accurate, it would not provide a sufficient basis on which to conclude that exposures from drinking water would be ''safe.''

A further consideration in this regard is that drinking water exposures are driven by uniquely local factors; not only is the source of drinking water local (*i.e.,* a person drinks water from his or her local water system not from a combination of water systems from across the United States), but the likelihood and degree of contamination of any particular, local drinking water source, whether it is a reservoir or well, varies widely based on local conditions (*e.g.,* from local pest pressures, weather). Examining a population across an entire state—let alone across several states—is an entirely inappropriate basis on which to conclude that drinking water exposures will be safe.

The evidence submitted therefore does not support their contention that 60% of the population in ''affected states'' obtain their drinking water from public systems that use the treatment processes effective at mitigating carbofuran residues. For example, Exhibit 17 shows that a major Chicago surface water drinking water system, which serves a population of 9,000,000, has neither lime softening processes nor filters. Petitioners have submitted no evidence that this population is protected. The fact that a small population remains unprotected is not outweighed by the fact that a larger population in another community or state is protected. Their own evidence also shows that only 26 of 141 of community water systems use lime softening/filters (Exhibit 17 at 4–9), which supports the conclusion in the final rule that approximately 20% facilities have appropriate treatment. See 57 FR 33244 (7/27/92) (Studies cited by NRDC do not provide a basis for the hearing because they ''support the [FDA] conclusion in question.''); 57 FR 6667 (2/27/1992) (''A hearing must be based on reliable evidence, not on mere allegations or on information that is inaccurate and contradicted by the record.''); 49 FR 6672 (2/22/84) (no hearing if claim based on demonstrably false premise).

iii. Denial of objection. For the reasons discussed above, this objection is denied. A further consideration is that treatment does not necessarily remove all residues. As previously noted, in both the proposed and final rules EPA discussed the SDWA monitoring detections between 4 and 7 ppb, which represent concentrations in samples collected post-treatment. As such, these levels are of particular concern to the Agency. An infant who consumes a single 8-ounce serving of water with a concentration of 4 ppb, as detected in the monitoring, would receive approximately 130% of the aPAD from water consumption alone. An infant who consumes a single 8-ounce serving of water with the higher detected concentration of 7 ppb, as detected in the monitoring, would receive approximately 220% of the aPAD from water consumption alone.

G. Objections to EPA's Dietary Risk Assessment

Petitioners raise two related objections to the way in which EPA evaluated the aggregate dietary exposures to carbofuran residues. First they raise several technical challenges to the way in which EPA calculated the two recovery half-lives that were used in the risk assessment supporting the final rule to account for the potential for individuals to recover from the effect of ingesting carbofuran residues between exposures. Second, they object to the fact that in the final rule EPA included both aggregate exposure estimates that did not account for the potential for individuals to recover from the effects between exposures as well as estimates that did account for such recovery. In support the Petitioners cite to Exhibits 9 and 10. Exhibit 9 is a memorandum prepared by Robert Sielken and Ciriaco Valdez-Flores. Exhibit 10 is a published literature study by Elsa Reiner that presents data on the rates of spontaneous reactivation of phosphorylated and carbamylated cholinesterases.

1. Objection/hearing request subissue: Inclusion of exposure estimates that do not incorporate recovery in final rule. The Petitioners object to the fact that the final rule presented aggregated exposure estimates that did not incorporate the anticipated recovery from carbofuran's effects between exposures, in addition to those that did account for recovery. They claim that recovery time should be included in EPA's ''primary'' risk assessment.

i. Background. As discussed in Unit V, EPA's standard acute dietary exposure assessment calculates total dietary exposure over a 24-hour period; that is consumption over 24 hours is summed and no account is taken of the

fact that eating and drinking occasions may spread out exposures over a day. This total daily exposure generally provides reasonable estimates of the risks from acute dietary exposures, given the nature of most chemical endpoints. Due to the rapid recovery associated with some chemical toxicity (*e.g.,* AChE inhibition), 24-hour exposure periods may or may not be appropriate. To the extent that a day's eating or drinking occasions leading to high total daily exposure might be found close together in time, or to occur from a single eating event, minimal AChE recovery would occur between eating occasions (*i.e.,* exposure events). In that case, the ''24-hour sum'' approach, which sums eating events over a 24-hour period, would provide reasonable estimates of risk from food and drinking water. Conversely, to the extent that eating occasions leading to high total daily exposures are widely separated in time (within 1 day) such that substantial AChE recovery occurs between eating occasions, then the estimated risks under any 24-hour sum approach may be overstated. In that case, a more sophisticated approach—one that accounts for intra-day eating and drinking patterns and the recovery of AChE between exposure events—may be more appropriate. This approach is referred to as the ''Eating Occasions Analysis'' and it takes into account the fact that the toxicological effect of a first dose may be reduced or tempered prior to a second (or subsequent) dose.

In the proposed rule, EPA conducted an Eating Occasion analysis based on two half-lives: 150 minutes and 300 minutes (73 FR 44887 (July 31, 2008)). These half-lives were not specific to carbofuran, but were calculations derived for the NMC Cumulative Risk Assessment. EPA concluded that incorporating these analyses into the risk assessment had little impact on the risk estimates from exposures from food alone, but that risk estimates from combined exposures from food and water were reduced by approximately 2–3X (Id). However, because many of EPA's risk concerns stemmed from a single exposure (*e.g.,* one meal) and because, even when recovery was accounted for, aggregate exposures far exceeded safe levels, EPA concluded that ''risks to carbofuran is indeed not substantively overestimated using * * * the 24-hour approach'' (Id).

In their comments, Petitioners complained that EPA had failed to incorporate recovery into their risk assessment. They further argued that EPA should calculate the per capita 99.9th percentile based on all person minutes rather than all person-days. In addition, they submitted an aggregate dietary risk assessment they had conducted using a 150-minute half-life input. They submitted no explanation for using only the 150-minute half-life rather than also including estimates based on the 300-minute half-life that EPA has used for the proposed rule.

In the final rule EPA explained that it had conducted a revised Eating Occasion analysis to evaluate the impact of carbofuran's rapid reversibility on its risk estimates (74 FR 23086 (May 15, 2009)). EPA concluded that incorporating Eating Occasion Analysis and the 186-minute or 426-minute recovery half-lives for carbofuran did not significantly change the risk estimates for food exposures alone (74 FR 23086 (May 15, 2009)). EPA concluded that risk estimates based on combined food and drinking water exposures are reduced considerably—by a factor of two or more in some cases, but nonetheless still substantially exceed EPA's level of concern for infants and children. EPA also explained that the Agency remains concerned about the risks from single eating or drinking events. Finally, EPA noted that the Eating Occasion Analyses underestimate exposures to the extent that they do not take into account carry-over effects from previous days, and because drinking water concentrations are randomly picked from the entire 30-year distribution (Id at 23087).

ii. Denial of hearing request. EPA is denying this hearing request on two grounds. First, the objection fails to present a disputed issue of material fact. The record is clear that EPA did incorporate recovery into its analysis; indeed, one of Petitioners' objections relates to the manner in which EPA incorporated recovery into its risk assessment (Obj at 30–33). Rather, their only challenge is that the final rule should have only presented risk estimates that accounted for recovery. The sole issue is whether it was reasonable for EPA to have also communicated aggregate risks that did not account for recovery, when (1) EPA's estimates showed that accounting for recovery demonstrated that EPA's standard 24-hour estimates were not substantially overstated; (2) EPA's approach to accounting for recovery underestimates some risks; and (3) EPA's risk assessments concluded that infants received unsafe exposures from a single meal (eating occasion). This is a policy issue, and hearings are not appropriate on such (40 CFR 178.32(b)(1)).

Second, the fact that EPA relied on 24-hour aggregate exposures in addition to analyses that accounted for recovery is not material. As documented in the final rule, EPA would still have concluded that revocation of all tolerances were warranted on the grounds that, even accounting for recovery, aggregate exposures are not ''safe.'' Even though accounting for recovery resulted in a 2–3X reduction in exposure estimates, many of EPA's estimates for aggregate exposures ranged between 2700% aPAD and 9400% aPAD for infants. Accounting for recovery does not, therefore, demonstrate that aggregate exposures will be safe for infants. Of greater significance in this regard is EPA's finding that infants are at risk from a single exposure. Recovery is only relevant, by definition, where the risk is derived from multiple exposures over time.

iii. Denial of objection. The reason for not simply adopting the assessment incorporating recovery time was that the Agency has concerns that other aspects of its exposure model tends to understate exposure. If the assessment using recovery time had suggested that carbofuran risks may be acceptable, EPA would have had to further examine how exposure was assessed. However, because both the assessment based on 24-hour exposure and the one incorporating recovery time showed carbofuran exposures to be well over the safe level, EPA concluded that its exposure assessment was reasonable. As explained in the final rule, incorporating Eating Occasion Analysis and the 186-minute or 426-minute recovery half-lives for carbofuran resulted in a reduction in the risk estimates for which food and drinking water are jointly considered (*i.e.,* Food + Drinking Water) by a factor of two or more in some cases. But even though the risk estimates from aggregate exposure are reduced, they nonetheless still substantially exceed EPA's level of concern for infants and children. Using drinking water derived from the surface water from the Idaho potato surface water scenario, which estimated one of the lowest exposure distributions, aggregate exposures at the 99.9th percentile ranged from 328% of the aPAD under the scenario for which infants rapidly metabolize carbofuran (*e.g.*, 186-minute half-life), to a high of 473% of the aPAD under the scenario for which infants metabolize carbofuran more slowly *(e.g.*, scenarios in which a 426-minute half life is assumed). Either way, the tolerances are unsafe.

Moreover, even accounting for the estimated decreased risk from accounting for carbofuran's rapid reversibility, for which recovery between exposures is irrelevant. The Agency remains concerned about the

risks from single eating or drinking events, as illustrated in the following example, based on an actual food consumption diary from the CSFII survey. A 4-month old male non-nursing infant weighing 10 kg is reported to have consumed a total of 1,070 milliters (ml) of indirect water over eight different occasions during the day. The first eating occasion occurred at 6:30 a.m., when this 4 month old consumed 8 fluid ounces of formula prepared from powder. The FCID food recipes indicate that this particular food item consists of approximately 87.7% water, and therefore, 8 ounces of formula contains approximately 214 ml (or grams) of indirect water; with the powder (various nutrients, dairy, soy, oils, etc.) accounting for the remaining 12.3%. This infant also reportedly consumed a full 8-ounce bottle of formula at 12 p.m., 4 p.m., and 8 p.m. that day. The food diary also indicates that the infant consumed about 1 tablespoon of water (14.8 ml) added to prepare rice cereal at 10 a.m., about 2 ounces of water (59.3 ml) added to pear juice at 11 a.m., another ½ tsp of water (2.5 ml) to prepare more rice cereal at 8:30 p.m.; and finally, he consumed another 4 ounces of formula (107 ml) at 9:30 p.m.

The infant's total daily water intake (1,070 ml, or approximately 107 ml/kg/day) is not overly conservative, and represents substantially less than the 90th percentile value from CSFII on a ml water/kg bodyweight (ml/kg/bw) basis. As noted, carbofuran has been detected in finished water at concentrations of 4 ppb. For this 10 kg body weight infant, an 8-ounce bottle of formula prepared from water containing carbofuran at 4 ppb leads to drinking water exposures of 0.0856 micrograms of active ingredient/kilogram of bodyweight (µg ai/kg bw), or 114% of the aPAD from that bottle alone. Based on the total daily water intake of 1,070 ml/day (no reversibility), total daily exposures from water at 4 ppb concentration would amount to 0.4158 µg ai/kg bw, or 555% of the aPAD; this is the amount that would be used for this person-day in the Total Daily Approach.

Peak inhibition occurs following each occasion on which the infant consumed 8 fluid ounces of formula (6 a.m., 12 p.m., 4 p.m. and 8 p.m.); however, the maximum persisting dose occurs following the 9:30 p.m. eating occasion, based on a 186-minute half-life parameter. This produces a maximum persisting dose of 0.1457 µg ai/kg bw, or about 30% of the total daily exposure of 0.4158 µg ai/kg bw derived above, or expressed as a fraction of the level of concern, the maximum persisting dose amounts to about 194% of the aPAD (or 30% of 554%). Note that with drinking water concentration at 4 ppb, an infant consuming one 8 oz bottle of formula—prepared from powder and tap water containing carbofuran at 4 ppb will obtain exposures of approximately 114% of aPAD. Since many infants consume the equivalent of this amount on a single eating occasion, accounting for reversibility over multiple occasions is not essential to ascertain that infants quite likely have obtained drinking water exposures to carbofuran exceeding the level of concern based on drinking water concentrations found in public drinking water supplies.

The approach discussed above is used to evaluate the extent to which the Agency's 24-hour approach to dietary risk assessment overestimates risk from carbofuran exposure. The results of both approaches indicate that the risk from carbofuran is indeed not substantively overestimated using the current exposure models and the 24-hour approach.

In this regard, it is important to note EPA's Eating Occasion Analyses underestimate exposures to the extent that they do not take into account carry-over effects from previous days, and because drinking water concentrations are randomly picked from the entire 30-year distribution. As discussed previously, DEEM–FCID is a single day dietary exposure model, and the DEEM-based Eating Occasion Analysis accounts for reversibility within each simulated person-day. All of the empirical data regarding time and amounts consumed (and corresponding exposures based on the corresponding residues) from the CSFII survey are used, along with the half-life to assess an equivalent persisting dose that produced the peak inhibition expected over the course of that day. This is a reasonable assumption for food alone; since the time between exposure events across 2 days is relatively high (compared to the half-life)—most children (>9 months) tend to sleep through the night—and the time between dinner and breakfast the following morning is long enough it is reasonable to ''ignore'' persisting effects from the previous day. A single day exposure model will underestimate the persisting effects from drinking water exposures (formula) among infants, and newborns in particular (<3 months), since newborns tend to wake up every 2 to 4 hours to feed. Any carry over effects may be important, especially if exposures from the previous day are relatively high, since the time between the last feeding (formula) of the day and the first feeding of the subsequent day is short. A single day model also does not account for the effect of seasonal variations in drinking water concentrations, which will make this effect more pronounced during the high use season (*i.e.*, the time of year when drinking water concentrations are high). Based on these analyses, the Agency concludes that the current exposure assessment methods used in the carbofuran dietary assessment provide realistic and high confidence estimates of risk to carbofuran exposure through food and water.

In summary, there are several factors that may cause EPA's exposure/risk model to either understate or overstate exposure/risk. It is unreasonable to present risks only incorporating factors that tend to reduce exposure/risk estimates (*e.g.*, recovery time), as Petitioners suggest. EPA's approach of evaluating the impact that these factors may have on the risk assessment is an appropriate method of taking all relevant factors into account. Petitioners' objection to EPA's policy decision to present acute risks in terms of 24-hours of exposure is therefore denied because EPA's policy approach here is reasonable.

2. Objection/hearing request subissue: Technical challenges to EPA's calculated half-lives. Petitioners contend that EPA's calculation of carbofuran half-lives of 186 minutes and 426 minutes were flawed, and that the data instead support the use of a 150-minute half-life. Petitioners identify three specific challenges: (1) Because one of the time course studies showed that the time-to-peak effect was one hour, EPA's assumption that the time-to-peak effect in each study was 15 minutes is incorrect; (2) EPA included the control rats in its modeling, which distorts the estimated recovery half-life because it incorporates AChE from animals that were not dosed and did not need to recover; (3) Biochemically, the recovery half-lives of all NMC chemicals should be the same, which supports the use of a 150-minute half-life. In support of these claims, Petitioners offered a summary of written testimony from Drs. Sielken and Valdez-Flores (Exhibit 9) and a published study (Exhibit 10).

i. Background. In the proposed rule, EPA relied on half-lives of 150 minutes and 300 minutes (73 FR 44887). These values were calculated for the NMC cumulative risk assessment and so were intended to encompass the half-lives for all of the NMC pesticides.

In the final rule, EPA calculated half-lives specific to carbofuran to ensure that its analyses accurately reflected carbofuran's risk. Using the two FMC

time course studies in rat pups EPA calculated half-lives for recovery of 186 and 426 minutes (Id). The two values were derived from two different studies using rat pups of the same age (Refs. 24, 25); the two values provide an indication that half-lives to recovery can vary among juvenile rats. By extension, children are expected to vary in their ability to recover from AChE inhibition where longer recoveries would be associated with a potentially higher ''persisting dose.''

ii. Denial of hearing request. The issue of the appropriate half-lives for carbofuran is not material. Petitioners have proffered no evidence to show that reliance on a 150-minute half-life rather than a 186-minute half-life would make a significant difference to their estimates. By contrast, in the risk assessment supporting the final rule, EPA's estimates show that the use of a 150-minute or 186-minute half-life makes little or no difference. For example, EPA's estimated exposures from food alone for children 1–2 were 43% of the aPAD, assuming a 186-minute half-life, and 41% of the aPAD, assuming a 150-minute half-life. Similarly, for infants, the estimates ranged from 31% aPAD, assuming a 186-minute half-life, and 30% of the aPAD, assuming a 150-minute half-life. For all other age groups, the estimated exposures were identical, whether one assumed a 150-minute or 186-minute half-life.

In any event, Petitioners' objection would have ultimately no effect on the Agency's conclusion that the carbofuran tolerances are not ''safe.'' Given EPA's assessments showing that a single exposure can result in excessive risks to infants—a conclusion that Petitioners have not challenged—the extent of recovery between subsequent exposures is irrelevant. This conclusion alone provides an adequate basis to revoke the carbofuran tolerances. Accordingly, because the action would be the same even if the factual issue were resolved in the manner sought, this request does not meet the standard for granting a hearing (40 CFR 178.32(b)(3)).

There is yet a further consideration affecting the materiality of this objection. EPA's recalculation of half-lives in the final rule would ordinarily mean that Petitioners could appropriately challenge EPA's methodology for deriving the revised half-lives for the first time in their objections. This is because the Petitioners would have had no prior opportunity to challenge the manner in which these estimates were developed, as EPA had not previously relied on carbofuran-specific estimates. However in this case, the Petitioners never commented on the 300-minute estimate EPA used in the proposal, nor raised any issue to challenge the reliance on a longer half-life to account for the variation in children's sensitivity. For the reasons discussed in Unit VI.D, they have therefore waived any objection to use of a 300-minute half-life. Accordingly, the question of whether the Petitioners' half-life of 150-minutes or EPA's estimated half-life of 186-minutes is immaterial, since the lower amount of recovery associated with the longer 300-minute half-life would be expected to have a far greater impact than the use of a 186-minute half-life.

EPA is also denying the hearing request because the evidentiary proffer in support of this objection is inadequate. Petitioners have not provided the underlying analyses conducted in support of their calculated half-lives. The remainder of Exhibit 9 consists of contentions that EPA's analyses were mistaken. In the absence of the analyses that support their claim that the data support a half-life of 150 minutes, Petitioners' evidentiary proffer consists of no more than mere allegations and denials. Hearings will not be granted on this basis (40 CFR 178.32(b)(2)) (See 73 FR 42706 (July 23, 2008) (''NRDC does no more than state '[w]e are aware of no statistical test' which would support EPA's use of the Gledhill data. As EPA's regulations make clear, a mere 'denial' of an EPA position is not sufficient to satisfy the standard for granting a hearing'') (citations omitted); 53 FR 53176, 53199 (December 30, 1998) (''Rather than presenting evidence [the objector] asserts that FDA did not adequately justify its conclusions. Such an assertion will not justify a hearing.'').

The published paper in Exhibit 10 does not cure this defect. The paper was submitted to support the claim that the Petitioners' 150-minute half-life is consistent with the ''available literature on the AChE recovery'' (Obj at 32). This evidence is immaterial. The Reiner paper relates to the reactivation of the AChE enzyme; however the relevant issue is not the reactivation of the cholinesterase enzyme, but the level of chemical in that target tissue, which this study does not address. Moreover, this study concludes that ''[I]t follows from the data in Tables 1 and 2 that the rate of spontaneous reactivation cannot be predicted, but must be separately determined for each compound and each enzyme source (Exhibit 10 at 1). The paper did not include data specifically on carbofuran, and it is therefore difficult to see how this could be argued to support the Petitioners' half-life of 150-minutes.

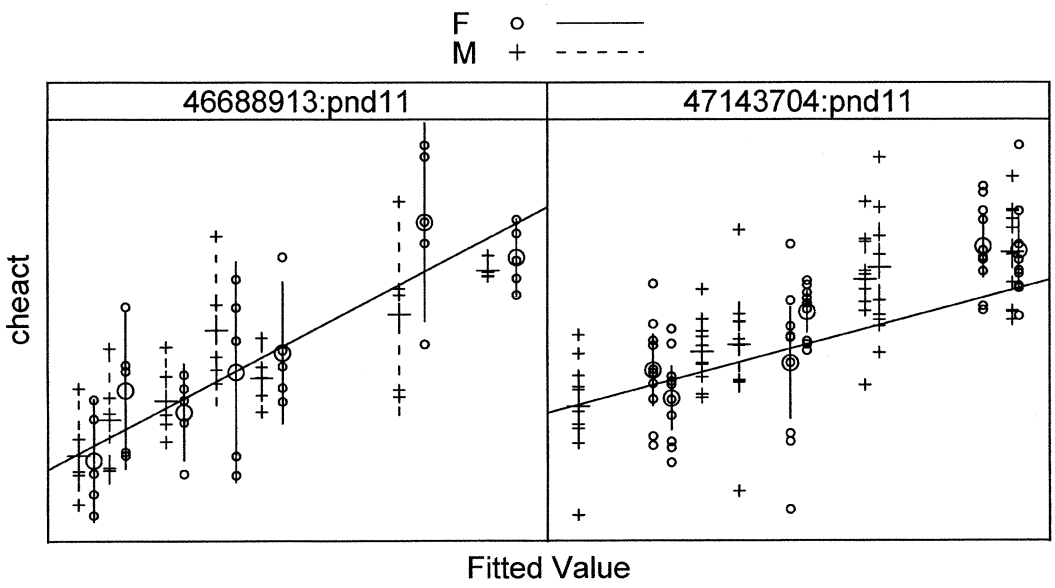
iii. Denial of objection subissue. All of Petitioners' claims are incorrect.

Appropriate time to peak effect. The Petitioners claim that the time to peak effect in the study with MRID 47143704 (Ref. 2) should have been 1 hour instead of the 15 minutes EPA calculated. Petitioners chose this value simply by choosing the data point with the highest level of inhibition. But this approach is flawed in a number of regards: First as a practical matter, using the same criteria on which the Petitioners rely, the time to peak effect in MRID 46688913 (Ref. 3) is 15 minutes. Petitioners have presented no basis for excluding those results.

More significantly, the Petitioners' approach fails to account for the variability of the estimated AChE activity at each time point. As a point of background, the level of the highest inhibition is not something that can be observed, in the way that motor activity is observed. To determine inhibition, samples are taken and measured—the samples may or may not capture the highest point of inhibition; the technician has not external indicia that will determine the moment of the ''peak.'' Determining peak inhibition is estimated based on the available measurements. But because measurements are generally variable—the animals differ and the sampling itself is not identical, as people cannot perfectly replicate their actions time after time—in order to accurately capture the peak levels, the variability needs to be accounted for. When, as here, the individual values are quite variable, then for a half-life as long as carbofuran's, the sampling variability will make the study means bounce up and down around a trend line representing the true recovery rate. Figure 2 illustrates the sampling variability of the measured AChE activity and its relationship to EPA's modeling estimates for PND11 pups. In brief, this plots observed versus predicted for all the data. Each little point is an individual animal, while the time-group mean is the larger version of the same plotting symbol. The vertical lines are the 95 percent confidence intervals for each mean, the vertical lines. The diagonal line in each figure is the identity line—*i.e.,* the line all the data would fall on if there were no variability and the model were perfect. Normally, one would expect some random scatter about the identity line. In such a case, simply visually picking the time with the lowest mean, which is what the Petitioners have done, will

not be a very reliable way to estimate the time to peak effect.

Figure 2



Inclusion of data from control animals. It is standard scientific practice to include concurrent control animals (*i.e.*, animals that are not dosed with the test substance) as part of any experimental design. The purpose of controls is to determine the effects of the inevitable, unexpected, and uncontrolled variations in experimental practice, such as the biological variation between individual living animals. EPA's model simply used control levels to establish a baseline against which to evaluate the recovery of the treated animals. For example, as discussed above, measurements of AChE activities may change, and that concurrent controls are set up so that the same non-dose-related factors that affect treated animals will also affect control animals. Thus, EPA measured activity and computed inhibition based on measures of activity in treated animals and concurrent control animals. Thus, if the control animals showed that measured levels of AChE typically varied by 5 percent, if the dosed animal showed inhibition levels of 20 percent, EPA would consider that only 15 percent of the inhibition would be related to the chemical exposure. EPA did not estimate a half-life of recovery for the control animals and incorporate that into the estimated half-lives, which seems to be the Petitioners' allegation.

Biochemically, the recovery half-lives of all NMC chemicals should be the same. Although the Petitioners' claim that the recovery rate of AChE inhibited by carbamate compounds is dictated by the commonly-shared NMC carbamyl group is theoretically plausible, in reality, it is not supported by the data on the NMC compounds. EPA had originally hoped, based on the same mechanistic argument Petitioners make, that half-lives would be the same across all NMCs, thus greatly simplifying the cumulative risk assessment. It turned out, though, in the NMC data sets analyzed for the NMC cumulative risk assessment, that estimated recovery half-lives changed (generally, they got longer) as dose increased, which is counter to the results that would be predicted from the Petitioners' simple mechanistic argument (Ref. 81). Ultimately, this is due to the fact that the relevant question is not the abstract reactivation of the cholinesterase enzyme, but the level of chemical in the living animal's target tissue, which is a function both of the pharmacokinetics of the NMC (*i.e.*, the rate at which the chemical is absorbed, distributed among tissues, and eliminated) in the animal and the rate of hydrolysis of the leaving group off the AChE molecule. These parameters vary at least somewhat for the different carbamates, accounting for the differences in half-lives between the NMC pesticides.

H. Objection to EPA's Decision Not To Rely on Carbofuran Human Study

Petitioners object to EPA's reliance on a default 10X interspecies factor, which accounts for the uncertainties inherent in extrapolating from animal data to the anticipated effects in humans. They argue, for several reasons, that EPA should have instead used a 3X interspecies factor. All of their arguments, however, depend on EPA consideration of an oral carbofuran dosing study conducted in humans. EPA did not rely on the cited human study because it found, taking into account the advice of the HSRB, that the study was scientifically invalid. EPA's Human Research rule prohibits EPA from considering scientifically invalid human studies (40 CFR 26.1701). In their objections, Petitioners argue that the HSRB's, and presumably EPA's, evaluation of the scientific validity of the human study was flawed because (1) the human study was not considered in light of the animal data on carbofuran; (2) insufficient weight was given prior independent reports on the value of the Arnold study which reached the opposite conclusion from the HSRB; (3) the ''technical'' concerns raised by the HSRB are addressed by ''the data within the study'' and that these ''technical'' deficiencies do not render the Arnold study unreliable.

1. Background. There are three intentional dosing human studies conducted with carbofuran that were conducted by J.D. Arnold in 1976, 1977, and 1978. One study was an oral ingestion toxicity study and two studies were intended to evaluate toxicity from dermal exposure (Refs. 7, 8, 9). The oral study conducted with carbofuran was carried out in nine healthy male

volunteers using an ascending dose schedule and single doses of 0.05, 0.1 and 0.25 mg/kg (Ref. 7). The two dermal toxicity studies were found to have significant ethical deficiencies and the EPA's Human Studies Review Board recommended against their use. The Petitioners do not challenge the decision to disregard these studies.

As previously noted, EPA did not rely upon any of the existing intentional dosing human toxicity study deriving an acceptable level of exposure for carbofuran. Instead, EPA relied on data conducted with rats, and applied the default 10 × interspecies factor to account for the potential uncertainty in extrapolating from animal data. EPA's decision not to rely on the Arnold studies was made pursuant to its Human Research rule. As explained in Unit III.B, that rule establishes different ethical standards for the review of completed human studies depending on whether they were initiated before or after the effective date of the rule on April 7, 2006. For an intentional human exposure study such as the Arnold studies, that was initiated prior to April 7, 2006, EPA is barred, subject to a very limited exception, from relying on it if there is clear and convincing evidence that the conduct of the research was fundamentally unethical or significantly deficient with respect to the ethical standards prevailing at the time the research was conducted (40 CFR 26.1704, 26.1706). Further, the rule limits the human research that can be relied upon by EPA to ''scientifically valid and relevant data'' (40 CFR 26.1701). Finally, because the Arnold study was conducted with the purpose of identifying or measuring a toxic effect, EPA is required by the rule to submit its determination regarding these issues to an independent expert advisory body known as the Human Studies Review Board (''HSRB'') for review. These procedures were followed with regard to the Arnold study.

The HSRB reviewed the Arnold oral and dermal carbofuran human studies at its May, 2006 meeting (Refs. 7, 8, 9). The Board found numerous technical deficiencies regarding the conduct of the oral study and that overall, the weaknesses of the studies far outweigh the strengths. These deficiencies included: (1) There was no justification or rationale for the selection of doses used in any of the three studies. (2) The sample size was very small (typically two subjects per dose or condition) with few or no controls (no more than two control subjects in any study). Such a design prevented evaluation of statistical significance for any parameter measured in the studies. (3) The values obtained for RBC and plasma cholinesterase levels were highly variable. Factors that contributed to this variability included the small sample size, the inclusion of only a single baseline sample collected immediately prior to dosing used to compare all post-dosing samples, the small number of control subjects, and an uncommon method for analytical determination of cholinesterase activities. The contribution of potential laboratory error cannot be ruled out. (4) Plasma cholinesterase levels were highly variable in all studies so as to preclude any useful interpretation. In general, plasma cholinesterase levels were not consistent with changes in RBC cholinesterase activities. (5) One subject who presented with abnormal vestibular mechanisms in the pre-dose evaluation was used in the oral study and showed serious symptoms after treatment. (6) Subjects were allowed to smoke during the study period.

In response to a specific request from the Agency, the Board provided additional analysis concerning the potential for the data in human subjects for carbofuran to be applied to: (1) The calculation of a benchmark dose (BMD_{10}) and identification of the $BMD_{10}L$ (lower confidence limit); (2) the identification of a NOAEL or LOAEL for effects or (3) the comparison to other species for possible adjustments to uncertainty factor for the cumulative assessment. The HSRB provided the following additional perspective relative to the Agency's question:

> The utility of the human studies with carbofuran was limited by the very small sample size used in all of the studies. The Agency proposed to use the RBC cholinesterase data for determination of the $BMDL_{10}$. However, under conditions where the group size was only two, it would be imperative to have highly accurate, valid, reliable and consistent measures of RBC cholinesterase activity in both control and carbofuran-treated subjects. This rigor was simply not achieved in the human studies. Rather, RBC cholinesterase activities were compared to a single baseline value, were highly variable across subjects, including controls, and did not show any consistency with plasma cholinesterase levels. As such, although EPA scientists calculated a $BMDL_{10}$ from the time course of changes in RBC cholinesterase values in the nine subjects evaluated in the oral study, the HSRB concluded that the accuracy and reliability of this calculation was limited by the technical shortcomings noted for the study. Therefore, the HSRB reiterated its recommendation that the $BMDL_{10}$ calculated by the Agency from the human data should not be used.
>
> In a similar manner, the small sample size, compounded by the lack of consistent changes in cholinesterase activities in all studies, the inappropriate methods used for dermal application of the compound in the dermal studies and the inclusion of at least one subject who presented with abnormal vestibular function in a pre-dose assessment limited the general utility of the data. Collectively, the weaknesses in the conduct and outcomes of the carbofuran human studies cast doubt on the utility of the data for identifying a NOAEL or LOAEL or for comparing across species in consideration of the interspecies uncertainty factor for the cumulative risk assessment. Thus the majority of HSRB members agreed the human oral data should not be used to identify a NOAEL or LOAEL, and there was unanimous agreement that the human dermal data should also not be used for these evaluations.

The HSRB concluded that while these studies were informative, due to the numerous technical issues regarding the conduct of the oral study, overall, the weaknesses of the studies far outweigh the strengths. Describing the studies as ''poor science,'' the HSRB recommended against the use of the oral study conducted with carbofuran in human subjects for the single chemical assessment or in informing the interspecies uncertainty factor for the cumulative assessment.

In their comments opposing EPA's proposal to revoke carbofuran tolerances, Petitioners essentially raised the same arguments they present in their objections.

In responding to Petitioners' comments, EPA explained that it agreed with the HSRB's conclusions that the studies were scientifically flawed, and that, therefore, under the Human Research rule, EPA was barred from considering them (Ref. 85 at 9).

2. Denial of hearing request. The critical issue here is EPA's determination under the Human Research rule that the Arnold study was scientifically invalid. All of Petitioners' arguments concerning the choice of the interspecies safety factor rely on EPA's consideration of the Arnold study. As noted above, Petitioners make three arguments as to why EPA erred in its determination. For the reasons discussed below, none of those arguments satisfy the regulatory standard for granting a hearing. Further, as explained in Unit VI.H.3., Petitioners' objections to EPA's determination have no merit. Thus, there is no need to consider Petitioners' more general arguments about EPA's decision to use a 10X interspecies factor in assessing carbofuran's risk.

Petitioners' first argument as to why EPA erred in its determination that the Arnold study was scientifically invalid is that EPA failed to consider the animal data on carbofuran in assessing the scientific quality of the Arnold study. This claim is not material and thus not

appropriate for a hearing (40 CFR 178.32(b)(3)). Under the Human Research Rule, the relevant question is whether the Arnold study is scientifically valid, not whether consideration of the Arnold study in conjunction with the animal data could justify a lower interspecies factor. EPA, and the HSRB, found the Arnold study to be flawed at its core—due primarily to its small sample size and the high variability in measurement of AChE inhibition—and no amount of data from other studies in animals can cure these defects in the Arnold study. Thus, Petitioners' claim here is irrelevant and immaterial to EPA's decision. Ultimately, Petitioners' objection is a challenge to the policy established in the Human Research rule that EPA will not routinely consider all human data. They contend that ''[s]ince [human] data exist for carbofuran, they should have been used to select the interspecies uncertainty factor.'' However, this policy question is not open for debate under the terms of the Human Research rule. And more importantly, such a question does not provide a basis for a hearing (40 CFR 178.32(b)(1)).

Second, Petitioners argue that insufficient weight was given the prior independent reports on the Arnold study. However, the weight EPA should give under the Human Research rule to pre-rule independent reviews as opposed to the conclusions of the HSRB—the body established by the rule for the purpose of aiding EPA's implementation of it—is a legal/policy question and not a factual one. Hearings will not be granted on legal/policy issues (40 CFR 178.32(b)(1)).

Finally, Petitioners' claims that EPA and the HSRB identified merely ''technical'' deficiencies in the Arnold study and that these deficiencies are ''address[ed]'' by ''data within the study itself'' and, therefore, do not render the study ''unreliable'' are no more than mere allegations and thus provide an insufficient basis for the granting of a hearing (40 CFR 178.32(b)(2)). Petitioners have proffered no evidence regarding the ''technical'' nature of the deficiencies in the Arnold study or how the deficiencies in sample size or variability are addressed within the study. Moreover, the record is clear that the deficiencies in the study are fundamental in nature and a hearing will not be granted on bald objections that are contradicted by the record (73 FR 42696 (July 23, 2008) (hearing denied when objection was contradicted by record and no evidence proffered in support)).

3. Denial of objection. Petitioners have offered no response to EPA's explanation for accepting the HSRB's reasoning as to the weaknesses of the studies that rendered them scientifically invalid. Specifically, Petitioners do not address the HSRB's conclusion, adopted by EPA, that ''the weaknesses in the conduct and outcomes of the carbofuran human studies cast doubt on the utility of the data for * * * comparing across species in consideration of the interspecies uncertainty factor.'' Nor do Petitioners offer any reason as to why the HSRB's conclusion is not ''justifiable'' in light of the individual peer review reports from Drs. Brimijoin, Chambers, and Pope. Actually, there are several very good reasons for EPA to place primary weight on the HSRB's report compared to the three individual reports from Drs. Brimijoin, Chambers, and Pope prepared in 1997. First, the prior reports were not produced under the rubric of the Human Research rule, which has a different scope of inquiry than a traditional peer review. Second, Drs. Brimijoin, Chambers, and Pope made their recommendation regarding use of the Arnold study for a RfD in the context of a very different overall database for carbofuran. A significant number of new toxicity studies have been submitted since 1997. Third, Drs. Brimijoin, Chambers, and Pope all noted the severe deficiencies in the Arnold study but proposed that they be dealt with through the use of additional safety factors. Given these considerations it was reasonable for EPA to place primary reliance on the HSRB's report.

The bulk of Petitioners' argument concerning EPA's determination on the scientific validity of the Arnold study is devoted to suggesting that the HSRB's review of the Arnold study was somehow ''inadequate'' because two members of the HSRB (Drs. Brimijoin and Chambers) were recused from the review due to their prior participation in a prior independent peer review. Petitioners also assert that the HSRB was hampered because EPA ''never informed the HSRB that it could call upon these experts for questioning or information regarding their prior peer review of the human studies, nor was it informed of—or provided with—those prior reviews.''

These claims are wholly without merit. As laid out in a letter responding to FMC's complaint regarding the recusal of Drs. Brimijoin and Chambers from the HSRB review of the carbofuran human studies, the recusal was entirely appropriate, and consistent with EPA's policies and regulations. The facts outlined in that letter also demonstrate that the HSRB's review was in no way restricted or hampered by the limited recusal of the two Board members.

First, the HSRB was fully apprised of the earlier peer review reports. EPA relied on the reports because EPA's position before the HSRB was that the Arnold study should be found to meet the standard of the Human Research rule and would be useful in establishing points of departure for the carbofuran's single chemical assessment and in informing the interspecies uncertainty factor for the NMC CRA. It was clearly in EPA's interest that the HSRB be made aware of the earlier reports. In fact, the background materials provided to the Board included the peer review reports by Drs. Brimijoin, Chambers, and Pope, and the Agency's Weight-of-the-Evidence presentation to the HSRB which noted the contributions of these reviewers. Further, both the peer review reports and EPA's Weight-of-Evidence presentations were included in the public docket for the HSRB review. To the extent that the HSRB was still somehow unaware of the prior reports, FMC clearly referenced them in both its written and oral comments to the Board.

Second, EPA's determination on the recusal of Drs. Brimijoin and Chambers was clearly consistent with Agency policy and well with EPA's discretion. The EPA's Peer Review Handbook (3rd Edition) (Ref. 80) provides guidance about peer review processes of the Agency. Of particular relevance is the Handbook's guidance regarding independent peer reviewers. While the Handbook notes that there is no prohibition against using the same peer reviewer more than once on the same product, it nevertheless advises that ''it is preferable to use different people each time to provide a broader perspective (Ref. 80 at 13). Further the Handbook advises that the review of experts who ''have participated substantially in the development of a product * * * may not qualify as unbiased, independent peer review * * *'' (Id.). Therefore, EPA concluded that, under the circumstances, a question could be raised regarding the impartiality of Drs. Brimijoin and Chambers from the particular matter under review by the HSRB. Further support on this point can be found in the regulations at 5 CFR 2635.502(a)(2), and in the preamble to the original regulation (56 FR 33778 (July 23, 1991)).

In light of these considerations, EPA addressed the appearance issue regarding Drs. Brimijoin and Chambers by determining whether authorization by the Agency designee should be invoked (see, 5 CFR 2635.502(d)). Three factors were particularly relevant to the determination of Drs. Brimijoin and Chambers (see, 5 CFR 2635.502(d)(4), (5), and (6)): the sensitivity of the

matter, the difficulty of reassigning the matter to another employee, and adjustments that may be made in the employee's duties that would reduce or eliminate the likelihood that a reasonable person would question the employee's impartiality. After considering these factors, the Agency decided the prudent course was be to recuse Drs. Brimijoin and Chambers from the HSRB carbofuran discussion but to authorize limited, as needed, participation.

As documented in Dr. William Farland's May 1, 2006 memorandum entitled, ''Ethics Determination for Participation at the May 2–3, 2006 EPA Human Studies Review Board Meeting'' (Ref. 39), EPA authorized the HSRB to ask Drs. Brimijoin and Chambers clarifying questions regarding their 1997 review, in the event that the HSRB deemed it necessary as part of their deliberations. At no point during the meeting did any of the HSRB's members indicate in any way that they wanted to consult with their recused colleagues. Nor did any of the members state that they wanted clarification on any point associated with the study.

For all of the above reasons, Petitioners' objection on this point is denied.

I. Objections to Revocation of Import Tolerances

Petitioners object to EPA's revocation of the tolerances for imported foods along with the tolerances associated with domestic uses. Petitioners allege that the revocation of the import tolerances is not supported by the available data because EPA's own risk assessments conclude that, when considered separately from the domestic uses, the residues from imported foods covered by these tolerances are ''safe.'' Petitioners further argue that EPA ''has not asserted any claim or rationale in the Final Order justifying its conclusions that the import tolerances are unsafe'' and therefore the revocation is unjustified.

1. Background. In the proposed rule, EPA explained that its finding that aggregate exposure from all of the existing uses of carbofuran is not safe does not necessarily mean that no individual tolerance or group of tolerances could meet the FFDCA 408(b)(2) safety standard and be maintained (73 FR 44865 (July 31, 2008)). Rather, to the extent parties wanted to retain a particular subset of existing tolerances, the onus was on commenters to identify those uses and to submit information to demonstrate that the tolerance(s) meet the statutory standard. Indeed, EPA specifically identified the import tolerances as a subset that might meet the safety standard (Id.).

No one submitted any comments alleging the need to retain individual tolerances for purposes of imports, or indicated an intention to seek to maintain those tolerances. The only subset of tolerances that commenters suggested was safe was the subset identified by the Petitioners, which included the import tolerances along with four domestic food uses.

In the final rule, EPA analyzed the aggregate exposures from the subset of tolerances the Petitioners sought to retain, and concluded that the aggregate residues from food covered by those tolerances and from residues in drinking water are unsafe (74 FR 23084–23088).

2. Denial of hearing request. A hearing is denied on this subissue because there is no disputed factual matter for resolution at a hearing. As the objection notes, EPA and Petitioners' risk assessment both concluded that the residues from imported food alone fell within the risk cup (Obj. at 52–54). The only issue this objection raises is whether EPA should have independently determined to retain a subset of the tolerances that Petitioners sought to maintain. This is a legal issue, and hearings are not appropriate on such issues (40 CFR 178.32(b)(1)). (*See* 73 FR 42696–42697 (July 23, 2008) (denying NRDC's request for a hearing on objection that children's safety factor could not be reduced in absence of endocrine screening data). FDA also has repeatedly confirmed that the application of a legal standard to undisputed facts is a question of law for which a hearing is not required. (*See, e.g.*, 68 FR 46403, 46406 n.18, 46408, 46409 (August 5, 2003) (whether facts in the record show there is a reasonable certainty of no harm is a question of law; whether a particular effect is a ''harm'' is a question of law)).

In addition, Petitioners failed to raise this issue as part of their comments on the proposed rule, and never requested retention of only the import tolerances. Accordingly, as discussed in Unit VI.D, EPA considers this issue to have been untimely raised, and therefore waived. (See, 73 FR 42,696 (July 23, 2008) (denying NRDC's hearing request on claims not presented in their original petition); 72 FR 39318, 39324 (July 18, 2007) (ruling that parties may not raise new issues in filing objections to EPA's denial of original petition)).

3. Denial of Objection. Petitioners incorrectly allege that EPA provided no rationale for the revocations of the import tolerances. In the final rule, EPA clearly found that the aggregate exposures to carbofuran residues from all remaining uses, when combined with residues found in drinking water, were unsafe (74 FR 23084–23088 (May 15, 2009).

EPA can only maintain tolerances that it can determine will be ''safe'' within the meaning of section 408(b)(2)(A)(ii). In making this determination, EPA must consider aggregate exposures from ''dietary exposure under the tolerance and all other tolerances in effect for the pesticide chemical residue, and exposure from other non-occupational sources'' (21 U.S.C. 346a(b)(2)(D)(vi)). At the time of the final rule, EPA evaluated the safety to the public from all dietary exposures to residues of carbofuran, which included not only the import tolerances, but also from residues on foods associated with domestic registrations and from residues in drinking water contaminated by the domestic uses. Indeed, until domestic use ceases—or at least until EPA has a reasonable basis to believe that it will cease—the Agency has no discretion to ignore the exposures from those uses. And revocation of the tolerances themselves does not necessarily resolve the issue, given the circumstances here. Until the registrations are cancelled, residues from contaminated drinking water, which is the primary contributor to the risks, must be included in EPA's risk assessment (Id).

The consequence of this requirement is that, when one tolerance is unsafe, all tolerances are equally unsafe until aggregate exposures have been reduced to acceptable levels. Accordingly, in circumstances where aggregate exposures exceed the risk cup, there are potentially multiple variations of the potential subset of tolerances that might meet the safety standard. FFDCA section 408 does not compel EPA to determine the appropriate subset that would meet the safety standard. EPA is compelled ''to revoke or modify a tolerance if [EPA] determines it is not safe,'' but the statute grants EPA the discretion to determine how to proceed where more than one tolerance is unsafe. EPA's general policy in such situations is not to independently select the subset that meets the standard, but to rely on the pesticide registrant and the public to determine which of the various subsets of tolerances are of sufficient importance to warrant retention. There are a number of reasons EPA adopted this policy; it would be an unreasonable burden for the Agency to evaluate every possible combination of tolerances that might fit within the risk cup. In addition, if there were multiple different combinations that might within the risk cup, it is not clear that any party would

agree that EPA had selected the appropriate combination of tolerances. This is particularly relevant, since EPA relies on individual entities to maintain the tolerance, by continuing to submit necessary data to demonstrate the continuing safety of the covered residues.

J. Summary of Reasons for Denial of Petitioners' Objections and Hearing Requests

1. General Denial. All of Petitioners' objections and hearing requests are denied because they are irrelevant, and thus immaterial, to EPA's final regulation revoking carbofuran tolerances. The lack of relevance stems from Petitioners' decision to object not to the safety decision EPA made in its final revocation regulation but to instead argue that EPA should reach a different decision based on FMC's proposed changes to the carbofuran registration that were submitted to EPA 44 days after the regulation published in the **Federal Register**. These proposed registration changes are central to and inextricably intertwined with the contention that underlies all of Petitioners' objections—that the carbofuran tolerances are safe, because in order to retain the contested tolerances, Petitioners must succeed on all of their objections. There exist statutory and regulatory procedures under FIFRA for FMC to pursue an amended carbofuran registration. As part of seeking an amended registration, FMC may petition to reestablish the revoked carbofuran tolerances. However, it is not proper to object to a final FFDCA tolerance revocation regulation based on the assertion that subsequently-filed, and as of yet unapproved FIFRA registration amendments, may change the risk picture under the FFDCA.

FMC has had ample opportunity prior to issuance of the final tolerance revocation regulation to amend its FIFRA registration, whether during the comment period on the proposed rule, the extended reregistration process, or the public process initiated as part of the NOIC for carbofuran. And FMC has requested a number of modifications to its registrations during that time period. Yet, FMC has waited until EPA issued a final revocation regulation finding that carbofuran tolerances are unsafe, particularly as to infants and children, before filing its latest series of proposed FIFRA registration amendments. For this FFDCA proceeding, that is too late. The FFDCA commands that EPA ''shall modify or revoke a tolerance if the Administrator determines it is not safe'' (21 U.S.C. 346a(b)(2)(A)(i)). The statute also places EPA under a special injunction to protect infants and children from the risks of pesticides (21 U.S.C. 346a(b)(2)(C)). EPA has made a final determination that carbofuran tolerances are unsafe and further determined that that lack of safety falls hardest on infants and children. Petitioners had the statutory right under FFDCA to challenge the accuracy of EPA's safety finding on carbofuran tolerances. FMC also has the statutory right under FIFRA to request amendment of its registration. What Petitioners may not do is prolong the FFDCA tolerance revocation process by challenging EPA's safety determination based on proposed FIFRA registration changes that were not before EPA at the time of its final revocation decision.

2. Alternate Grounds for Denial. Despite the fact that Petitioners' objections and hearing requests are facially defective for reliance on newly-proposed FIFRA registration amendments, EPA has carefully examined each of Petitioners' objections and hearing requests and found that, in every instance, there are alternate grounds for denial. Those grounds are summarized below.

There are multiple problems with Petitioners' hearing requests. Many of these problems stem from the Petitioners' decision to withhold analyses and information from the notice-and-comment rulemaking portion of this proceeding. Thus, despite EPA's clear warning that issues not raised in comments on the proposed rule, and information not submitted in that same timeframe, would be considered waived, Petitioners included several new issues, and numerous documents and analyses for the first time with their objections although they were clearly available earlier. Petitioners also have, for the most part, ignored how EPA responded to the comments they did submit in the notice-and-comment rulemaking, and instead have often merely recycled their earlier comments as objections without addressing the reasons why EPA found them lacking in the first instance. This strategy, unfortunately for Petitioners, is fatal to many of their hearing requests and objections. EPA will not grant hearings on issues that have been waived, on issues where supporting documents were untimely submitted, or on claims that have become stale in that EPA addressed them in the final rule and Petitioners have not responded by clarifying where disputed issues still remain.

It is not as if Petitioners lacked warning that EPA would take such an approach. Not only did EPA clearly state in the proposed rule that comments and information must be submitted in the comment period to be preserved but in 2007 EPA denied a hearing to a party who treated the notice-and-comment rulemaking process in a similarly cavalier fashion. In that instance, the party in question, like Petitioners, filed objections that largely mirrored its earlier submissions to the Agency without taking into account how EPA's final action had altered the nature of issues in dispute (See, *e.g.*, 73 FR 42693 (''NRDC's objections largely restate the claims in its petition. Significantly, NRDC does not acknowledge or respond to the DDVP dietary and residential risk assessments made in response to the NRDC petition.'')). Such objections and hearing requests were denied for a lack of materiality (73 FR 42698–42699 (''When an objector does not challenge EPA conclusions in the section 408(d)(4)(iii) order but rather challenges some prior conclusion that was superseded by the section 408(d)(4)(iii) order, the objector has not raised a live controversy as to an issue material to the section 408(d)(4)(iii) order.'').

a. Children's Safety Factor Objection. In support of their objection on the children's safety factor, Petitioners put forward several arguments; EPA summarizes below the various reasons for rejecting Petitioners' hearing requests and objections on each argument. Given the voluminous number of arguments asserted by petitioners in support of this objection, it is easy to lose track of the fact that all of the arguments relate to a single decision by EPA—the decision to reduce the presumptive 10X children's safety factor to 4X, rather than to 1X or 2X as the Petitioners desire.

(i) Subissue: Are brain AChE measures in juveniles adequately protective of CNS effects in juveniles? EPA based its determination to reduce the children's safety factor to 4X on the ratio of sensitivity shown between carbofuran's effects on RBC AChE and brain AChE in juvenile rats. It is EPA's general policy to rely on RBC AChE as a surrogate for effects on the PNS but Petitioners failed to provide adequate RBC AChE data in juveniles to fully characterize the dose level of concern for PNS effects in infants and children. Petitioners claim EPA was wrong from the start. They claim that once EPA determined it had adequate data on brain AChE, the RBC data was irrelevant because brain AChE is an adequately-protective surrogate for PNS effects.

Petitioners' hearing requests and objections on this issue are denied for identical reasons: the available evidence

identified by petitioners is ''insufficient to justify the factual determination urged'' (40 CFR 178.32(b)(2)). The critical issue with regard to EPA's children's safety factor decision is whether EPA has reliable data to ensure that residues of carbofuran in food will not cause adverse effects on infants and children's PNS. Petitioners claim that carbofuran data on brain AChE in juveniles is such reliable data. However, the evidence they proffer to support such an assertion is facially insufficient. Primarily, Petitioners cite data involving comparisons of brain AChE and PNS effects in adult animals. But evidence from adult animals is beside the point; the question is whether brain AChE in juveniles is protective of the PNS in juveniles. For at least 25 years, EPA has required toxicity tests be performed with pre- and post-natal animals as well as adult animals because young animals can be more sensitive and affected in a different manner than adults. Further, the only studies Petitioners cite that compared brain AChE in juveniles with PNS effects in juveniles, were conducted using other pesticides. For good reason, EPA requires that pesticides be individually tested in toxicity studies. Moreover, the majority of the data cited by Petitioners in other chemicals actually fails to demonstrate that the brain is more sensitive than the PNS, and the remainder of the evidence is, at best, merely equivocal on this point.

To reiterate, if EPA chooses to select a children's safety factor different than 10X, it bears the statutory burden of showing that reliable data support its determination that the selected factor is safe for infants and children. Thus, Petitioners, in seeking to establish that EPA erred by not selecting an even lower children's safety factor for carbofuran (in fact, no such factor at all), similarly bear the burden of showing that there are reliable data for the proposition that juvenile brain AChE data for carbofuran are protective of PNS effects in children. Petitioners' equivocal and largely irrelevant proffer cannot meet that standard, particularly where EPA is lacking data it has traditionally-required on cholinesterase-inhibiting pesticides to protect against PNS effects, and the data EPA does have on measures of PNS effects indicate that effects on the juvenile PNS occur at lower doses than effects on brain AChE.

(ii) Subissue: Are RBC AChE measures adequately reliable evidence of CNS effects? As a corollary to their claim that brain AChE measures are adequately protective of PNS effects, Petitioners also argue that RBC is not an appropriate surrogate for CNS effects in most circumstances. A hearing is not warranted on this subissue because Petitioners' evidentiary proffers either concern matters of undisputed fact (*e.g.*, RBC AChE inhibition is not an adverse effect, RBC AChE can be variable at low doses) or inadequate and irrelevant data on other pesticides. Further, Petitioners' claim basically reduces to an argument over which is the ''preferred'' surrogate for PNS effects in the absence of data directly measuring such effects. Thus, this subissue is an argument about science policy and EPA's regulations are clear that hearings will not be held on policy matters. Even more problematic to Petitioners' hearing request on this subissue is its lack of materiality. Having failed in the previous subissue to proffer sufficient evidence to show carbofuran brain AChE data in juveniles is protective of carbofuran's effect on the PNS in juveniles, Petitioners' attempt to attack EPA's basis for addressing carbofuran's effects on the PNS in juveniles can only undercut Petitioners' ability to demonstrate the safety of the carbofuran tolerances. With the demise of Petitioners' brain AChE argument, EPA's analysis of the RBC AChE data is the only remaining basis for reducing the children's safety factor. If Petitioners are successful in showing that RBC AChE data are not a reliable measure of PNS effects in juveniles, EPA would have no reliable data on such impacts and would be required to retain the full children's safety factor. As such, Petitioners' claim is immaterial; even if the claim were upheld, it would not justify the ultimate relief sought by Petitioners.

As to Petitioners' objection to EPA's science policy decision to use RBC cholinesterase as a surrogate for PNS effects, EPA explains in detail in Unit VI.E, the biological basis for its policy decision, the multitude of data supporting its approach, and the frequent consultations with the SAP concerning the wisdom of using such an approach. The equivocal data submitted by Petitioners does not raise a serious question regarding EPA's policy. In any event, as noted with regard to the hearing request, this subissue lacks materiality in that success on this subissue by Petitioners would retard rather than advance their challenge to EPA's action.

(iii) Subissue: Is ''lip-smacking'' a CNS or PNS effect? Petitioners object that EPA's evidence of ''lip smacking'' in a carbofuran adult developmental rat study does not support concern for potential PNS effects because lip smacking is more properly correlated to CNS, rather than PNS inhibition. A hearing is denied on this issue because Petitioners did not raise this issue in its comments on the proposed tolerance revocation. A hearing on this issue is also inappropriate because the issue is immaterial. EPA's decision that a 4X children's safety factor is appropriate did not rest exclusively—or even significantly—on the effects observed in this developmental study. Rather, EPA retained the children's safety factor based on the lack of data in the PNS and/or a surrogate at the low end of the response curve, and the fact that the available pup RBC data at higher doses affirmatively indicate that the PNS appears to be significantly more sensitive than the CNS.

Petitioners' objection on this subissue is denied because both parties agree that muscle fasiculations, which are the movements EPA described at the SAP meeting and in the proposed and final rules, are PNS-mediated effects. Further, it is unclear that the effects described in the studies Petitioners submitted are actually the same effects seen in the carbofuran study; other factors in the studies suggest that the movements being studied are not purely cholinergic, which calls into question whether the effects are the same. For the same reason, this calls into question the contention that the effects are exclusively CNS-related. Finally, the cited studies fail to support Petitioners' remaining contentions. Since it is unclear that the studies actually describe the same effects, and Petitioners have failed to demonstrate that the effects are exclusively CNS-related, the evidence does not, therefore, rebut EPA's conclusions regarding the movements described in the carbofuran study.

(iv) Subissue: Did EPA err by relying on studies not conducted pursuant to EPA's GLP regulations? Petitioners claim that EPA's reliance on the ORD data is problematic because the data were not conducted in accordance with EPA's GLP regulations at 40 CFR part 160. Petitioners have not cited any evidence suggesting there is a substantive problem with the ORD data or made any arguments to such effect. Thus, this subissue presents only a legal question and legal questions are not appropriate grounds for a hearing. EPA denies Petitioners' objection on this point because EPA regulations make clear its GLP regulations only apply to studies in support of a pesticide registration or tolerance (40 CFR 160.1(a), 160.3). In any event, non-compliance with the GLP regulations does not automatically disqualify a study from EPA consideration but rather goes to reliability (40 CFR 160.17(a)).

(As noted, Petitioners have made no claim that the ORD data is not reliable.).

(v) Subissue: Was EPA's selection of a 4X children's safety factor consistent with EPA's approach to other carbamate pesticides? Petitioners object that EPA was inconsistent in retaining a 4X children's safety factor for carbofuran given that EPA removed the children's safety factor for other carbamates. A hearing is not appropriate on this subissue because it presents a purely legal question. There is no dispute regarding the facts of EPA's decision in each case, the only question is whether EPA acted appropriately on carbofuran given its decision on the children's safety factor for other carbamate pesticides, such as carbaryl. The objection is denied because EPA's decisions in each case were consistent; EPA applied a different children's safety factor to carbofuran than to the other carbamate pesticides based on the different facts in each case. For example, the data showed that carbaryl differed significantly from carbofuran in terms of each chemical's relative sensitivity in juveniles with regard to brain and RBC AChE inhibition. For carbofuran, EPA concluded that RBC AChE inhibition in juveniles was more sensitive than brain AChE inhibition in juveniles by a factor of 4X. For carbaryl, the AChE inhibition in brain and RBC of juveniles was essentially equal.

(vi) Subissue: Did EPA err in not using within-animal brain to RBC AChE inhibition comparisons to derive the children's safety factor? EPA derived an alternate to the default 10X children's safety factor based on the ratio of RBC and brain AChE inhibition. In their comments on the proposed rule, Petitioners criticized this approach, arguing that EPA should have compared the RBC and brain AChE inhibition levels at the same time in the same rat when these rats are exposed to carbofuran. Petitioners claimed to have done such an analysis and that the analysis showed that within rat inhibition levels in brain and RBC AChE were roughly equivalent. Although the results of the statistical analyses were summarized in the comments, the underlying analysis was not submitted. In the final tolerance revocation regulation, EPA extensively reviewed the ''within animal'' approach and rejected it as fundamentally flawed in several regards. Additionally, EPA noted that EPA's review of the Petitioners' suggested approach showed that it produced results, which are in fact consistent with EPA's conclusions. In their objections, Petitioners do not respond to EPA's rejection of the within animal approach in the final tolerance revocation rule either by explaining their disagreement with EPA's critique or proffering evidence to counter EPA's conclusion. Rather, Petitioners simply resubmitted essentially the same comments they provided on the proposed rule. Petitioners also again failed to submit the underlying analysis supporting their within animal calculations.

A hearing on this subissue is not appropriate for two reasons. First, Petitioners' repeated failure to submit the analysis supporting their claim reduces this objection to a mere allegation. Under EPA's regulations, hearings will not be granted on the basis of mere allegations. More importantly, Petitioners' objection on this subissue is irrelevant, and therefore immaterial, with regard to EPA's final tolerance revocation regulation because Petitioners ignored EPA's extensive analysis of this subissue in the final rule and refiled their comments on the proposal as if EPA's determination in the final rule did not exist. The statute, however, requires that objections be filed on the final rule, not on the proposal. By ignoring the EPA's final rule on this subissue, Petitioners have failed to lodge a relevant objection. Both EPA and FDA precedent make clear that when the agency substantively responds to comments on the proposal, the commenter may only keep that issue alive in its objections by addressing the agency's substantive response. In other words, the final rule is the focal point for determining whether issues remain that must be resolved by the objection and hearing process. Any other approach relegates the notice-and-comment rulemaking stage of the revocation process to a meaningless exercise.

Petitioners' objections on this subissue are denied as irrelevant to the conclusions reached in the final rule. The final rule explains why Petitioners' arguments are without a basis, and Petitioners have failed to address that explanation. For essentially the same reasons, EPA denies the objection.

For essentially the same reasons, EPA denies the hearing request and objection designated above as *Objection/hearing request sub issue: Technical Flaws in EPA's statistical comparisons.* Petitioners' objection and hearing request on this subissue consist of mere reiteration of the comments submitted in response to the proposed tolerance revocation. The final rule explained the reasons that Petitioners' arguments are flawed, and the objections are denied for the same reasons.

(vii) Subissue: Is EPA's approach to comparing brain and RBC AChE inhibition in juveniles due to carbofuran exposure scientifically valid? Petitioners allege that EPA's approach to calculating the relative sensitivity between AChE inhibition in brain and RBC in juveniles is not scientifically valid. EPA derived the ratio of RBC and brain AChE inhibition using the data on administered dose (measured in terms of BMD_{50}) for PND11 animals. In addition, the Petitioners criticize EPA for incorrectly assuming that the relationship of the dose response curve between BMD_{50}s and BMD_{10}s is linear, which they claim overstates the potential differences. In support of the claim that EPA's approach overstates the differences, Petitioners argue that data suggests that BMD_{50}s for brain and RBC AChE inhibition for the carbamates tend to diverge more than the dose levels that cause the low levels of AChE inhibition used to select the PoD (*i.e.,* the BMD_{10}s), which demonstrates that at levels causing lower levels of inhibition, no safety factor is necessary. Petitioners' argument is that the 4X ratio EPA calculated based on the BMD_{50} is unnecessarily protective, because the difference between brain and RBC at the doses causing lower levels of inhibition (*i.e.,* 10%), which are the levels at which EPA is regulating, would not be significant.

Petitioners' hearing request on this subissue is denied for two reasons. First, Petitioners proffered no evidence on any carbamate, much less carbofuran, in support of their claim that BMD_{50}s for the carbamates tend to diverge more than the BMD_{10}s or that the response curve between BMD_{50}s and BMD_{10}s is not linear. A hearing will not be granted on the basis of mere allegations. Second, Petitioners' claims are immaterial because unless Petitioners can show what the relationship is between the response curves for BMD_{50}s and BMD_{10}s (an assertion they have not even made), a showing that EPA's assumption of linearity is incorrect can only force EPA to abandon the 4X children's safety factor in favor of the default 10X value.

The objection that EPA's modeling is scientifically invalid is denied. EPA's modeling has been repeatedly reviewed and approved by the SAP, including most recently with respect to the modeling of carbofuran's dose-response curves. There is no indication in the modeling that EPA's assumption of parallel dose-response curves overstates the difference, and given the absence of data supplied by Petitioners in support of this objection, the objection is denied.

(viii) Subissue: Did EPA err by combining data from different toxicological studies in calculating the estimates of BMD_{50}s that serves as

quantitative support for derivation of the 4X childrens' safety factor? In its risk assessment, EPA relied on all of the valid data from the available studies to calculate the estimates that served as the PoD, and to calculate BMD_{50}s used in choosing the children's safety factor. In their comments on the proposed rule, Petitioners claimed that EPA's decision to combine data for different strains of rats, sexes, experiments, laboratories, dates, dose preparations, rat ages, and times between dosing and AChE measurement, is problematic, claiming that these differences in study design severely limit the validity of EPA's comparisons and caused EPA to overestimate the difference between brain and RBC AChE inhibition. EPA responded to these comments in full during the rulemaking (74 FR 23052–23053; Ref. 85). Petitioners referenced their earlier comments in their objections, but presented no further evidence on any of these points. Nor in their objections and request for hearing did Petitioners address EPA's explanation set forth in the final rule.

A hearing is not appropriate on this subissue because Petitioners have not challenged the basis EPA asserted in the final rule for rejecting their concerns nor have they proffered any evidence that calls the substance of EPA's conclusions into question. A hearing is not warranted on the basis of mere denials or contentions, nor when the commenter simply reiterates comments raised in response to the proposed rule (40 CFR 178.32(b)(1) and (2)). Additionally, this hearing request is rejected for lack of materiality. If EPA abandoned its sophisticated analysis of multiple studies and datasets and simply followed the general approach laid out in its BMD policy, EPA would have chosen a significantly lower BMD dramatically raising EPA's risk estimates.

Petitioners' objection on this subissue is denied because Petitioners have not responded to the explanation EPA provided in the final rule supporting its meta-analysis of multiple studies. Consistent with Agency guidance, EPA believes that consideration of all available data is the scientifically more defensible approach, rather than the selective exclusion of reliable data. Petitioners' objection on this point is particularly weak given that their analysis also combines various data sets and only arrives at a higher estimate of the BMD by selectively excluding, without explanation, the data most pertinent to assessing carbofuran's acute affects.

b. Drinking Water Exposure Objection—In large part, Petitioners' objections to EPA's assessment of carbofuran levels in drinking water are inextricably intertwined with their recently-proposed registration amendments which attempt to create a scheme whereby carbofuran use would be limited in individual watersheds. As explained above (see Unit VI.F.2.a), objections based on these recently-proposed registration amendments are irrelevant to EPA's determination in the final tolerance revocation rule. Nonetheless, in Unit VI.F, EPA exhaustively evaluated all of the arguments put forward in Petitioners' drinking water objection and explained why a hearing was not appropriate on any of these arguments and why, on the merits, the arguments were without basis. Below EPA has summarized its reasoning.

The first four subissues below pertain to EPA's assessment of the carbofuran groundwater exposure assessment and the last eight address the surface water assessment. In this regard, it is important to note that, in order to determine that a tolerance for a particular use will be safe, EPA must be able to determine that anticipated concentrations in both surface water and ground water resulting from that use will be safe.

(i) Subissue: Did EPA err in relying on the results of the prospective ground water study (PGW) and historical monitoring to validate groundwater exposure estimate? The Petitioners object that EPA should not have relied for validation on their PGW study or historical monitoring data. They argue that these data no longer reflect current use patterns and that all areas like those seen in the PGW have now been removed from the carbofuran label.

A hearing is not appropriate on this subissue because the Petitioners have failed to proffer evidence, which would, if established, resolve a material issue in their favor. First, Petitioners fail to take into account the clear record evidence that EPA scaled the PGW modeling to reflect the lower current use rates. Second, Petitioners are simply incorrect to claim that EPA ''validated'' its quantitative groundwater assessment based on historic monitoring data that are not reflective of current application rates. The targeted monitoring data used for validation were based on application rates that are identical or lower than the current use rates. Third, the majority of Petitioners' evidence is untimely, and to the extent Petitioners' are claiming that the PGW and other targeted monitoring data are not reflective of FMC's June 29, 2009 proposed registration amendments, that claim is irrelevant to the current proceeding. Finally, Petitioners' evidentiary proffer on the PGW is internally contradictory given that Petitioners' own experts relied on the PGW to validate the modeling submitted in support of this objection.

The objection on this subissue is denied because timely evidence and reasoning submitted by Petitioners is contradictory, non-probative, or flatly contradicted by the record.

(ii) Subissue: Does EPA's assessment of carbofuran levels in ground water account for all of FMC's label mitigation measures and ''rely on unrealistic and overly conservative assumptions about potential concentrations''? In this objection, the Petitioners allege that maximum concentrations of carbofuran in groundwater are expected to be below 1.1 ppb, based on their proposed geographic restrictions and well setbacks. EPA believes Petitioners' objection and hearing request on this subissue is inextricably intertwined with FMC's recently-submitted FIFRA registration amendments and thus the objection is denied as irrelevant on that account.

Nonetheless, to the extent possible EPA has attempted to evaluate this objection based on the label mitigation measures submitted and adopted prior to issuance of the final tolerance revocation rule and ruled on it on that basis. EPA denies the objection and its associated hearing request because Petitioners have again failed to object to EPA's final rule. It is clear from the record that EPA's final rule and risk assessment did account for all of the risk mitigation measures submitted as part of the September 2008 comments. Petitioners have not raised any substantive challenge to the manner in which EPA's modeling addressed those measures. In addition, Petitioners' objections provide no further clarification as to what is meant by their claim that EPA's assessment relied on ''unrealistic and overly conservative assumptions.'' Therefore, this objection, and the attendant hearing request, is denied based on Petitioners' failure to state with ''particularity * * * the basis for the objection * * *.''(40 CFR 178.25(a)(2)). As Petitioners raised similar allegations in their comments, EPA has assumed that they intended to incorporate all of the issues raised in the comments on the proposed rule. However, EPA addressed these assertions in the final rule. Because Petitioners have once again ignored the explanations provided in the final rule, this objection and hearing request are denied as immaterial.

(iii) Subissue: Is EPA's assessment of the levels of carbofuran in groundwater appropriate given the manner in which

EPA assessed groundwater exposures in the NMC CRA? Petitioners object that EPA's estimates in the final rule are inconsistent with the groundwater concentration estimates EPA developed for the NMC CRA. However, they do not identify any specific inconsistency, they simply make the general allegation. They allege that, by contrast, their assessment, which estimated maximum concentrations of 1.1 ppb, is consistent with the NMC CRA.

EPA denies the request for a hearing on this sub-issue because there is no disputed factual matter for resolution (*i.e.*, the manner in which EPA assessed groundwater exposure for carbofuran and for the NMCs is a matter of record); rather, the objection poses the legal question of whether it was appropriate for EPA to assess groundwater exposure for carbofuran and the NMCs in a different manner. Further, because Petitioners have not identified any specific inconsistency between the two groundwater exposure assessments, it constitutes nothing more than a mere allegation or denial. As EPA's regulations make clear, a mere ''denial'' of an EPA position is not sufficient to satisfy the standard for granting a hearing (40 CFR 178.32(b)(2)). Finally, the claim that their modeling is consistent with the NMC CRA does not justify a hearing on this question. As EPA explained in the final rule, the values estimated in the modeling conducted for the NMC CRA are greater than the 1.1 ppb level that FMC claims is the maximum expected 1-in-10-year peak concentration. A hearing is not warranted where the claim is clearly contradicted by the record (40 CFR 178.32(b)(2)).

On the merits, Petitioners' objection is denied because the results of Petitioners' groundwater assessment are not consistent with the estimates developed for the NMC CRA. The NMC CRA examined carbofuran at two sites, northeast Florida and the Delmarva Peninsula. In Florida, concentrations were found to be below levels of concern because of high pH, but in Delmarva, both in corn and in melon scenarios EPA estimated that 90% of daily concentrations could be as high as 20.5 and 25.6 ppb, respectively. These values are far greater than the 1.1 ppb that Petitioners claim is the maximum expected 1-in-10-year peak concentration.

(iv) Did EPA err in not using PCT data in assessing surface water exposure? The Petitioners object to the assumption in the surface water assessments in the final rule that 100% of the crops in a watershed will be treated with carbofuran. The Petitioners argue that actual carbofuran sales data on a county basis from 2002-present demonstrate that the current carbofuran PCT is less than 4.25%. Using this PCT, and taking into account the recently submitted ''no application buffers,'' the Petitioners allege that the modeling in Exhibit 15 demonstrates that carbofuran concentrations in surface water will not exceed 1.1 ppb, ''which is below the level of concern.'' In support of this objection, the Petitioners reference county level sales data that were submitted to the Agency after the close of the comment period. They also reference the use tracking system proposed in their recent registration amendments (Exhibit 2) and the modeling contained in Exhibit 15. Because this subissue is inextricably intertwined with Petitioners' recently-proposed FIFRA registration amendments, it is denied as irrelevant.

To the extent Petitioners' objection on this subissue is limited to EPA's refusal to use a 4% PCT in estimating drinking water concentrations in individual watersheds based on the information provided as part of their comments on the proposed rule, this objection and hearing request are also denied as immaterial. The Petitioners have failed to respond to EPA's explanation in the final rule that the information and methodology on which they relied to estimate a 4% PCT was fundamentally flawed, and to submit any evidence calling the basis of EPA's response into question (40 CFR 178.32(b)(3)). Additionally, the proffered evidence here is untimely. The sales data and methodology used to generate use estimates, as well as the modeling in Exhibit 15, were not submitted during the comment period on the proposed rule even though the information was clearly available to Petitioners (40 CFR 178.32(b)(2)).

Petitioners' objection on this subissue is denied because the proffered evidence is untimely and, even if considered, insufficient. Although EPA does use reliable data on pesticide usage in estimating exposure levels in food, this approach has limited applicability in drinking water assessments due to the differences in the sources of food and water for consumers. The food market in the United States is national in scope but the sources of drinking water are primarily local. Thus, while differences in the usage of pesticides across the country will average out in estimating pesticide exposure from food, such averaging is not applicable to estimating pesticide exposure in drinking water—*i.e.*, a person's drinking water exposure is generally always from the same watershed. Moreover, the information that Petitioners submitted on PCT was not usage data—the type of information normally used in estimating PCT for food—but sales data. The link between sales data and the location of use is tenuous. Given that EPA lacks the information to allow EPA to generally use PCT information in estimating drinking water exposure, and the poor quality of information Petitioners submitted on usage (*i.e.* county-level sales data), EPA concludes it could not make an exposure estimate on carbofuran in drinking water with sufficient confidence to meet the FFDCA's reasonable certainty of no harm standard.

(v) Subissue: Do the results of FMC surface water modeling establish that carbofuran levels will not exceed 1.1 ppb? The Petitioners claim that the prior surface water assessments submitted to the Agency and a new assessment incorporating FMC's newly-proposed FIFRA registration amendments demonstrate that carbofuran concentrations in surface water are not expected to exceed 1.1 ppb. Because this subissue is inextricably intertwined with Petitioners' recently-proposed FIFRA registration amendments, it is denied as irrelevant. Nonetheless, EPA has carefully evaluated all of Petitioners' allegation to determine if any of their claims meet the standard for a hearing or are otherwise meritorious.

A hearing is also denied on this sub-issue because Petitioners' objection on this subissue is irrelevant, and therefore immaterial, with regard to EPA's final tolerance revocation regulation. Petitioners have not responded to EPA's extensive analysis of these studies, which included an explanation for the Agency's conclusion that they were significantly flawed, presented in the final rule. The statute, however, requires that objections be filed on the final rule not the proposal. By ignoring EPA's final rule on this subissue, Petitioners have failed to lodge a relevant objection. Both EPA and FDA precedent make clear that when the agency substantively responds to comments on the proposal, the commenter may only keep that issue alive in its objections by addressing the agency's substantive response (40 CFR 178.32(b)(3)). Similarly, the Petitioners' new assessment directly relies on FMC's newly-proposed FIFRA registration amendments and is thus irrelevant to this proceeding. Their new assessment is also untimely in that it primarily appears to be a fuller description of Petitioners' National CWS Assessment, which was described, but not provided as part of their comments on the proposed rule (40 CFR 178.32(b)(2)).

EPA has outlined the substantial flaws in the previously-submitted assessments in the final tolerance revocation rule and in Unit VI.F, above. For the all the reasons cited therein, this objection is denied.

(vi) Did EPA inappropriately rely on NAWQA monitoring data in assessing carbofuran levels in surface water? The Petitioners object to EPA's discussion in the final rule of the high concentrations detected in Zollner Creek in Oregon and claim that EPA inappropriately relied on NAWQA monitoring data in estimating surface water exposure levels of carbofuran. A hearing on this issue is denied because there are no material factual issues in dispute. The extent to which EPA discussed the Zollner Creek data as part of its discussion of monitoring results from all other NAWQA sites, SDWA post-treatment monitoring, and the results of field studies is clear on the record. The record is also clear regarding the degree of reliance EPA placed on monitoring data in estimating carbofuran levels in surface water. The objection on this subissue is denied because it was reasonable for EPA to consider NAWQA data in assessing the likelihood that carbofuran residues may be present in surface water. Moreover, the record is clear that, even though EPA considered the NAWQA data, it placed primary emphasis on the carbofuran levels detected in post-treatment SDWA monitoring.

(vii) Should EPA consider FMC's newly-proposed terms of registration for carbofuran? The objection is denied because it is based on FMC's newly proposed revisions to its carbofuran registration that were submitted after publication of the final tolerance revocation rule and is thus irrelevant to this proceeding. An additional ground for denial of this objection and hearing request is that Petitioners proferred no evidence to support their allegation that these proposed requirements would be effective in limiting carbofuran exposure to the extent claimed

(viii) Should EPA have used the NMC CRA surface water estimates in assessing exposure to carbofuran in surface water? Petitioners object to EPA's surface water exposure estimates on the ground that they are inconsistent with the estimates EPA developed for purposes of the NMC CRA. This hearing request is denied because there are no factual matters in dispute; rather, the only question is a legal one of whether it was inappropriate for EPA to use different approaches to assessing surface water exposure for the carbofuran surface water assessment and the cumulative assessment of surface water exposure for NMCs (40 CFR 178.32(b)(1)). In addition, this issue was raised in Petitioners' comments on the proposed revocation. In the final revocation, EPA explained how the substantial differences between a cumulative risk assessment for a class of pesticides and a risk assessment for a single pesticide necessitate different approaches. Petitioners have not challenged the substance of EPA's response to their comments or submitted evidence that calls the substance of EPA's final rule conclusions into question, and the objection and associated hearing request is therefore immaterial (40 CFR 178.32(b)(3)). Finally, on multiple grounds, Petitioners' evidentiary proffer is insufficient to support a conclusion that there is a reasonable possibility that the issue could be resolved in their favor. Petitioners' objection on this subissue is denied for essentially the same reasons explained in the final tolerance revocation.

(ix) Has EPA taken natural surface water pH conditions into account? The Petitioners contend that the PCT levels guaranteed by the recently proposed use tracking system, along with natural surface water pH conditions in the areas included under the revised label will ensure that potential exposures are *de minimis*. Because this objection is inextricably intertwined with FMC's newly-proposed FIFRA registration amendments, it is denied as irrelevant to this proceeding.

Even assuming Petitioners' allegation concerning soil pH can be separated from the proposed registration amendments, Petitioners' claims are insufficient to justify the action urged (40 CFR 178.32(b)(3)). Petitioners admit that their pH analyses explicitly only capture 95% of surface waters. Because EPA cannot ignore the other 5% of surface water, this information, even if established, would provide an insufficient basis on which EPA could reasonably conclude that the drinking water exposures would be ''safe.'' Additionally, the proffered evidence for this objection is untimely because although the effects of pH were clearly discussed in the proposed rule, Petitioners' claim and the analyses supporting it were not submitted during the comment period.

For the same reasons, the Petitioners' objection is denied.

(x) Has EPA taken the effect of existing drinking water treatment systems into account? The Petitioners contend that, in the areas where carbofuran use is allowed under revised labels, the majority of the total population is protected from carbofuran by water treatment systems and that the rest of the population is protected by Petitioners' newly-proposed FIFRA registration amendments. Because this objection is inextricably intertwined with FMC's newly-proposed FIFRA registration amendments, it is denied as irrelevant to this proceeding.

Separating out the allegations that are independent from the new registration amendments, EPA denies this hearing request on the grounds that Petitioners' claims are insufficient to justify the action urged (40 CFR 178.32(b)(3)) in that they would fail to justify a conclusion that the carbofuran tolerances are safe. The fact that the majority of people are protected is irrelevant if major identifiable subpopulations are not. Further, both the objection and the proffered evidence are untimely because Petitioners' claims and analyses supporting them were not submitted during the comment period. For the same reasons, this objection is denied.

c. Recovery Time Objection—(i) Subissue: Has EPA overstated risk through its approach to considering recovery time to the effects of carbofuran? For carbofuran, EPA estimated acute dietary exposure for the acute risk assessment by summing exposure over a 24-hour period. Because humans are likely to recover in a relatively short time period from any single carbofuran exposure, EPA also undertook a more sophisticated exposure assessment that took recovery time into effect. This more sophisticated analysis was not substituted for the 24-hour assessment approach but rather was used to evaluate whether the 24-hour approach substantially overstated risk. The reason for not simply adopting the assessment incorporating recovery time was based on concerns that other aspects of its exposure model tend to understate exposure. If the assessment using recovery time had suggested that carbofuran risks may be acceptable, EPA would have further examined how exposure should be assessed. However, because both the assessment based on 24-hour exposure and the one incorporating recovery time showed carbofuran exposures significantly exceed the safe level, EPA concluded that its exposure assessment was reasonable. Further supporting this conclusion was the fact that various other analyses showed that a single eating occasion could result in excessive risk to infants. Petitioners have objected to this approach claiming that recovery time should be included in EPA's ''primary'' risk assessment.

EPA is denying this hearing request on two grounds. First, the objection fails

to present a disputed issue of material fact because EPA did incorporate recovery time into its analysis. Rather, Petitioners' only challenge is to whether EPA should have only presented risk estimates that accounted for recovery. This is a policy issue, and hearings are not appropriate on such (40 CFR 178.32(b)(1)).

Second, the fact that EPA relied on 24-hour aggregate exposures in addition to analyses that accounted for recovery is not material, because even though accounting for recovery resulted in a 2–3X reduction in exposure estimates, many of EPA's estimates for aggregate exposures ranged between 2700% aPAD and 9400% aPAD for infants. Accounting for recovery does not, therefore, demonstrate that aggregate exposures will be safe for infants. Of greater significance in this regard is EPA's finding that infants are at risk from a single exposure. Recovery is only relevant, by definition, where the risk is derived from multiple exposures over time.

Petitioners' objection to EPA's policy decision to present acute risks in terms of 24 hours of exposure is denied because EPA's policy approach here is reasonable. For the reasons explained in Unit VI.G, there are several factors that may cause EPA's exposure/risk model to either understate or overstate exposure/risk. It is unreasonable to present risks only incorporating factors that tend to reduce exposure/risk estimates (*e.g.,* recovery time), as Petitioners suggest. EPA's approach of evaluating the impact that these factors may have on the risk assessment is an appropriate method of taking all relevant factors into account.

(ii) Subissue: Did EPA err in calculating carbofuran half-lives? In the proposed rule, EPA used half-lives of 150 minutes and 300 minutes, based on calculations derived for the NMC CRA. In the final rule, EPA calculated half-lives specific to carbofuran to ensure that its analyses accurately reflected carbofuran's risk. Petitioners contend that EPA's calculation of carbofuran half-lives of 186 minutes and 426 minutes were flawed, and that the data instead support the use of a 150-minute half-life.

Petitioners' hearing requests on this subissue are denied for two reasons. First, Petitioners have not provided the underlying analyses conducted in support of their claims that the appropriate half-life for carbofuran is 150 minutes, rather than the 186 or 426 minutes that EPA calculated. Petitioners' evidentiary proffer thus consists of no more than mere allegations and denials. Hearings will not be granted on this basis (40 CFR 178.32(b)(2)).

Further, the issue of the appropriate half-lives for carbofuran is not material. Petitioners have proffered no evidence to show that reliance on a 150-minute half-life rather than a 186-minute half-life would make a significant difference to their estimates. By contrast, in the risk assessment supporting the final rule, EPA's estimates show that the use of a 150-minute or 186-minute half-life makes little or no difference. In addition, EPA's final risk assessment found that infants are at risk from a single exposure. Recovery is only relevant, by definition, where the risk is derived from multiple exposures over time.

EPA denies Petitioners' objection on this subissue because the evidence submitted fails to establish their allegations, or to rebut the data and analyses discussed in the final rule.

d. Human Study Objection—Issue: Did EPA reasonably conclude that a human toxicity study with carbofuran was barred from EPA consideration by the Human Research Rule? In conducting its dietary risk assessment for carbofuran, EPA relied on toxicity data conducted with rats, and applied the default 10X interspecies factor to account for the potential uncertainty in extrapolating from animal data to humans. Petitioners object to the decision to use a 10X interspecies factor claiming that data from a human toxicity study (Arnold) provides a basis for reducing this factor to 3X. However, EPA has previously determined that the Arnold study lacks scientific validity and thus may not be considered by the Agency under EPA's Human Research rule. That decision was based on the advice of the HSRB, which found the Arnold study to constitute ''poor science'' (Ref. 38 at 11).

Although Petitioners have made a number of arguments in support of adopting a 3X interspecies factor, all of the arguments rely on consideration of the Arnold study. Thus, as a preliminary matter, Petitioners must show that a hearing is appropriate based exclusively on whether EPA erred in determining that the Arnold study cannot be considered under the Human Research rule or, that even if a hearing is not warranted, that EPA's decision under the Human Research rule was incorrect.

Petitioners have proffered no evidence that merits a hearing on EPA's application of the Human Research rule to the Arnold study. As an evidentiary proffer, Petitioners claim (1) that review of the Arnold study under the Human Research rule was too narrow in that it did not consider the Arnold study in light of the animal data; (2) that insufficient weight was given prior independent reports on the value of the Arnold study; (3) that the ''technical'' concerns raised by the HSRB are addressed by ''the data within the study'' and that these ''technical'' deficiencies do not render the Arnold study unreliable. The first proffer is not material because the availability of animal data does not address the validity of the Arnold human study. At bottom, this issue involves a challenge to the policy underlying the Human Research rule that allows only limited consideration of human toxicity studies. A hearing is not appropriate on such a policy issue, nor on the Human Research rule itself. Petitioners' second proffer is a legal/policy question regarding the weight to be accorded to existing peer review reports. No hearing is required on such issues. To the extent the third proffer even constitutes a proffer of ''evidence,'' it fails because it is nothing more than a mere allegation. Petitioners have supplied no information as to how the HSRB's ''technical'' concerns are resolved by the study itself.

Viewed on their merits, these claims do not convince EPA that it erred in determining that the Arnold study did not meet the Human Research rule because it lacked scientific validity. EPA concluded, based on the advice of the HSRB, that, because the Arnold study had an extremely small sample size (2 persons per dose) and highly variable measurement of RBC and plasma AChE, it had no scientific value. The claim by Petitioners that somehow the Arnold study could be rehabilitated by considering it in the context of carbofuran animal data misunderstands the issue. The question under the Human Research rule is whether the human study at issue is scientifically valid. Here, EPA found the Arnold study to be flawed at its core. Animal data on carbofuran are simply irrelevant to the problems with sample size and AChE measurement in the Arnold study. As to the earlier reports on the Arnold study, Petitioners have provided no reason as to why these should outweigh the HSRB's conclusion concerning whether the Arnold study met the Human Research rule standard. The earlier reports were completed well before the Human Research rule was promulgated and thus could not have addressed the rule's requirements. Further, the earlier reports identified the same defects, but concluded that the Arnold's study's flaws could be addressed by the use of additional safety

factors—an option not available under the Human Research rule. In such circumstances, it was reasonable for EPA to give primary weight to the HSRB findings. Petitioners' claim that the HSRB only identified ''technical'' problems with the Arnold study and that the study itself addresses the HSRB's concerns is without basis. The flaws in the Arnold study are not technical but fundamental, and cannot be explained away. Finally, Petitioners' allegations that EPA hampered the HSRB's consideration of the prior peer review reports and that EPA's recusal decision was somehow improper are contradicted by the record. Accordingly, the objection is denied.

e. Import Tolerance Objection—Issue: Did EPA err by failing to retain the carbofuran tolerances that apply solely to imported food. Whether EPA had some type of independent duty to retain carbofuran tolerances for the imported foods bananas, rice, coffee, and sugarcane despite its finding that aggregate exposure to carbofuran is unsafe, is a legal question. Hearings are not held on legal issues. Having found that aggregate exposure to carbofuran is unsafe, EPA was clearly warranted, if not required, to revoke all tolerances. For the policy reasons identified above, (see Unit VI.I), when aggregate risk to a pesticide is unsafe, EPA defers to interested parties to decide in the first instance what tolerances, if any, they wish to retain. Although explicitly invited to do so, no person submitted a comment on the proposed revocation that identified the import tolerances as a subset of tolerances that were asserted to be safe, and that the commenter wished to retain. Accordingly, this objection is denied.

K. Conclusion

For all of the reasons set forth above, EPA denies the Petitioners' objections and their requests for a hearing on those objections.

VII. Regulatory Assessment Requirements

As indicated previously, this action announces the Agency's final order regarding objections filed under section 408 of FFDCA. As such, this action is an adjudication and not a rule. The regulatory assessment requirements imposed on rulemaking do not, therefore, apply to this action.

VIII. Submission to Congress and the Comptroller General

The Congressional Review Act, (5 U.S.C. 801 *et seq.*), as added by the Small Business Regulatory Enforcement Fairness Act of 1996, does not apply because this action is not a rule for purposes of 5 U.S.C. 804(3).

IX. References

EPA has established an official record for this rulemaking. The official record includes all information considered by EPA in developing this proposed rule including documents specifically referenced in this action and listed below, any public comments received during an applicable comment period, and any other information related to this action, including any information claimed as CBI. This official record includes all information physically located in docket ID number EPA–HQ–OPP–2005–0162, as well as any documents that are referenced in the documents listed below or in the docket. The public version of the official record does not include any information claimed as CBI.

Objections to the Final Order Revoking Tolerances for Carbofuran, and Request for Public Evidentiary Hearing, submitted by National Potato Council, National Corn Growers Association, National Cotton Council, National Sunflower Association, and FMC Corporation. June 30, 2009. EPA–HQ–OPP–2005–0162–0578.

Exhibit 1

- FMC's letter of 9–29–08 and accompanying label amendments.

Exhibit 2

- FMC's letter of 12–24–08 and accompanying label amendments.

Exhibit 3

- FMC's letter of 6–30–09 and accompanying label amendments.

Exhibit 4

- Expert Report: Carbofuran's FQPA Safety Factor and Interspecies Uncertainty Factor by K. Wallace (6 p.)
- 13 published articles on pesticide effect on cholinesterase activity.

Exhibit 5

- Central Nervous System as the Primary Target for Carbofuran's Effects on Lip Smacking by Neal, Williams, & Lamb (3 p.)
- 10 published articles on effects of cholinergic stimulation.

Exhibit 6

- Expert Report: Carbofuran FQPA Safety Factor by K. Wallace (8 p.)
- 9 published articles on HBC versus brain cholinesterase inhibition.

Exhibit 7

- Dose Response Modeling Issue in Carbofuran by Sielken: AChE and BMD Ratios

Exhibit 8

- Dose Response Modeling Issue in Carbofuran by Sielken: Statistical Comparison of AChE Inhibition in RBC and Brain in Rats Exposed to Carbofuran.

Exhibit 9

- Dose Response Modeling Issue in Carbofuran by Sielken: OPP's Estimates of the Half-Life of AChE Recovery.

Exhibit 10

- Reiner, 1971. Spontaneous Reactivation of Phosphorylated and Carbamylated Cholinesterases Bulletin WHO 44, 109–112.

Exhibit 11

- Carbofuran Dietary Risk Assessment. 2009. (Exponent Inc., for FMC)

Exhibit 12

- Williams, Cheplick, Engle, Fawcett and Hoogeweg. 2009. National Carbofuran Leaching Assessment. Vol 1. Waterborne Environmental Inc., Engel Consulting, and Fawcett Consulting for FMC.

Exhibit 13

- Williams, Cheplick, Engle, Fawcett and Hoogeweg. 2009. National Carbofuran Leaching Assessment. Vol 2. Setback Analysis. Waterborne Environmental Inc., Engel Consulting, and Fawcett Consulting for FMC.

Exhibit 14

- Memorandum. From: Hoogeweg and Williams, Waterborne, Inc., To: Fuge, Latham and Watkins, LLP. June 30, 2009. Subject: Groundwater pH in selected states.

Exhibit 15

- Williams, Fawcett and Engle. 2009. The Development and Evaluation of a Carbofuran Management Plan to Protect Drinking Water Derived from Surface Water Sources. Waterborne Environmental Inc., for FMC.

Exhibit 16

- Memorandum. From: Hoogeweg and Williams, Waterborne, Inc., To: Fuge, Latham and Watkins, LLP. June 30, 2009. Subject: Surface water pH in selected states.

Exhibit 17

- Memorandum. From: Williams, Waterborne, Inc., To: Fuge, Latham and Watkins, LLP. June 30, 2009. Subject: Water Treatment Assessment in Carbofuran Use States.

Exhibit 18

• Petition of the National Corn Grower's Association, the National Sunflower Association, the National Potato Council, and FMC Corporation to Defer the Effective Date of Certain Tolerance Revocations for Carbofuran.

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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 30, 2009.

Debra Edwards,

Director, Office of Pesticide Programs.

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Federal Register

Wednesday,
November 18, 2009

Part III

Department of Education

34 CFR Subtitle B, Chapter II
Race to the Top Fund; Final Rule

DEPARTMENT OF EDUCATION

34 CFR Subtitle B, Chapter II

[Docket ID ED–2009–OESE–0006]

RIN 1810–AB07

Race to the Top Fund

AGENCY: Department of Education.

ACTION: Final priorities, requirements, definitions, and selection criteria.

Catalog of Federal Domestic Assistance (CFDA) Number: 84.395A.

SUMMARY: The Secretary of Education (Secretary) announces priorities, requirements, definitions, and selection criteria for the Race to the Top Fund. The Secretary may use these priorities, requirements, definitions, and selection criteria in any year in which this program is in effect.

DATES: *Effective Date:* These priorities, requirements, definitions, and selection criteria are effective January 19, 2010.

FOR FURTHER INFORMATION CONTACT: James Butler, U.S. Department of Education, 400 Maryland Ave., SW., room 3E108, Washington, DC 20202–6400. Telephone: 202–205–3775 or by e-mail: *racetothetop@ed.gov.*

SUPPLEMENTARY INFORMATION:

Purpose of Program: The purpose of the Race to the Top Fund, a competitive grant program, is to encourage and reward States that are creating the conditions for education innovation and reform; achieving significant improvement in student outcomes, including making substantial gains in student achievement, closing achievement gaps, improving high school graduation rates, and ensuring student preparation for success in college and careers; and implementing ambitious plans in four core education reform areas—

(a) Adopting internationally benchmarked standards and assessments that prepare students for success in college and the workplace;

(b) Building data systems that measure student success and inform teachers and principals about how they can improve their practices;

(c) Increasing teacher and principal effectiveness and achieving equity in their distribution; and

(d) Turning around our lowest-achieving schools. Additional information on the Race to the Top program can be found at: *http://www.ed.gov/programs/racetothetop*.

Program Authority: American Recovery and Reinvestment Act of 2009, Division A, Section 14006, Public Law 111–5.

We published a notice of proposed priorities, requirements, definitions, and selection criteria (NPP) for this program in the **Federal Register** on July 29, 2009 (74 FR 37804). That notice contained background information and our reasons for proposing the particular priorities, requirements, definitions, and selection criteria.

There are a number of differences between the NPP and this notice of final priorities, requirements, definitions, and selection criteria as discussed in the *Analysis of Comments and Changes* section elsewhere in this notice.

Public Comment:

In response to our invitation in the NPP, 1,161 parties submitted comments on the proposed priorities, requirements, definitions, and selection criteria.

Generally, we do not address technical and other minor changes, nor do we address suggested changes that the law does not authorize us to make under the applicable statutory authority. In addition, we do not address general comments that raised concerns not directly related to the NPP.

Introduction

The Race to the Top program, a $4.35 billion fund created under the American Recovery and Reinvestment Act of 2009 (ARRA), is the largest competitive education grant program in U.S. history. The Race to the Top Fund (referred to in the ARRA as the State Incentive Grant Fund) is designed to provide incentives to States to implement large-scale, system-changing reforms that result in improved student achievement, narrowed achievement gaps, and increased graduation and college enrollment rates.

The ARRA specifies that applications for Race to the Top funds must address the four assurance areas referenced in section 14006(a)(2): Enhancing standards and assessments, improving the collection and use of data, increasing teacher effectiveness and achieving equity in teacher distribution, and turning around struggling schools. The Department published the NPP to solicit public comment on the priorities, requirements, and selection criteria that State applications will address in accordance with this statutory requirement.

The NPP prompted an outpouring of public comments. Some 1,161 commenters submitted thousands of unique comments, ranging from one paragraph to 67 pages. Parents submitted comments, as did professional associations. From the statehouse to the schoolhouse, scores of public officials and educators, governors, chief State school officers, teachers, and principals weighed in with suggestions and critiques. All told, individuals from all 50 States and the District of Columbia, including over 550 individuals and 200 organizations, commented on the NPP.

The extensive and thoughtful public commentary on the NPP has been invaluable in helping the Department revise, improve, and clarify the priorities, requirements, definitions, and selection criteria for the Race to the Top program. A discussion of the most significant changes follows.

Major Changes in the Selection Criteria, Priorities, Requirements, and Definitions

State Success Factors

Many of the commenters expressed concern that the NPP's encouragement of comprehensive and coherent statewide reform was undercut by the need for State applicants to organize their plans around each of the four reform assurances, one at a time. In response to this concern, the Department has reorganized a number of the criteria, moving key criteria from the Overall section to a new section at the beginning of the selection criteria called State Success Factors. This new section provides States with the opportunity to start their proposals with clear statements of their coherent, coordinated, statewide reform agendas.

As several commenters noted, States face at least three overarching issues critical to their success in implementing their Race to the Top plans—the need for a coherent reform agenda, the capacity to lead LEAs, and the ability to improve outcomes. In this notice, these three issues are reflected in the State Success Factors as follows: Criterion (A)(1) pertains to a State's ability to articulate a comprehensive and coherent education reform agenda, and to engage its local educational agencies (LEAs) in strongly committing to and participating in that agenda; criterion (A)(2) relates to a State's capacity to implement its proposed plans through strong leadership, successfully supporting its LEAs in improving student outcomes, administering a grant of this magnitude efficiently, and organizing its financial resources to optimize impact; and finally, criterion (A)(3) asks States to demonstrate their ability to significantly improve education outcomes for students across the State.

More specifically, criterion (A)(1)(i) is a new criterion that asks States to set forth a comprehensive and coherent reform agenda that clearly articulates their goals for implementing reform in

the four education areas described in the ARRA and improving student outcomes statewide, establishes a clear and credible path to achieving these goals, and is consistent with the specific reform plans that the State has proposed throughout its application.

Under criterion (A)(1)(ii) (proposed criterion (E)(3)(iv)), States will demonstrate the participation and commitment of their LEAs. First, as described in criterion (A)(1)(ii)(a), the strength of LEAs' commitments to their State's plans will be evaluated based on the terms and conditions in a State's binding agreements with its LEAs. (To support States' efforts, the Department has drafted a model Memorandum of Understanding (MOU) and included it in Appendix D of this notice.) Criterion (A)(1)(ii)(b) has been added to make it clear that the commitment of participating LEAs will also be judged, in part, based on LEAs' agreements to implement all or significant portions of the work outlined in the State's plan. Criterion (A)(1)(ii)(c) clarifies that the extent of an LEA's leadership support for participating in the State's Race to the Top plans will be assessed by how many signatures are on the binding agreement between the State and the LEA, from among (if applicable) the superintendent, the president of the local school board, and the local teachers' union leader, or their equivalents (provided that there is at least one authorized LEA signatory on the agreement). For all of these criteria, States will be asked to provide as evidence examples of their participating LEA agreements as well as tables that summarize which portions of the State plans LEAs are committing to implement and how extensive the LEAs' leadership support is.

Criterion (A)(1)(iii) (adapted from proposed criteria (E)(3)(iv) and (E)(4)) asks States to describe how the engagement of those LEAs that are participating in the State's Race to the Top plans will translate into broad statewide impact on student outcomes, including increasing achievement and decreasing achievement gaps for (at a minimum) reading/language arts and mathematics on the National Assessment of Educational Progress (NAEP) and on the assessments required under the Elementary and Secondary Education Act of 1965, as amended (ESEA); and increasing high school graduation rates, college enrollment rates, and college credit accumulation.

Criterion (A)(2) asks States to describe their capacity to implement, scale up, and sustain their proposed plans. Criterion (A)(2)(i) (adapted from proposed criterion (E)(5)) concerns States' capacity to implement their plans. Criterion (A)(2)(i)(a) asks States to demonstrate that they have strong leadership and dedicated teams to implement their statewide education reform plans; and criterion (A)(2)(i)(b) (proposed (E)(5)(ii)) encourages States to describe the activities they will undertake in supporting participating LEAs in successfully implementing their plans. Criterion (A)(2)(i)(c) (proposed criterion (E)(5)(i)) asks States about the effectiveness and efficiency of their operations and processes for implementing a Race to the Top grant. Criterion (A)(2)(i)(d) (proposed (E)(5)(v)) further clarifies that States will be evaluated based on how they plan to use the funds for this grant, as described in their budgets and accompanying budget narratives, to accomplish their plans and meet their performance targets. Proposed criterion (E)(5)(iv), regarding collaboration between States, is not included in this final notice.

In criterion (A)(2)(ii) (proposed (E)(3)(i) and (E)(3)(ii)), States demonstrate that they have a plan to use the support from a broad group of stakeholders to better implement their reform plans. Criterion (A)(2)(ii)(a) concerns enlisting the support of teachers and principals as key stakeholders. Criterion (A)(2)(ii)(b) asks States to describe the strength of statements and actions of support from other critical stakeholders, and examples of these are listed. Proposed criterion (E)(3)(iii), regarding the support of grant-making foundations and other funding sources, is not included in this final notice.

Criterion (A)(3) addresses the extent to which the State has demonstrated significant progress in raising achievement and closing gaps. Criterion (A)(3)(i) (proposed criteria (E)(1)(i) and (E)(1)(ii)) provides for the evaluation of States based on whether they have made progress in each of the four education reform areas over the past several years and used ARRA and other Federal and State funding to pursue such reforms.

Criterion (A)(3)(ii) (proposed criterion (E)(1)(iv)) addresses States' track records of increasing student achievement, decreasing achievement gaps, and increasing graduation rates. When evaluating these student academic outcomes, reviewers will examine student assessment results in reading/language arts and mathematics, both on the NAEP and on the assessments required under the ESEA; progress will be considered for each subgroup as well as for the ''all students'' group.

Standards and Assessments

In response to comments indicating that some States would have difficulty meeting a June 2010 deadline for adopting a new set of common, kindergarten-to-grade-12 (K–12) standards, this notice extends the deadline for adopting standards as far as possible, while still allowing the Department to comply with the statutory requirement to obligate all Race to the Top funds by September 30, 2010. As set forth in criterion (B)(1)(ii), the new deadline for adopting a set of common K–12 standards is August 2, 2010. States that cannot adopt a common set of K–12 standards by this date will be evaluated based on the extent to which they demonstrate commitment and progress toward adoption of such standards by a later date in 2010 (*see* criterion (B)(1) and Appendix B). Evidence supporting the State's adoption claims will include a description of the legal process in the State for adopting standards, and the State's plan, current progress against that plan, and timeframe for adoption.

For criteria (B)(1) and (B)(2) (proposed criteria (A)(1) and (A)(2), respectively), regarding the development and adoption of common, high-quality standards and assessments, the term ''significant number of States'' has been further explained in the scoring rubric that will be used by reviewers to judge the Race to the Top applications (*see* Appendix B). The rubric clarifies that, on this aspect of the criterion, a State will earn ''high'' points if its consortium includes a majority of the States in the country; it will earn ''medium'' or ''low'' points if its consortium includes one-half or fewer of the States in the country.

Further, for criterion (B)(2), concerning the development and implementation of common, high-quality assessments, States will be asked to present, as evidence, copies of their Memoranda of Agreement showing that the State is part of a consortium that intends to develop high-quality assessments aligned with the consortium's common set of standards. This is similar to the evidence required for criterion (B)(1) concerning the development and adoption of common standards.

Finally, this notice clarifies the language in criterion (B)(3) (proposed criterion (A)(3)) regarding the transition to enhanced standards and high-quality assessments; the criterion now lists a number of activities in which States or LEAs might engage as they work to translate the standards and assessments into classroom practice.

Data Systems to Support Instruction

The data systems selection criteria in the Race to the Top competition involve two types of data systems—statewide longitudinal data systems and instructional improvement systems. While numerous comments addressed the Department's emphasis on statewide longitudinal data systems in the NPP, the Department intends to give equal priority in this program to using instructional data as a critical tool for teachers, principals, and administrators to identify student needs, fill curriculum gaps, and target professional development. The final selection criteria, therefore, place significant emphasis on using data to inform professional development and fostering a culture of continuous improvement in schools and LEAs.

More specifically, the final notice contains new language in criterion (C)(3)(i) (proposed (B)(3)(i)) that clarifies that this criterion concerns local instructional improvement systems, not statewide longitudinal data systems, and further clarifies the LEA's role in the acquisition, adoption, and use of local instructional improvement systems.

New criterion (C)(3)(ii) was added to encourage LEAs and States to provide effective professional development on using data from these systems to support continuous instructional improvement.

Great Teachers and Leaders

The teachers and leaders criteria are built on two core principles that remain consistent with the NPP—that teacher and principal quality matters, and that effective teachers and principals are those whose students grow academically. Thus, this notice continues to include criteria directed at improving teacher and principal effectiveness and at ensuring that highly effective teachers and principals are serving in the high-poverty, high-minority schools where their talents are needed the most. In addition, this notice continues to define effective teachers and principals as those whose students make significant academic growth. While the final notice reaffirms these core principles, it also includes a number of changes to the criteria and related definitions based on public input.

The Department received over 400 comments in this reform area, many of which provided helpful suggestions that informed our revisions. One commenter suggested that the greatest contribution that the Race to the Top program could make would be to encourage the development of outstanding models for teacher and principal evaluation systems, now widely described as flawed and superficial. Based on this and similar comments, the Department has revised criterion (D)(2), now titled Improving Teacher and Principal Effectiveness Based on Performance, to encourage the design of high-quality evaluation systems, and to promote their use for feedback, professional improvement, and decision-making.

The Department concurs with the many commenters who cautioned that teacher and principal ''effectiveness'' should not be based solely on student test scores. In this notice, ''effectiveness'' is defined as based on input from multiple measures, provided that student growth is a significant factor. In addition, this notice re-emphasizes that it is student growth—not raw student achievement data or proficiency levels—that is the ''significant factor'' to be considered in evaluating effectiveness.

Finally, this notice expands and improves the four selection criteria that deal with teacher and principal professional development (criteria (B)(3), (C)(3)(ii), (D)(2)(iv)(a), and (D)(5)). It clarifies that professional collaboration and planning time, individualized professional development plans, training and support in the analysis and use of data, classroom observations with immediate feedback, and other activities are critical to supporting the development of teachers and principals.

Specifically, criterion (D)(1) (proposed (C)(1)), concerning high-quality pathways for aspiring teachers and leaders, has been expanded. It now includes a new criterion (D)(1)(iii), under which States will be evaluated based on the extent to which they have in place a process for monitoring, evaluating, and identifying areas of teacher and principal shortage and for preparing teachers and principals to fill these areas of shortage.

Criterion (D)(2) (proposed (C)(2)) has been revised to focus on the design and use of rigorous, transparent, and fair evaluation systems that provide regular feedback on performance to teachers and principals. This criterion also has been changed to clarify that the LEAs, not the States, should implement the teacher and principal effectiveness reforms under this criterion, and that the role of the States is to support their participating LEAs in implementing these reforms.

Criterion (D)(2)(ii) (proposed (C)(2)(b)) now emphasizes that these evaluation systems should differentiate effectiveness using multiple rating categories, and should be designed and developed with teacher and principal involvement. Criterion (D)(2)(iii) (proposed criteria (C)(2)(c) and (C)(2)(d)(i)) encourages such evaluations to be conducted annually and to include timely and constructive feedback, while criterion (D)(2)(iv) (proposed criterion (C)(2)(d)) addresses uses of evaluations to inform decision-making.

Criteria (D)(2)(iv)(c) and (D)(2)(iv)(d) (proposed criterion (C)(2)(d)(iii)) separately address the use of these evaluation systems to inform decisions regarding whether to grant tenure and/or full certification to effective teachers and principals (in criterion (D)(2)(iv)(c)), and removing ineffective teachers and principals (in criterion (D)(2)(iv)(d)). In addition, the Department has clarified that these decisions should be made using rigorous standards and streamlined, transparent, and fair procedures.

Criterion (D)(3) (proposed (C)(3)) has been revised to clarify that the State's plan for the equitable distribution of effective teachers and principals should be informed by the State's prior actions and data, and should ensure that students in high-poverty as well as high-minority schools have equitable access to highly effective teachers and principals—and are not served by ineffective ones at higher rates than are other students. The performance measures for this criterion now include, for comparison purposes, data on the presence of highly effective and ineffective teachers and principals in low-poverty and low-minority schools.

Criterion (D)(4) concerns improving the effectiveness of teacher and principal preparation programs. Criterion (D)(4)(i) (proposed (C)(4)) was revised to specify that, when reporting the effectiveness of teacher and principal credentialing programs, States should report student growth as well as student achievement data; they should report the data for all in-State credentialing programs, regardless of the number of graduates; and they should publicly report data, not ''findings.''

Criterion (D)(4)(ii) has been added to encourage States to expand those preparation and credentialing options and programs that are successful at producing effective teachers and principals (both as defined in this notice).

Criterion (D)(5) (proposed criterion (C)(5)) focuses on providing effective support to teachers and principals. Here, the Department has inserted a new paragraph, (D)(5)(i), to provide additional guidance on, and examples of, effective support. The Department has also removed the reference to using

''rapid-time'' student data to inform and guide the supports provided to teachers and principals.

Turning Around the Lowest-Achieving Schools

The Department made three noteworthy changes to the selection criteria on turning around the persistently lowest-achieving schools. First, this notice removes the restriction, proposed in the NPP, that permitted the ''transformation'' model to be used solely as a last resort. Instead, we simply specify that an LEA with more than nine persistently lowest-achieving schools may not use the transformation model for more than 50 percent of its schools.

Second, the Department has fully aligned the school intervention requirements and definitions across Race to the Top, the State Fiscal Stabilization Fund, and the forthcoming Title I School Improvement Grants final notice. The Department's intention, in so doing, is to make it easier for States to develop consistent and coherent plans across these three programs.

Third, the public comments suggested that there was confusion about the role of charter schools in the Department's reform agenda. Some commenters concluded that by placing the charter school criterion in the school turnaround section, the Department was advancing charter schools as the chief remedy for addressing the needs of the persistently lowest-achieving schools. While the Department believes that charter schools can be strong partners in school turnaround work, it does not believe that charter schools are the only or preferred solution to turning around struggling schools. In fact, it is the Department's belief that turning around the persistently lowest-achieving schools is a core competency that every district needs to develop, and that closing bad schools and opening good ones is the job of school district leaders. Notwithstanding research showing that charter schools on average perform similarly to traditional public schools, a growing body of evidence suggests that high-quality charter schools can be powerful forces for increasing student achievement, closing achievement gaps, and spurring educational innovation. As a consequence, the selection criterion pertaining to charter schools (criterion (F)(2), proposed (D)(2)) has been shifted from the Turning Around the Lowest-Achieving Schools section to the General section, where it more appropriately reflects charter schools' broader role as a tool for school innovation and reform.

Specifically, the following changes have been made to criterion (E)(2) (proposed criterion (D)(3)), regarding turning around the lowest-achieving schools. Criterion (E)(2)(i) (proposed (D)(3)(i)) has been changed to allow States, at their discretion, to use Race to the Top funds to turn around non-Title I eligible secondary schools that would be considered ''persistently lowest-achieving schools'' if they were eligible to receive Title I funds.

Criterion (E)(2)(ii) (proposed criterion (D)(3)(ii)) has been changed by removing the clause that restricted the use of the ''transformation'' model to situations where the other intervention models were not possible and by specifying that an LEA with more than nine persistently lowest-achieving schools may not use the transformation model for more than 50 percent of its schools. In addition, the four intervention models LEAs may use under this criterion are now described in detail in Appendix C, and these models have been made identical across the Race to the Top, State Fiscal Stabilization Fund, and Title I School Improvement Grants notices.

Finally, the evidence collected for criterion (E)(2) will include the State's historic performance on school turnaround efforts, as evidenced by the total number of persistently lowest-achieving schools that States or LEAs attempted to turn around in the last five years, the approach used, and the results and lessons learned to date.

General

The General section includes a number of other key reform conditions or plans.

First, criterion (F)(1) concerns education funding across the State. Criterion (F)(1)(i) (proposed (E)(2)) addresses the State's efforts to maintain education funding between FY 2008 and FY 2009. New criterion (F)(1)(ii) has been added to reward States whose policies lead to equitable funding between high-need LEAs and other LEAs, and within LEAs, between high-poverty schools and other schools.

As noted above, criterion (F)(2) regarding charter schools has been moved to the General section from the Turning Around the Lowest-Achieving Schools section, where it was proposed criterion (D)(2). In this notice, the Department maintains its focus on high-quality charter schools as important tools for school reform.

As was the case with the NPP, the final charter school criteria presented under (F)(2) encourage both unrestrictive charter school growth laws and strong charter school accountability. In support of charter school growth, the criteria also provide for the evaluation of States based on the extent to which they provide equitable funding for charter schools and offer them access to facilities. Criterion (F)(2)(ii) has also been revised to urge authorizers to encourage charter schools that serve student populations that are similar to local district student populations, especially relative to high-need students.

In their comments, a number of States argued that they had laws—other than charter school laws—that spurred school innovation. In response to these comments, the Department has added a new criterion, (F)(2)(v), that invites States to describe the extent to which they enable LEAs to operate innovative, autonomous public schools other than charter schools.

It is the Department's hope that the Race to the Top competition gives States ample opportunity to explain and implement proven and promising ideas for bolstering student learning and educational attainment, and to do this in ways that work best in their local contexts. To ensure that the application reflects a broad range of effective State and local solutions, criterion (F)(3) (proposed criterion (E)(1)(iii)) asks States to describe laws, regulations, or policies (other than those asked about in other selection criteria) that have created conditions in the State that are conducive to education reform and improved student outcomes.

Priorities

Many commenters offered suggestions about the proposed priorities, in particular the invitational and competitive preference priorities. A number of commenters urged the Department to increase the importance of each invitational priority by making it a competitive or absolute priority, while others wanted to add new priorities. Because of the Department's desire to give States latitude and flexibility in developing focused plans to best meet their students' needs, we are not changing any of the priorities from invitational to competitive or absolute. We did, however, add a new invitational priority and make some changes to the proposed priorities.

Regarding the proposed absolute priority, which stated that States' applications must comprehensively and coherently address all of the four education reform areas specified in the ARRA, the Department has added the requirement that States must comprehensively and coherently address the new State Success Factors criteria as well.

The final notice adds a new invitational priority 3, Innovations for Improving Early Learning Outcomes, expressing the Secretary's interest in applications that will improve early learning outcomes for high-need students who are young children.

In invitational priority 4 (proposed priority 3), Expansion and Adaptation of Statewide Longitudinal Data Systems, programs such as at-risk and dropout prevention programs, school climate and culture programs, and early learning programs have been added to the list of programs that a State may choose to integrate with its statewide longitudinal data system.

In invitational priority 5 (proposed priority 4), P–20 Coordination, Vertical and Horizontal Alignment, horizontal coordination of services was added as a critical component for supporting high-need students.

In invitational priority 6 (proposed priority 5), School-level Conditions for Reform, Innovation, and Learning, new paragraph (vi) adds school climate and culture, and new paragraph (vii) adds family and community engagement to the list of school conditions conducive to reform and innovation.

Requirements

The first eligibility requirement, requirement (a), has been changed to provide that a State must have both phases of its State Fiscal Stabilization Fund application approved by the Department prior to being awarded a Race to the Top grant. In the NPP, we proposed that a State would have to receive approval of its Stabilization Fund applications prior to December 31, 2009 (for Race to the Top Phase 1 applicants) or prior to submitting a Race to the Top application (for Race to the Top Phase 2 applicants).

The second eligibility requirement, requirement (b), was revised to clarify that the State must not have any legal, statutory, or regulatory barriers at the State level to linking data on student achievement (as defined in this notice) or student growth (as defined in this notice) to teachers and principals for the purpose of teacher and principal evaluation.

In addition, several changes were made to the application requirements. The Department removed two proposed application requirements, application requirements (c) and (d), which would have required States to provide information about making education funding a priority and about stakeholder support. Note that the final notice retains the selection criteria that request this same information.

Application requirement (c)(2) provides additional clarity about how to calculate the relative shares of the Race to the Top grant that participating LEAs will be eligible to receive.

The Department has added a new application requirement, requirement (g), to clarify specific issues related to the term ''subgroup,'' to NAEP, and to the assessments required under the ESEA. In addition to requiring States to include, at a minimum, the listed student subgroups when reporting past outcomes and setting future targets, this application requirement includes statutory references. This addition eliminates the need for statutory references that define subgroups elsewhere in the notice, and they therefore have been removed.

The program requirements have also changed. First, the Department has indicated its final approach to evaluation. The Institute of Education Sciences will conduct a series of national evaluations of Race to the Top State grantees as part of its evaluation of programs funded under the ARRA. States that are awarded Race to the Top grants will be required to participate in these evaluations and are welcome, but not required, to conduct their own independent, statewide evaluations as well.

Finally, the program requirements have clarified that funds awarded under this competition may not be used to pay for costs related to statewide summative assessments.

Definitions

The Department has revised the definition of *alternative routes to certification* to require that in addition to the other program characteristics listed, the program must be selective in accepting candidates. The revised definition also clarifies that such programs should include standard features of high-quality preparation programs and award the same level of certification that is awarded by traditional preparation programs.

A new definition of *college enrollment* refers to the enrollment of students who graduate from high school consistent with 34 CFR 200.19(b)(1) and who enroll in an institution of higher education (as defined in section 101 of the Higher Education Act, Public Law 105–244, 20 U.S.C. 1001) within 16 months of graduation.

The final notice revises the definitions of *effective teacher, effective principal*, *highly effective teacher,* and *highly effective principal* to require that multiple measures be used to evaluate effectiveness, and provides several examples of appropriate measures.

The definition of *formative assessment* has been revised to clarify that formative assessments are assessment questions, tools and processes and to require that feedback from such assessments need only be timely rather than instant.

Under a new definition of *high-minority school*, States are to define high-minority schools in their applications in a manner consistent with their Teacher Equity Plans.

The definition of *high-need LEA* was changed to conform with the definition of this term used in section 14013 of the ARRA.

The final notice adds and defines *high-need students* to mean students at risk of educational failure or otherwise in need of special assistance and support, such as students who are living in poverty, who attend high-minority schools (as defined in this notice), who are far below grade level, who have left school before receiving a regular high school diploma, who are at risk of not graduating with a diploma on time, who are homeless, who are in foster care, who have been incarcerated, who have disabilities, or who are English language learners.[1]

The final notice adds a definition of *high-performing charter school*. This definition refers to a charter school that has been in operation for at least three consecutive years and has demonstrated overall success, including substantial progress in improving student achievement and having the management and leadership necessary to overcome initial start-up problems and establish a thriving, financially viable charter school.

The definition of *high-quality assessment* has been revised to clarify that test design must, to the extent feasible, use universal design principles in development and administration, and incorporate technology where appropriate.

The final notice also adds a definition of *increased learning time*, which refers to using a longer school day, week, or year schedule to significantly increase the total number of school hours to include additional time for (a) instruction in core academic subjects, including English; reading or language arts; mathematics; science; foreign languages; civics and government; economics; arts; history; and geography; (b) instruction in other subjects and enrichment activities that contribute to a well-rounded education, including, for

[1] The term English language learner, as used in this notice, is synonymous with the term limited English proficient, as defined in section 9101 of the ESEA.

example, physical education, service learning, and experiential and work-based learning opportunities that are provided by partnering, as appropriate, with other organizations; and (c) teachers to collaborate, plan, and engage in professional development within and across grades and subjects.

The final notice adds a definition of *innovative, autonomous public schools* to refer to open enrollment public schools that, in return for increased accountability for student achievement (as defined in this notice), have the flexibility and authority to define their instructional models and associated curriculum; select and replace staff; implement new structures and formats for the school day or year; and control their budgets.

In the definition of *instructional improvement systems*, the Department now provides examples of related types of data that could be integrated into these systems.

The final notice adds a definition of *involved LEAs*, which refers to LEAs that choose to work with the State to implement those specific portions of the State's plan that necessitate full or nearly full statewide implementation, such as transitioning to a common set of K–12 standards, (as defined in this notice). Involved LEAs do not receive a share of the 50 percent of a State's grant award that it must subgrant to LEAs in accordance with section 14006(c) of the ARRA; however, States may provide other funding to involved LEAs under the State's Race to the Top grant in a manner that is consistent with the State's application.

The final notice adds a definition of *low-minority school*, which is to be defined by the State in a manner consistent with the State's Teacher Equity Plan.

A new definition of *low-poverty school* refers, consistent with section 1111(h)(1)(C)(viii) of the ESEA, to a school in the lowest quartile of schools in the State with respect to poverty level, using a measure of poverty determined by the State.

The final notice adds a definition of *participating LEAs,* which refers to LEAs that choose to work with the State to implement all or significant portions of the State's Race to the Top plan, as specified in each LEA's agreement with the State. Each participating LEA that receives funding under Title I, Part A will receive a share of the 50 percent of a State's grant award that the State must subgrant to LEAs, based on the LEA's relative share of Title I, Part A allocations in the most recent year (that is, 2009), in accordance with section 14006(c) of the ARRA. Any participating LEA that does not receive funding under Title I, Part A (as well as one that does) may receive funding from the State's other 50 percent of the grant award, in accordance with the State's plan.

The term *persistently lowest-performing schools* has been changed to *persistently lowest-achieving schools.* The definition has been revised to include the lowest-achieving five percent criterion originally included in proposed criterion (D)(3) and to add high schools with graduation rates below 60 percent. The definition also provides that, in determining the lowest-achieving schools, a State must consider the academic achievement of the ''all students'' group for each school in terms of proficiency on the State's assessments required by the ESEA in reading/language arts and mathematics combined, and the lack of progress by that group on these assessments over a number of years.

The definition of *rapid-time,* in reference to reporting and availability of data, has been changed to remove the specification of a turnaround time of 72 hours and to clarify that it refers to locally collected school- and LEA-level data.

The definition of *student achievement* has been revised to include several examples of alternate measures of student learning and performance for non-tested grades and subjects. The final notice also clarifies that, for tested grades and subjects, student achievement can be measured using alternative measures of student learning and performance in addition to the State's assessments under the ESEA. Finally, the reference to Individualized Education Program (IEP) goals as a potential achievement measure has been removed.

The definition of *student growth* was clarified to mean the change in student achievement (as defined in this notice) for an individual student between two or more points in time, rather than just between two points in time, as the NPP had proposed, and that a State may also include other measures that are rigorous and comparable across classrooms.

In the following section, the Department has summarized and provided its responses to the comments received.

Analysis of Comments and Changes: An analysis of the comments and of any changes in the priorities, requirements, definitions, and selection criteria since publication of the NPP follows.

General Comments on the Race to the Top Program

Reorganization of the Final Notice

Comment: None.

Discussion: The selection criteria in this notice are reordered. The most significant change is the addition of State Success Factors to the beginning of the selection criteria. State Success Factors criteria include some new criteria, as well as criteria that are adapted from proposed criteria from the overall selection criteria section proposed in the NPP. This reorganization will give States the opportunity to begin their proposals with clear statements of their coherent and coordinated statewide reform agendas. However, with this change, it was necessary to redesignate the remaining criteria. For example, in the NPP, the criteria related to standards and assessments were designated as ''A'' (*e.g.,* (A)(1), (A)(2), etc.), but in this final notice have been re-designated as ''B'' (*e.g.,* (B)(1), (B)(2), etc.). One way to indicate this change throughout the final notice is to include both references every time a criterion is used (*e.g.,* revised criterion (B)(1) (proposed criterion (A)(1)). Given the length of this notice and the extensive references to criteria, we have opted to refer only to the revised designation in the discussion of the comments. For example, we refer to a criterion for standards and assessments as ''criterion (B)(1),'' rather than as ''revised criterion (B)(1) (proposed criterion (A)(1)).'' In a few instances, we refer to ''proposed criterion'' or ''revised criterion'' for clarity but, generally, do not refer to each criterion with both its ''revised'' and ''proposed'' designation. We believe this format makes the document easier to read and understand. As a reminder to readers, we include both the final and proposed designations under the appropriate headings. Table 1 lists the final criteria and the corresponding proposed criteria. In Table 2, the columns are reversed to show the proposed criteria and the corresponding final criteria.

There is a similar re-designation of the priorities. Specifically, we added a new invitational priority on innovations for improving early learning outcomes and designated it as priority 3. Subsequent priorities were re-numbered, and thus, proposed priorities 3, 4, and 5 are now priorities 4, 5, and 6, respectively. As with the selection criteria, generally, we will refer only to the final designation for these priorities and will use headers, as appropriate, to remind the reader of the changes. Thus, for example, we will refer to the priority

on Expansion and Adaptation of Statewide Longitudinal Data Systems, which was proposed priority 3 in the NPP, as priority 4. Table 3 summarizes these changes.

Changes: We have re-designated the selection criteria and proposed priorities 3, 4, and 5. We will refer to the selection criteria and priorities with their final designations throughout this notice and, in a few instances, will refer to proposed designations for clarity. Three tables have been added to show how the final selection criteria and priorities relate to the proposed criteria and priorities.

TABLE 1—THE FINAL SELECTION CRITERIA COMPARED WITH THE PROPOSED SELECTION CRITERIA

Final notice	Proposed notice
A. State Success Factors	(E)(1), (E)(3), (E)(4), (E)(5), and new
A1. Articulating State's education reform agenda and LEAs' participation in it	(E)(3)(iv), new
(A)(1)(i)	New
(A)(1)(ii)	(E)(3)(iv)
(A)(1)(ii)(a)	(E)(3)(iv)
(A)(1)(ii)(b)	(E)(3)(iv)
(A)(1)(ii)(c)	(E)(3)(iv)
(A)(1)(iii)(a)	(E)(3)(iv) and (E)(4)(i)
(A)(1)(iii)(b)	(E)(3)(iv) and (E)(4)(ii)
(A)(1)(iii)(c)	(E)(3)(iv) and (E)(4)(iii)
(A)(1)(iii)(d)	(E)(3)(iv) and new
A2. Building strong statewide capacity to implement, scale up, and sustain proposed plans	(E)(3)(i–ii), (E)(5), and new
(A)(2)(i)(a)	New
(A)(2)(i)(b)	(E)(5)(ii)
(A)(2)(i)(c)	(E)(5)(i)
(A)(2)(i)(d)	(E)(5)(v)
(A)(2)(i)(e)	(E)(5)(iii)
(A)(2)(ii)(a)	(E)(3)(i)
(A)(2)(ii)(b)	(E)(3)(i–ii)
A3. Demonstrating significant progress in raising achievement and closing gaps	(E)(1) and (E)(4)
(A)(3)(i)	(E)(1)(i–ii)
(A)(3)(ii)(a)	(E)(1)(iv)
(A)(3)(ii)(b)	(E)(1)(iv)
(A)(3)(ii)(c)	(E)(1)(iv)
B. Standards and Assessments	A. Standards and Assessments
B1. Developing and adopting common standards	(A)(1)
(B)(1)(i)(a)	(A)(1)(i) and (A)(1)(ii)
(B)(1)(i)(b)	(A)(1)(i) and (A)(1)(ii)
(B)(1)(i)(c)	(A)(1)(i) and (A)(1)(ii)
(B)(1)(ii)(a)	(A)(1)(i)
(B)(1)(ii)(b)	(A)(1)(ii)
B2. Developing and implementing common, high-quality assessments	(A)(2)
(B)(2)(a)	(A)(2)
(B)(2)(a)	(A)(2)
B3. Supporting the transition to enhanced standards and high-quality assessments	(A)(3)
C. Data Systems to Support Instruction	B. Data Systems to Support Instruction
C1. Fully implementing a statewide longitudinal data system	(B)(1)
C2. Accessing and using State data	(B)(2)
C3. Using data to improve instruction	(B)(3)
(C)(3)(i)	(B)(3)(i)
(C)(3)(ii)	New
(C)(3)(iii)	(B)(3)(ii)
D. Great Teachers and Leaders	C. Great Teachers and Leaders
D1. Providing high-quality pathways for aspiring teachers and principals	(C)(1)
(D)(1)(i)	(C)(1)
(D)(1)(ii)	(C)(1)
(D)(1)(iii)	New
D2. Improving teacher and principal effectiveness based on performance	(C)(2)
(D)(2)(i)	(C)(2)(a)
(D)(2)(ii)	(C)(2)(b)
(D)(2)(iii)	(C)(2)(c) and (C)(2)(d)(i)
(D)(2)(iv)	(C)(2)(d)
(D)(2)(iv)(a)	(C)(2)(d)(i)
(D)(2)(iv)(b)	(C)(2)(d)(ii)
(D)(2)(iv)(c)	(C)(2)(d)(iii)
(D)(2)(iv)(d)	(C)(2)(d)(iii)
D3. Ensuring equitable distribution of effective teachers and principals	(C)(3)

TABLE 1—THE FINAL SELECTION CRITERIA COMPARED WITH THE PROPOSED SELECTION CRITERIA—Continued

Final notice	Proposed notice
(D)(3)(i)	(C)(3)
(D)(3)(ii)	(C)(3)
D4. Improving the effectiveness of teacher and principal preparation programs	(C)(4)
(D)(4)(i)	(C)(4)
(D)(4)(ii)	New
D5. Providing effective support to teachers and principals	(C)(5)
(D)(5)(i)	(C)(5)
(D)(5)(ii)	(C)(5)
E. Turning Around the Lowest-Achieving Schools	D. Turning Around Struggling Schools
E1. Intervening in the lowest-achieving schools and LEAs	(D)(1)
E2. Turning around the lowest-achieving schools	(D)(3)
(E)(2)(i)	(D)(3)(i)
(E)(2)(ii)	(D)(3)(ii)
F. General Selection Criteria	(D)(2), (E)(1), (E)(2), and new
F1. Making education funding a priority	(E)(2) and new
(F)(1)(i)	(E)(2)
(F)(1)(ii)	New
F2. Ensuring successful conditions for high-performing charter schools and other innovative schools	(D)(2)
(F)(2)(i)	(D)(2)(i)
(F)(2)(ii)	(D)(2)(ii)
(F)(2)(iii)	(D)(2)(iii)
(F)(2)(iv)	(D)(2)(iv)
(F)(2)(v)	New
F3. Demonstrating other significant reform conditions	(E)(1)(iii)
Removed	(E)(3)(iii)
Removed	(E)(5)(iv)

TABLE 2—THE PROPOSED SELECTION CRITERIA COMPARED WITH THE FINAL SELECTION CRITERIA

Proposed notice	Final notice
A. Standards and Assessments	B. Standards and Assessments
(A)(1). Developing and adopting common standards	(B)(1)
(A)(1)(i)	(B)(1)(i), (B)(1)(ii)(a)
(A)(1)(ii)	(B)(1)(i), (B)(1)(ii)(b)
(A)(2). Developing and implementing common, high-quality assessments	(B)(2)
(A)(3). Supporting the transition to enhanced standards and high-quality assessments	(B)(3)
B. Data Systems to Support Instruction	C. Data Systems to Support Instruction
(B)(1). Fully implementing a statewide longitudinal data system	(C)(1)
(B)(2). Accessing and using State data	(C)(2)
(B)(3). Using data to improve instruction	(C)(3)(i), (C)(3)(iii)
(B)(3)(i)	(C)(3)(i)
(B)(3)(ii)	(C)(3)(iii)
C. Great Teachers and Leaders	D. Great Teachers and Leaders
(C)(1). Providing high-quality pathways for aspiring teachers and principals	(D)(1)(i–ii)
(C)(2). Improving teacher and principal effectiveness based on performance	(D)(2)
(C)(2)(a)	(D)(2)(i)
(C)(2)(b)	(D)(2)(ii)
(C)(2)(c)	(D)(2)(iii)
(C)(2)(d)(i)	(D)(2)(iii), (D)(2)(iv)(a)
(C)(2)(d)(ii)	(D)(2)(iv)(b)
(C)(2)(d)(iii)	(D)(2)(iv)(c), (D)(2)(iv)(d)
(C)(3). Ensuring equitable distribution of effective teachers and principals	(D)(3)(i), (D)(3)(ii)
(C)(4). Reporting the effectiveness of teacher and principal preparation programs	(D)(4)(i)
(C)(5). Providing effective support to teachers and principals	(D)(5)(i), (D)(5)(ii)
D. Turning Around Struggling Schools	E. Turning Around the Lowest-Achieving Schools
(D)(1). Intervening in the lowest-achieving schools and LEAs	(E)(1)
(D)(2). Increasing the supply of high-quality charter schools	(F)(2)
(D)(2)(i)	(F)(2)(i)
(D)(2)(ii)	(F)(2)(ii)
(D)(2)(iii)	(F)(2)(iii)
(D)(2)(iv)	(F)(2)(iv)
(D)(3). Turning around the lowest-achieving schools	(E)(2)

TABLE 2—THE PROPOSED SELECTION CRITERIA COMPARED WITH THE FINAL SELECTION CRITERIA—Continued

Proposed notice	Final notice
(D)(3)(i)	(E)(2)(i)
(D)(3)(ii)	(E)(2)(ii)
E. Overall Selection Criteria	(A) State Success Factors and (F) General Selection Criteria
(E)(1). Demonstrating significant progress	(A)(3)(i), (A)(3)(ii), (F)(3)
(E)(1)(i)	(A)(3)(i)
(E)(1)(ii)	(A)(3)(i)
(E)(1)(iii)	(F)(3)
(E)(1)(iv)	(A)(3)(ii)
(E)(2). Making education funding a priority	(F)(1)(i)
(E)(3). Enlisting statewide support and commitment	(A)(1)(ii), (A)(1)(iii), (A)(2)(ii)
(E)(3)(i)	(A)(2)(ii)(a), (A)(2)(ii)(b)
(E)(3)(ii)	(A)(2)(ii)(b)
(E)(3)(iii)	Removed
(E)(3)(iv)	(A)(1)(ii), (A)(1)(iii)
(E)(4). Raising achievement and closing gaps	(A)(1)(iii)
(E)(4)(i)	(A)(1)(iii)(a)
(E)(4)(ii)	(A)(1)(iii)(b)
(E)(4)(iii)	(A)(1)(iii)(c)
(E)(5). Building strong statewide capacity to implement, scale up, and sustain proposed plans	(A)(2)(i)(b–e)
(E)(5)(i)	(A)(2)(i)(c)
(E)(5)(ii)	(A)(2)(i)(b)
(E)(5)(iii)	(A)(2)(i)(e)
(E)(5)(iv)	Removed
(E)(5)(v)	(A)(2)(i)(d)
New	(A)(1)(i)
New	(A)(1)(iii)(d)
New	(A)(2)(i)(a)
New	(C)(3)(ii)
New	(D)(1)(iii)
New	(D)(4)(ii)
New	(F)(1)(ii)
New	(F)(2)(v)

TABLE 3—THE FINAL PRIORITIES COMPARED WITH THE PROPOSED PRIORITIES

Final priorities	Proposed priorities
Priority 1: Absolute Priority—Comprehensive Approach to Education Reform.	Priority 1: Absolute Priority.
Priority 2: Competitive Preference Priority—Emphasis on Science, Technology, Engineering, and Mathematics (STEM).	Priority 2: Competitive Preference Priority.
Priority 3: Invitational Priority—Innovations for Improving Early Learning Outcomes.	New.
Priority 4: Invitational Priority—Expansion and Adaptation of Statewide Longitudinal Data Systems.	Priority 3.
Priority 5: Invitational Priority—P–20 Coordination, Vertical and Horizontal Alignment.	Priority 4.
Priority 6: Invitational Priority—School-Level Conditions for Reform, Innovation, and Learning.	Priority 5.
Priority 6, Paragraph vi.	New.
Priority 6, Paragraph vii.	New.

Overall Comments on the Race to the Top Program

Comment: We received a number of comments that addressed issues related to the Race to the Top program in general, as well as comments that focused on a number of priorities and selection criteria.

Discussion: We are addressing, in this section, general comments on the Race to the Top program, as well as comments that focused on multiple priorities and selection criteria. This allows us to group similar comments and be more responsive to the commenters.

Changes: None.

Comment: Many commenters supported our proposals in the NPP and our effort to leverage cutting-edge education reforms and innovation in a competitive Race to the Top program that will lay the foundation for significant improvement of America's education system. In particular, these commenters praised the Department's proposals for ''game-changing'' reforms in the areas of improving teacher and principal effectiveness and turning around our lowest-achieving schools.

Other commenters expressed their overall opposition to the Race to the Top program because of what they described as its ''one-size-fits-all'' approach to education reform involving ''a top-down, narrow definition of innovation that has little research to support it.'' Another commenter stated that the Department is prescribing a national formula for education reform, which threatens to undermine the program. In particular, several

commenters objected to the proposed use of test scores as an accurate measure of student achievement and what they claimed were ''unproven'' interventions such as charter schools and linking teacher compensation to student achievement data. Many commenters asserted that the proposed program design would interfere with State and local prerogatives and responsibilities for public education. Other commenters noted that some of the interventions proposed in Race to the Top, such as increasing the number of high-quality charter schools, are not consistent with existing State laws and might not work as well in rural areas as in urban environments. One commenter stated that the NPP ignored the existing ESEA school improvement process and ''would simply layer another top-down accountability process on top of the current faulty one.'' Some of these commenters urged that the final notice instead encourage States to propose multiple innovative, research-based reform strategies and models tailored to their own unique local needs.

Discussion: The Department appreciates the expressions of support for its Race to the Top proposal as well as commenters' constructive suggestions. The Race to the Top program provides a flexible framework for comprehensive State and local innovation in the key reform areas identified in the ARRA. In fact, one of the key purposes of this program is to ask States for their best ideas about how to address the levers of change—the four assurances in the ARRA—to significantly improve student outcomes and advance the field of education reform.

To create ''room'' for States to meet this goal, this final notice, consistent with the NPP, includes only one absolute priority and two eligibility requirements—none of which interferes with a State's flexibility to put forward its best ideas and practices for reform. The absolute priority focuses on comprehensiveness and coherence across the reform areas, and the eligibility requirements include (1) approved applications for funding under Phase 1 and Phase 2 of the Stabilization program, and (2) no legal, statutory, or regulatory barriers at the State level to linking data on student achievement or student growth to teachers and principals for the purpose of teacher and principal evaluation. As we noted in the NPP, section 14005(d) of the ARRA requires a State that receives funds under the Stabilization program to provide assurances in the same four education reform areas that are advanced by the Race to the Top program. We, therefore, believe it would be inconsistent to award a Race to the Top grant, which requires a determination that a State has made significant progress in the four education reform areas, to a State that has not met requirements for receiving funds under the Stabilization program. With regard to the second eligibility requirement, we believe that the capability to link student achievement to teachers and principals for the purposes of evaluation is fundamental to the Race to the Top reforms and to the requirement in section 14005(d)(2) of the ARRA that States take actions to improve teacher effectiveness. Furthermore, without the legal authority to use student achievement or student growth data for teacher and principal evaluations, States would not be able to execute reform plans related to several selection criteria in this notice.

In addition, the proposed selection criteria were not designated as eligibility requirements; instead, they were proposed as recommended elements of a comprehensive State plan that would provide an individual State with the flexibility to emphasize its own priorities and craft a winning application. This flexible approach has been retained in this final notice. For instance, States need not address every selection criterion, so long as they comprehensively and coherently address all of the four education reform areas as well as the State Success Factors Criteria.

Through this program, the Department will reward success in at least two ways: First, by giving States credit for having already put into place key conditions for reform, improving student achievement, and closing achievement gaps; and second, by encouraging States to build on their assets and successes. We believe that State plans that build on a foundation of successful existing practices will be more likely to succeed in improving student outcomes.

It is important to note that the Race to the Top program is a voluntary competitive grant program. Consistent with section 14006(b) of the ARRA, we may use ''such other criteria as the Secretary determines appropriate'' in making Race to the Top awards; our intention is not to fund every State but to identify and reward the subset of States that demonstrate the greatest promise of making meaningful gains in developing standards and assessments, using data to drive improved student outcomes, improving teacher and principal effectiveness and achieving equity in the distribution of effective teachers and principals, and turning around struggling schools. Moreover, because the effects of the Race to the Top program might not be captured by existing State accountability systems, such as those created under the ESEA, this final notice retains the separate performance measures included in the NPP.

In response to commenters' concerns pertaining to ''unproven'' interventions in the Race to the Top program, there is ample evidence, for example, that high-performing charter schools can significantly improve the achievement of high-need students. Likewise, the research supports that effective teachers and principals are essential to improving student achievement; accordingly, the Department believes that identifying, recruiting, developing, and retaining effective teachers and school leaders is critical to creating high-performing schools and a world-class education system. Finally, we are providing States with flexibility to incorporate these reforms into their plans through their own innovative and thoughtful approaches that are designed to address their specific needs. In addition, we are including in this final notice two additional criteria intended to make this flexibility for innovation more explicit.

Changes: We have added the following criteria: First, criterion (F)(2)(v) asks a State to demonstrate the extent to which it enables LEAs to operate innovative, autonomous public schools other than charter schools. Second, criterion (F)(3) (proposed criterion (E)(1)(iii)) encourages States to describe any other conditions favorable to education reform or innovation that have increased student achievement or graduation rates, narrowed achievement gaps, or resulted in other important outcomes.

Transparency

Comment: Some commenters requested that the Department make all State applications and annual reports publicly available for review. Additional commenters requested that applications and all related materials be posted online prior to approval.

Discussion: To foster transparency and openness, the Department plans to post all State applications—for both successful and unsuccessful applications—on our Web site at the conclusion of each phase of the competition, together with the final scores each received. States may choose to make their applications publicly available at any time. We also anticipate making State annual reports publicly available.

Changes: None.

Allocation of Points

Comment: Several commenters requested clarification concerning the weighting of selection criteria. Two commenters specifically requested that the point scale or rubric be disclosed. Other commenters suggested that the point allocations be subject to public comment. One commenter suggested that Secretary Duncan make the final award selections.

Discussion: To ensure that the Race to the Top competition is as open and transparent as possible, the Department is publishing the reviewer scoring rubric in Appendix B of this notice. The rubric is designed to ensure consistency across reviewers and help applicants better understand the Department's priorities for this competition by clearly identifying the point allocations for each selection criterion and indicating how priorities will be judged. The Secretary will select the grantees after considering the rank order of applications, each applicant's status with respect to the Absolute Priority and eligibility requirement (a), and any other relevant information. Grant award decisions are made by the Secretary, pursuant to the Department's regulations. It is the Department's practice to first take public comment on proposed selection criteria before making final decisions on those criteria. This allows the Department to consider public comment on the proposed selection criteria before making final decisions on point allocations, which are then published in the application package and final notice inviting applications.

Changes: The scoring rubric for the criteria is included as Appendix B.

Comment: Many commenters recommended weighting State Reform Conditions Criteria more heavily than Reform Plan Criteria, arguing that States that have already enacted reform policies are more likely to accelerate student achievement. On the other hand, one commenter suggested that States be given extra credit for recently enacted regulatory or legislative reforms, particularly in Phase 2 of the Race to the Top competition. Several other commenters recommended that the Department ensure that no single criterion or assurance, by itself, operate to eliminate a State from the Race to the Top competition. One of these commenters argued that States need flexibility, while another commenter added that a State application that addresses some criteria in depth may be stronger than one that addresses all criteria but is ''shallow'' in its overall approach.

Discussion: The scoring rubric assigns more weight to accomplishments (*i.e.,* State Reform Conditions Criteria) than to plans (*i.e.,* Reform Plan Criteria). (*See* Appendix B). However, the Department will not give ''extra credit'' to States that have recently enacted laws or polices intended to support their Race to the Top applications, as that would penalize early reformers. Finally, as is made clear elsewhere in this notice, the selection criteria are not eligibility requirements; the failure to meet any single criterion, or even a number of criteria, will not preclude a State from receiving a Race to the Top award. Moreover, the large number of criteria for which a State may earn points means that an application that is exceptionally strong on a majority of, but not all, Race to the Top selection criteria may score higher than an application that earns only partial credit on every criterion. On the other hand, applicants should keep in mind the statutory emphasis on comprehensive reforms, as well as absolute priority 1, which requires an applicant to address comprehensively all four ARRA assurance areas as well as the State Success Factors (Section (A)) of the selection criteria.

Changes: None.

Comment: Many commenters recommended that the Department heavily weight the selection criteria for turning around struggling schools. Another commenter suggested a weighting system that rewards States for providing flexibility or autonomy to schools, whether charter or traditional. One commenter suggested awarding a significant portion of points for activities that support science, technology, engineering, and mathematics (STEM) initiatives; needy locations; turning around school climate; partnerships with community based organizations and volunteers; and family engagement.

Discussion: The Department believes that each of the four reform areas is critical and has assigned points accordingly. The Department, therefore, declines to heavily weight the selection criteria for turning around struggling schools or to provide extra points to States that provide flexibility and autonomy to its schools. We decline to award a significant portion of points for activities that support STEM initiatives, needy locations, school climate, partnerships with community based organizations and volunteers, and family engagement. We note that each of these areas already is addressed in this notice. For example, a State that includes STEM education in its comprehensive plan will be eligible to receive competitive preference points; States are required to give priority to high-need LEAs in their Race to the Top plans; and strategies to improve school climate, develop partnerships with CBOs, and improve family engagement are specifically encouraged in the school intervention models in Appendix C.

Changes: None.

Comment: One commenter suggested that the Department release guidance to help States determine whether they are likely to be successful in competing for Race to the Top funds as judged by their NAEP scores. The commenter suggested that States with low NAEP scores are unlikely to receive funds and would be wasting tremendous resources in completing a Race to the Top application.

Discussion: The Department has created a scoring rubric with the number of possible points for each selection criterion. The rubric will be used by reviewers to judge State applications for Race to the Top funds. The Department is including the rubric in Appendix B to ensure that the scoring of State applications is transparent and so that States are fully informed as they develop their applications. We note that the criterion referenced by the commenter (proposed criterion (E)(1)(iv), which has been revised and designated as criterion (A)(1)(iii)), focuses on improvements in achievement, and not simply whether a State has high or low scores, as reported by both the NAEP and the assessments required under the ESEA.

Changes: None.

Other Education Reform Strategies

Comment: Many commenters suggested that Race to the Top take into account existing State and local education reform strategies, particularly in high-need schools. Several commenters suggested that Race to the Top include reform initiatives specifically targeted to high schools, the learning needs of advanced students, or the attainment of ''21st Century Skills'' (described in the comments as skills pertaining to media, technology, and financial literacy and global awareness). One commenter urged a greater focus in Race to the Top on ''disruptive innovations'' such as online learning, while others championed specific subjects, such as music and the arts, as essential ways of engaging students in learning and keeping them in school. In addition, several commenters argued that the study of foreign languages is critical for our future competitiveness in the global economy and should be included as a priority in the Race to the Top program.

Discussion: The Department recognizes that numerous strategies, interventions, technologies, and subjects can make meaningful contributions to improving the quality of our education system, engaging students, and turning around the lowest-achieving schools. We also agree that it is important to give States credit for existing reforms that are achieving positive outcomes. This is one reason why we are clarifying and expanding criterion (F)(3) (proposed criterion (E)(1)(iii)) which, as mentioned earlier, asks States to demonstrate the extent to which they have created conditions favorable to education reform or innovation, in addition to the information provided under other State Reform Conditions Criteria. We also note that under the State Reform Conditions Criteria, States will be rewarded for having put into place key conditions for reform, while the State Reform Plan Criteria asks States to create plans that build on their successes.

Changes: Criterion (F)(3) (proposed criterion (E)(1)(iii)) has been clarified and expanded to focus on the extent to which a State, in addition to information provided under other State Reform Conditions Criteria, has created, through law, regulation, or policy, other conditions favorable to education reform or innovation that have increased student achievement or graduation rates, narrowed achievement gaps, or resulted in other important outcomes.

Evidence-Based Practices in Race to the Top

Comment: Some commenters argued that the Race to the Top program, as outlined in the NPP, would not adequately support evidence-based practices. One of these commenters suggested including a minimum evidence threshold for each of the State Reform Plan Criteria.

Discussion: We believe that the use of evidence-based practices is critical to the success of the Race to the Top program. However, we acknowledge that the research evidence to support education practices, strategies, and programs may not reach the same threshold for each reform area. The four education reform areas in the ARRA are in large part focused on giving educators new data-based tools for developing and implementing their own best practices. Indeed, developing stronger standards and assessments, expanding the use of longitudinal data systems, improving teacher and principal effectiveness, and supporting struggling schools are all intended to create and support evidence-driven continuous instructional improvement based on what works in the classroom. One key purpose of Race to the Top is to empower cutting-edge States and LEAs to build on what works while also creating new, more effective models of educational reform and improvement that will significantly expand our collection of evidence-based practices. We believe that State flexibility is key in this effort.

Changes: None.

Support for Traditional Public Schools

Comment: One commenter claimed that the Race to the Top program, as outlined in the NPP, would result in little or no support for traditional public schools because it seemed primarily concerned with creating ''financial opportunities for educational entrepreneurs.''

Discussion: This commenter misconstrues Race to the Top, which is focused almost entirely on improving our traditional public schools. Furthermore, pursuant to section 14006(c) of the ARRA, at least 50 percent of Race to the Top funds must be allocated directly to LEAs according to their relative shares of funding under Title I, Part A of the ESEA; a majority of those LEAs are likely to serve exclusively traditional public schools. Further, each of the four assurances under the ARRA, which provide the overall framework for the Race to the Top program, is aimed at increasing the effectiveness of State and local support for traditional public schools.

Changes: None.

Eligibility of Other Entities

Comment: Several commenters suggested that entities other than States be made eligible to apply directly for Race to the Top funds. Specifically, commenters suggested that such organizations as charter schools, independent school districts, community colleges, historically black colleges and universities, LEAs, and not-for-profit organizations partnering with either LEAs or universities be able to apply for Race to the Top funds. Those commenters argued that preventing these entities from applying for the Race to the Top competition would limit the creation of innovative partnerships. Other commenters requested that private schools and non-profit organizations that partner with LEAs be eligible. Another commenter suggested that municipalities, in addition to LEAs, should be eligible to receive Race to the Top subgrants. One commenter was supportive of States applying directly for funds as opposed to LEAs.

Discussion: Section 14006(a)(2) of the ARRA specifically states that ''the Secretary shall make grants to States that have made significant progress'' in meeting the objectives of the four reform areas. As such, the Department does not have the authority to expand the statute's directive to extend eligibility to the other entities suggested by the commenters. The Department recognizes, however, that these entities and others within the State are essential to the success of Race to the Top grantees. For this reason, we are adding additional examples of stakeholders to State Success Factors Criterion (A)(2)(ii)(b) (proposed criteria (E)(3)(i) and (ii)), which specifically asks applicants to demonstrate the extent to which they have secured broad stakeholder support. In addition, participating LEAs may use their funds to serve non-Title I schools, if doing so aligns with the State's plan and the Department's general regulations on uses of funds. States also may, consistent with applicable procurement requirements, contract with organizations such as those mentioned by the commenters, using the State's share of Race to the Top funds.

Changes: Criterion (A)(2)(ii)(b) has been expanded to include additional examples of stakeholder support.

Comment: Some commenters suggested that private schools be eligible for Race to the Top funds. One commenter argued that services to students and teachers in private schools is permitted under the Stabilization Fund and, therefore, should be permitted under the Race to the Top program. The commenter stated that section 14006(b) of the ARRA leaves considerable discretion to the Secretary in awarding grants on the basis of State applications for the Stabilization Fund and argued that this latitude extends to Race to the Top funds. The commenter requested that the overall selection criteria be amended to include a criterion that focuses on applicants' compliance with statutory provisions related to the equitable participation of private school students and teachers in Federal education programs.

Other commenters recommended that the notice encourage States to include faith-based schools in their applications. These commenters pointed to positive effects on at-risk youth attributed to Catholic and other faith-based schools. A few commenters specifically requested that faith-based schools be eligible to apply for Race to the Top funds directly. One commenter noted that because private school students participate in Title I, Part A programs under the ESEA, they should be allowed

to participate in the Race to the Top activities approved in a State's plan. Other commenters requested that private schools that partner with LEAs be made eligible to receive Race to the Top funds. One commenter asserted that private schools should have the option to participate in all Federal programs without sacrificing control in such areas as curriculum, hiring, or teacher requirements.

Discussion: As described in the response to the previous set of comments related to eligibility, the statutory language of the ARRA specifically provides that States are the eligible applicants for Race to the Top funds, and that only LEAs are eligible to receive subgrants from the States. Race to the Top funds may not be provided to private schools through a grant or subgrant, and there is no requirement that private school students, teachers, or other educational personnel participate in Race to the Top on an equitable basis (as required in some programs in the ESEA). Furthermore, Race to the Top funds may not be used to provide financial assistance to students to attend private schools. However, States and LEAs have the flexibility to include private school students, teachers, and other educational personnel in activities that the States and LEAs deem appropriate, and may contract with private schools for appropriate secular activities, consistent with the State's plan.

Changes: None.

Authority for the NPP

Comment: Some commenters objected to the NPP, arguing that it proposed education policy outside of the legislative process. One commenter claimed that while the ARRA ''imposes only brief and general requirements'' governing the use of Race to the Top funds, the prescriptive proposals in the NPP ''amount to writing new laws.'' One commenter recommended that Congress hold hearings on the notice, claiming that there has been a lack of sufficient time to review the NPP.

Another commenter asserted that Congress should conduct a broad review of the NPP and of our determination that the NPP would ''not unduly interfere with State, local, and Tribal governments in the exercise of governmental functions.'' Two commenters also stated that it appeared that we were using Race to the Top, in the context of the fiscal emergency currently faced by many States, to impose education reform policies that would not otherwise be accepted by States and LEAs.

Discussion: The commenters are correct that the ARRA offers few specifics governing the Race to the Top program; however, the ARRA is very clear that (1) The program is expected to provide incentives for ''significant progress'' in the four assurance areas, and (2) the Secretary has authority to award Race to the Top funds using ''such criteria as the Secretary determines appropriate.'' Moreover, section 410 of the General Education Provisions Act (20 U.S.C. 1221e–3) gives the Secretary full authority to promulgate rules and regulations necessary for the effective administration of Federal education programs. This final notice, like the NPP, is consistent with these authorities.

Moreover, the ARRA specifically provides that Race to the Top funds must be awarded not later than September 30, 2010. In order to provide States the maximum amount of time possible to plan, organize, and draft their applications for the Phase 1 and Phase 2 competitions, while still allowing and responding fully to public comment, the Department sought comment on the NPP for a 30-day time period. Notably, section 437(d)(1) of the General Education Provisions Act, 20 U.S.C. 1232(d)(1), allows the Department to waive rulemaking for the first grant competition under a new or substantially revised program authority. The Race to the Top program is a new program, so the Department was not required to conduct notice-and-comment rulemaking. The Department, however, instead of taking advantage of that option, specifically sought public comment in order to inform the development of the program. Moreover, the comments received from over 1,100 commenters during the NPP's 30-day comment period suggest that this period of time was sufficient for broad public review and comment.

In response to claims that the Race to the Top requirements would interfere with State, local, or Tribal governments or impose policies on these governments, we note that the Race to the Top program is a voluntary competitive grant program that, like other such programs, includes requirements and criteria that must be met in order for States to participate and receive funding. States and LEAs that do not wish to comply with these conditions and criteria are not required to apply for a grant. While the fiscal crises currently faced by many States may encourage States to apply for Race to the Top funds, ameliorating State and local deficits is not the primary purpose of this program. Instead, the Race to the Top program, which will award only about 4 percent of all education funds provided by the ARRA, was specifically intended to encourage and reward those States that are making ''significant progress'' toward the four assurances. This final notice, like the NPP, represents our effort to establish reasonable and appropriate criteria for defining the ''significant progress'' as required by the statute.

Changes: None.

Promoting Successful Implementation

Comment: Several commenters raised questions concerning the implementation of Race to the Top. One commenter expressed concern that the proposed priorities pertained to State rather than LEA functions. The commenter noted that States do not achieve significant improvements in student outcomes; rather teachers working in LEAs with students, parents, school administrators, and other stakeholders make the difference.

Another commenter urged us to make Race to the Top awards as soon as possible, but not later than early 2010, so that States and school districts can begin implementing reforms in the 2010–2011 school year. Two commenters suggested that we will not be able to create the momentum to accomplish national education reform unless a sufficient number of States receive Race to the Top funds. One commenter suggested that the Race to the Top program would have a broader national impact if 26–30 States participated in the program, and recommended structuring the award phases so that the first round provides large ''lead'' grant awards followed by a second round of smaller ''but still substantial'' awards.

Discussion: The Department agrees that the success of a State's Race to the Top reform efforts will depend on its ability to articulate a comprehensive and coherent education reform agenda, secure the commitment of its LEAs to implement on its proposed plans, and provide leadership and support to its LEAs. We recognize that the most important reform efforts will take place in the classroom and that a critical part of a State's application will be the State's capacity to support its LEAs in successfully implementing its plans through such activities as identifying best practices, widely disseminating and replicating effective practices statewide, and holding LEAs accountable for progress and performance.

We are aware of the need for successful applicants to begin implementing their Race to the Top plans as soon as possible. Toward this

end, we expect to make Phase 1 Race to the Top awards in the first half of calendar year 2010. We do not agree that Race to the Top funds should be spread across an arbitrarily larger number of States. Instead, the size and number of Race to the Top awards in the two phases of funding will depend on the scope and quality of the applications that States submit to the Department.

Changes: None.

Comment: Several commenters requested clarification regarding how States should develop and use performance and data indicators. One commenter suggested requiring States to provide information on the extent to which LEAs in the State have made adequate yearly progress (AYP) as part of their annual reports. Other commenters called for the Department to peer-review annual State Race to the Top reports. Two commenters expressed concern that performance measures would vary from State to State, causing confusion in the field. Finally, one commenter recommended that the Department remove the phrase ''ambitious yet achievable'' because its meaning is unclear.

Discussion: In the NPP the Department proposed core performance measures for evaluating the performance of States receiving Race to the Top funds against both the four assurances and specific elements of State Race to the Top plans (see Appendix A). For the most part, we are retaining these measures, with some modifications, in this notice. The Department understands the concerns expressed by commenters about comparability of data across States receiving Race to the Top grants; this is one reason that this final notice retains the request for States to set student achievement and gap-closing goals based on NAEP data in revised criterion (A)(1)(iii) (proposed criterion (E)(4)). NAEP scores are comparable across States, thus eliminating concerns about the widely varying standards and assessments in use by States under ESEA accountability systems.

States already issue annual reports on AYP status for schools and LEAs, including proficiency rates for all schools; there is no need to duplicate this reporting by requiring its inclusion in a State's annual Race to the Top report. However, States that desire to include AYP data in their annual Race to the Top reports are free to do so. The Department declines to add a requirement for peer review of these annual reports.

Finally, we are retaining the ''ambitious yet achievable'' language throughout the Race to the Top State Reform Plan Criteria. As noted elsewhere in this notice, the Department believes that this language strikes the right balance between encouraging States to set a high bar for Race to the Top goals while recognizing that real change in education is difficult and takes time. The goal is to encourage realistic thinking and planning that connects specific activities to specific, achievable results, while acknowledging that improvements in the Nation's education system are urgently needed and the country's children cannot wait.

Changes: None.

Comment: One commenter expressed concern that too many of the measures proposed in the NPP reflect past performance and recommended a greater emphasis on future Race to the Top performance.

Discussion: The emphasis on past performance comes directly from the requirements in the ARRA, which requires States to have made significant progress in the four education reform areas in order to receive a grant. Once Race to the Top grants are awarded and winning States begin implementing their reform plans, the Department will become far more focused on how States perform under this program.

Changes: None.

Race to the Top Funding

Comment: Several commenters suggested that the Department provide more information on expected funding levels for States that receive Race to the Top funds, including the number and size of Race to the Top awards for both the Phase 1 and 2 competitions. Multiple commenters suggested that we provide funding for States to develop reform plans and applications. One commenter requested assurances that the level of funding to successful State applicants will be sufficient to carry out all activities in States' reform plans. Two commenters expressed concern that LEAs will have control of ARRA funds, outside of public accountability and without provisions for oversight, while another commenter requested information about the restrictions on the usage of Race to the Top funds, and an explanation of how States are expected to use them.

Discussion: We encourage States to develop budgets that match the needs they have outlined in their applications. To support States in planning their budgets, we have developed nonbinding budget guidance with ranges for each State; these are listed in the notice inviting applications, published elsewhere in this issue of the **Federal Register**. These ranges may be used to guide States as they draft their applications, but States may prepare budgets that are above or below the suggested ranges. The amount awarded in Phase 1 will depend on the quality of the applications that States submit to the Department, as well as the successful applicants' proposed budgets. It is our intention to have significant funds available for Phase 2 applicants and awards. The ARRA does not provide funding to help States prepare or design their Race to the Top applications.

Finally, the Department has taken extraordinary measures to ensure accountability in the use of all ARRA funds, including the Race to the Top fund, so that all dollars are used wisely and accounted for in a transparent manner. Indeed, as explained in the Reporting section of this final notice and in the notice inviting applications, successful applicants must comply with the ARRA annual reporting requirements in section 14008 of the ARRA and with quarterly reporting requirements in section 1512(c) of the ARRA, which are designed to ensure thorough and public oversight of the expenditure of ARRA funds. In addition, the Department has established a Recovery Act Web site and hotline for members of the public to report suspected misuse of funds.

Changes: None.

Comment: One commenter expressed concern about structuring the Race to the Top program as a competitive grant. The commenter noted that structuring the program this way will mean that not every State will win Race to the Top grant funds. Another commenter stated that by predetermining ''the conditions necessary for reform,'' the winners and losers have already been chosen.

Discussion: The Race to the Top program is intended to promote and reward States making the most progress in achieving the goals described in the ARRA and by the Secretary. As the Secretary and the President have said, Race to the Top is designed as a competitive, once-in-a-lifetime opportunity for the Federal Government to create incentives for far-reaching improvement in our Nation's schools. While other ARRA funds provide substantial increases in formula funds to States (*e.g.*, the Stabilization Fund, ESEA Title I, IDEA), we strongly believe that the competitive nature of the Race to the Top program will encourage statewide reform resulting in significant improvement in student outcomes. Finally, we note that contrary to the suggestion made by one commenter, the Department has not pre-selected the winners and losers for this competition. Applications will be judged based on the conditions States have put in place

by the time they apply, the strength of their plans, and how these come together as a coherent and cohesive strategy to improve student outcomes.

Changes: None.

Flexibility to Allocate Funds

Comment: Several commenters sought greater flexibility for States and LEAs to determine award levels. For example, a few commenters suggested that allocating 50 percent of Race to the Top funds by formula runs counter to the program's goals, and that States should be allowed to focus funding on LEAs with the greatest need for additional resources to address the educational needs of at-risk students such as English language learners, students with disabilities, and students from low-income families, or to give priority to one or more of the four assurances when funding LEAs. Other commenters sought clarification about State flexibility in using the 50 percent of funds that will not be distributed on the basis of the Title I formula. One commenter suggested that States might use their shares of Race to the Top awards to support high-need students in non-Title I schools, while another proposed allowing States to use these funds for State-level activities or to make their own formula or competitive subgrants. Another commenter asked whether LEAs can serve non-Title I schools in their districts with their 50 percent share, and whether use of these funds must also adhere to Title I regulations.

Discussion: Section 14006(c) of the ARRA requires at least 50 percent of Race to the Top funding to States to be sub-granted to participating LEAs according to their relative shares of funding under the ESEA Title I, Part A program for the most recent year. Neither the Department nor the States have discretion to deviate from this allocation requirement. LEAs that agree to work with the State to implement the State's Race to the Top plan may use these funds to serve non-Title I schools. Because these are not Title I program funds, LEAs are not required to adhere to Title I regulations regarding the usage of those funds. Fund uses, however, must be consistent with the State's plan and the Department's general regulations on uses of funds.

In addition, States have considerable flexibility in awarding or allocating the remaining 50 percent of their Race to the Top awards, which are available for State-level activities, disbursements to LEAs, and other purposes as the State may propose in its plan. Many of the activities recommended by commenters would be allowable uses of the State's share of Race to the Top funds, including: Serving high-need students in non-Title I schools, State-level activities in support of Race to the Top plans, competitive or formula-based subgrants to LEAs, contracts with non-profit organizations, or supporting the participation of private school students and teachers in Race to the Top.

Changes: None.

Comment: One commenter stated that a portion of the Race to the Top funds should be set aside for LEA–IHE consortia to develop training that would allow for the development and implementation of systemic P–20 collaboration, facilitate curricular alignment, and promote seamless transitions from high school to college.

Discussion: As noted in the previous comment, section 14006(c) of the ARRA requires a State that receives a Race to the Top grant to use at least 50 percent of the award to provide subgrants to LEAs, including public charter schools identified as LEAs under State law. The ARRA does not require or specify that funds should be set aside for any other specific purposes; therefore, we decline to require that a portion of the Race to the Top funds be set aside for LEA–IHE consortia as recommended by the commenter. However, States are welcome to include such expenditures in their proposals if they align with their plans. We also note that IHEs are critical partners in implementing significant reforms, particularly in ensuring that a State's longitudinal data system can provide data to assess the extent to which students are adequately prepared for success in post-secondary education. As noted elsewhere, we are adding language to criterion (B)(3) to acknowledge the role that IHEs may play in supporting the transition to enhanced standards and high-quality assessments. In addition, as noted elsewhere, we are adding ''institutions of higher education'' in criterion (A)(2)(ii)(b) as an example of a type of stakeholder from whom a State should enlist support and commitment to assist in the State's education reform efforts.

Changes: None.

Sustaining Race to the Top Reforms

Comment: One commenter expressed concern that the requirements and activities proposed in Race to the Top would not be fully paid for by Race to the Top awards, and that these activities would ''be difficult to sustain operationally and financially.'' This commenter recommended a sharper focus in the final notice on the requirements ''of greatest importance.'' In a related comment, one individual described Race to the Top as an ''underfunded mandate'' and argued that it would impose additional costs on State and local taxpayers.

Discussion: While the Race to the Top program is intended to support a comprehensive approach to developing and carrying out critical change and reform in the four assurance areas, States have flexibility to tailor their Race to the Top budgets and spending plans according to both the relative priority of plan activities and the availability of funding from other Federal, State, and local sources, consistent with criterion (A)(2)(i)(d) (proposed criterion (E)(5)(v)). For example, States may use their Title I School Improvement Grants to execute most of their plans under criterion (E)(2) (proposed criterion (D)(3)), thereby allowing themselves to dedicate a higher proportion of Race to the Top funds to activities in the other three assurance areas. Similarly, a State that receives a Statewide Longitudinal Data Systems grant might use these funds to enhance its data systems work and could, therefore, focus its Race to the Top funding on other assurance areas. Also, the selection criteria include elements intended to help ensure that funding issues do not derail Race to the Top plans. For example, under criterion (F)(1), States are asked to demonstrate the extent to which (i) the share of overall State revenues supporting education in FY 2009 was greater than or equal to the share provided for education in FY 2008; and (ii) the State's policies lead to equitable funding (a) between high-need LEAs and other LEAs, and (b) within LEAs, between high-poverty schools and other schools (new criterion). In addition, criterion (A)(2)(i)(e) (proposed criterion (E)(5)(iii)) addresses whether a State has explained in its application how it will use its fiscal, political, and human capital resources to continue Race to the Top reforms after the period of funding has ended. Finally, because the Race to the Top is a voluntary, competitive grant program, it does not impose costs on any State or local taxpayers, and thus does not meet any reasonable definition of an underfunded mandate.

Changes: Criteria related to budget planning and funding have been modified and rearranged in this final notice to promote the development and submission of more coherent Race to the Top plans. Criterion (A)(2)(i)(d) asks States to demonstrate through their budget narratives and accompanying budgets the extent to which they have high-quality plans to use Race to the Top funds to accomplish their plans and meet their targets, including, where feasible, coordinating, reallocating, or

repurposing education funds from other Federal, State, and local sources to align with their Race to the Top goals. Criterion (A)(2)(e) (proposed criterion (E)(5)(iii)) will help ensure that States have plans to continue support for Race to the Top reforms once Race to the Top funds have been spent.

Addressing Obstacles Created by Poverty

Comment: One commenter asserted that overcoming achievement gaps—a key goal of the Race to the Top program—would require addressing obstacles to high academic achievement created by the conditions of poverty. This commenter urged that Race to the Top be used to promote ''comprehensive educational opportunity'' for all students, but particularly for those from low-income families. Other commenters argued that Race to the Top plans should include efforts and incentives to ensure the adequacy and equity of State and local education funding, such as by rewarding States that have taken steps to allocate resources and inputs equitably.

Discussion: The Secretary believes that a high-quality education is the surest route out of poverty. However, while broader societal problems such as the lack of affordable housing or access to health care certainly make the jobs of schools serving disadvantaged students more challenging, they should not be used to excuse the lack of achievement in high-need schools. Race to the Top is structured to promote comprehensive educational reforms benefitting all students while targeting additional attention and resources towards high-need LEAs and toward the persistently lowest-achieving schools that typically enroll a disproportionate number of students from low-income families. For example, 50 percent of Race to the Top funding must be subgranted by States to LEAs on the basis of their relative shares of formula grant allocations under Title I, Part A of the ESEA, which are based largely on counts of children from low-income families residing in the communities served by those LEAs. Also, under criterion (E)(2) (proposed criterion (D)(3)), States will create comprehensive school intervention plans for the persistently lowest-achieving schools. Furthermore, under criterion (D)(3) (proposed criterion (C)(3)), States will be evaluated on their plans to ensure that students in high-poverty and/or high-minority schools have equitable access to highly effective teachers and principals and are not served by ineffective teachers and principals at higher rates than other students.

However, we agree that in this final notice, the Department should place greater emphasis on equitable funding of high-need LEAs and students. For this reason, we are adding criterion (F)(1)(ii), which examines the extent to which a State's policies lead to equitable funding (a) between high-need LEAs (as defined in this notice) and other LEAs, and (b) within LEAs, between high-poverty schools (as defined in this notice) and other schools.

Changes: The addition of criterion (F)(1)(ii) establishes a new State Reform Condition Criterion that will consider the extent to which a State's policies lead to equitable funding (a) between high-need LEAs and other LEAs, and (b) within LEAs, between high-poverty schools and other schools.

Civil Rights Enforcement

Comment: Several commenters raised concerns about the NPP as it relates to civil rights laws and discrimination based on race and sex in schools. One commenter recommended that the Department include language in the final notice reminding States of their obligations under anti-discrimination statutes, including Title IX of the Education Amendments Act of 1972.

Discussion: The Department believes in promoting educational excellence throughout the Nation through vigorous enforcement of civil rights laws. The Department's Office for Civil Rights is specifically tasked with enforcing several Federal civil rights laws that prohibit discrimination in programs or activities that receive Federal financial assistance from the Department, and issuing guidance to school districts on how to comply with those laws. Since SEAs and LEAs are ongoing recipients of Federal financial assistance, they are aware of these civil rights laws. We believe, therefore, that reiteration of State responsibilities under various civil rights laws in the final notice is unnecessary.

Changes: None.

Comment: One commenter suggested that the notice include language requiring States to support voluntary school integration efforts. Another commenter recommended adding an invitational priority for innovative approaches to voluntary school integration in order to encourage inter-district magnet schools and new charter schools that achieve racial and economic integration. The commenter also recommended adding an invitational priority to encourage the use of inter-district school transfers to promote integration. Another commenter recommended adding a criterion requiring a high-quality plan for a State to substantially reduce the isolation and segregation of low-income students, through intra- or inter-district collaboration, magnet schools, transfer programs, or school restructuring and consolidation. One commenter suggested adding requirements that State proposals reduce school-based poverty concentrations and racial isolation in schools. Another commenter wrote that the NPP overlooked ''the continuing importance of avoiding racial and economic segregation in public schools, and promoting voluntary integration'' and urged that the final notice promote these goals.

Discussion: Racial and economic diversity are laudable goals that the Department supports. The Race to the Top program encourages innovative solutions to important problems facing our Nation's schools, which could include appropriate approaches to further racially and economically diverse schools. However, we have not added this objective as an invitational priority in the Race to the Top program. We note that the Department has for many years administered the statutory Magnet Schools Assistance Program, 20 U.S.C. 7231. This program provides grants to LEAs to fund magnet schools that—in addition to strengthening students' academic knowledge and their attainment of tangible and marketable skills—will further the ''elimination, reduction or prevention of minority group isolation'' in elementary and secondary schools. 20 U.S.C. 7231(b).

Changes: None.

Family and Community Engagement

Comment: Many commenters stressed the importance of including parents, students, family, and community members ''as equal partners'' in developing States' Race to the Top plans. One commenter urged that the final notice require States and LEAs to document the involvement of parents in developing their Race to the Top plans, while another commenter recommended the inclusion of parent and student accountability measures in Race to the Top plans. One commenter urged that the Department and participating States keep parents informed of Race to the Top activities using materials written in ''easy-to-understand language'' and, where necessary, multiple languages. Several commenters stated that family engagement policies and practices that are culturally and linguistically appropriate are essential components of comprehensive services to high-need

students. A few commenters recommended that school personnel work with community partners to align school, family, and community assets and expertise in order to support student achievement (*e.g.*, centers of community, community schools, community learning centers, full service community schools). Many commenters stressed the importance of family and community involvement in local school turnaround strategies. Several commenters also noted that the terms ''family engagement'' and ''community engagement'' should be separated, arguing that these concepts involve different stakeholders and require different strategies.

Discussion: The Department agrees that States' Race to the Top plans would benefit from documented input and involvement by parents and organizations that represent parents, students, families, and community members. To encourage States to do so, we are adding, in criterion (A)(2)(ii)(b) (proposed criterion (E)(3)(ii)), Tribal schools; and parent, student, and community organizations among the stakeholders from which a State could obtain statements or actions of support to demonstrate statewide commitment to its Race to the Top plan. At the local level, criterion (E)(2) and Appendix C (proposed criterion (D)(3)) support greater parent involvement in individual school turnaround plans and the turnaround model and the transformation model in particular. The Department views such mechanisms not only as opportunities for parents to participate in turnaround planning but also for LEAs and schools to promote greater accountability for parents and students in areas such as school attendance, homework completion, and monitoring student achievement. In addition, the Department believes that any mechanism for family and community engagement naturally would require keeping parents informed of Race to the Top-related activities, including providing information in multiple formats and languages, where necessary. However, the final notice retains flexibility for LEAs to determine the nature of these mechanisms and does not specifically require plans to include separate parental involvement programs.

Changes: Criterion (A)(2)(ii)(b) adds ''Tribal schools; parent, student, and community organizations (*e.g.*, parent-teacher associations, nonprofit organizations, local education foundations, and community-based organizations)'' to the list of stakeholder groups from which a State can obtain statements or actions of support in order to demonstrate statewide support for its Race to the Top plan.

I. Final Priorities

General Comments on Proposed Priorities

Comment: We received a number of comments that addressed more than one proposed priority or that focused on a proposed priority as well as on specific selection criteria.

Discussion: In some cases we have responded to comments received in response to more than one priority or that focused on a priority and selection criteria in this ''General Comments on Proposed Priorities'' section. In other cases, we decided that it would be more appropriate to respond to the comments in the ''General Comments on the Race to the Top Program'' earlier in this notice. This enabled us to group similar comments and concerns in order to be more responsive to the commenters.

Changes: None.

Comment: One commenter stated that including absolute, competitive preference, and invitational priorities in the NPP was confusing and undermined the review process by suggesting that the Department does not have a clear sense of what is important. Another commenter recommended eliminating the invitational priorities claiming that they provide no competitive advantage in the grant competition and distract from the key elements of the program.

One commenter requested that the final notice include an explanation of the differences and significance of the competitive preference priority for STEM and the invitational priorities for data systems, P–20 coordination, and school-level conditions for reform and innovation. Another commenter asked whether different weights will be assigned to the absolute priority versus the competitive preference and invitational priorities.

Two commenters expressed concern with the statement in the NPP that the Secretary reserves the right to propose additional priorities, requirements, definitions, or selection criteria. These commenters requested that any additional priorities, requirements, definitions, or selection criteria be published in the **Federal Register** and that the public be given the opportunity to comment on them.

Discussion: The Education Department General Administrative Regulations (EDGAR) in 34 CFR 75.105(c) identify the types of priorities the Department may establish for its direct grant programs. Under an absolute priority, the Secretary considers only those applications that meet the priority (*see* 34 CFR 75.105(c)(3)). Under a competitive preference priority, the Secretary may award bonus points to an application depending on the extent to which the application meets the priority or may select an application that meets the priority over an application of comparable merit that does not meet the priority (*see* 34 CFR 75.105(c)(2)). And, under an invitational priority, the Secretary may simply invite applications that meet the priority; an application that meets the invitational priority, however, receives no competitive or absolute preference over other applications (*see* 34 CFR 75.105(c)(1)).

The designation of priorities as invitational in the NPP and in this final notice demonstrates the Department's interest in particular topics or issues and applicants' interest in and capacity to address those areas. Applicants are not required to address these invitational priorities in their applications. Because the Department is interested in State focus and capacity in the areas identified as invitational priorities, we decline to remove them in this final notice.

In this final notice, we are designating priority 1, Comprehensive Approach to Education Reform, as an absolute priority that all applicants must meet. Priority 2, Emphasis on Science, Technology, Engineering, and Mathematics (STEM), has been designated as a competitive preference priority for which a State can receive additional points (*see* Appendix B for the scoring rubric). Finally, we are including the following invitational priorities: Priority 3, Innovations for Improving Early Learning Outcomes; priority 4, Expansion and Adaptation of Longitudinal Data Systems; priority 5, P–20 Coordination, Vertical and Horizontal Alignment; and priority 6, School-Level Conditions for Reform, Innovation, and Learning. Unless certain exceptions apply, the Department must conduct notice-and-comment rulemaking when establishing absolute and competitive preference priorities. *See* 34 CFR 75.105(b)(2). Notice-and-comment rulemaking is not required for the Department to establish invitational priorities. *See* 34 CFR 75.105(b)(2)(i). As noted by one commenter, we stated in the NPP that the proposed priorities could be changed in the final notice, and that the Department may propose additional priorities, requirements, definitions, or selection criteria, subject to applicable rulemaking requirements. As indicated elsewhere, we are adding a new invitational priority 3, Innovations for

Improving Early Learning Outcomes, based on comments received on the NPP. Since the priority is invitational only, we were able to include it in this final notice without additional public comment.

Changes: None.

Comment: Several commenters recommended that invitational priorities 4, 5, and 6 be changed to competitive preference priorities given the importance of each of the priorities and the need for States to have an integrated and coordinated reform strategy. One commenter recommended that additional points be given to a State that demonstrates how all the invitational priorities are integrated in its overall reform strategy.

Discussion: We believe that priorities 4, 5, and 6 are appropriately designated as invitational priorities. Although the Secretary is interested in receiving applications addressing these priorities, each of the priorities extends or complements the core reform work that States must already address in their applications. For example, priority 4, Expansion and Adaptation of Statewide Longitudinal Data Systems, extends States' core work in developing statewide longitudinal data systems; priority 5, P–20 Coordination, Vertical and Horizontal Alignment, complements States' core reform efforts in the K–12 education systems and extends them to the larger P–20 education systems; and priority 6, School-level Conditions for Reform, Innovation, and Learning, is a natural extension of the work States are doing to create, through law, regulation, or policy, other conditions favorable to education reform or innovation that improve student outcomes. For these reasons, we do not believe that extra points should be awarded to applications that address the invitational priorities.

Changes: None.

Comment: One commenter recommended adding an invitational priority to support alternative governance structures. The commenter stated that in addition to charter schools, mayoral control, gubernatorial control, and State control have been effective in reforming public education.

Discussion: As noted elsewhere, we are adding criterion (F)(2)(v) to give credit to States that enable LEAs to operate innovative, autonomous public schools other than charter schools.

Changes: None.

Literacy

Comment: Numerous commenters recommended that the final notice include a competitive preference priority focused on literacy development for young children; reading and writing skills for young students; and higher-order literacy skills for adolescent students (*e.g.*, ability to analyze diverse texts and write using critical reasoning). Many commenters also proposed that priority be given to States that prepare more students (particularly low-income students, English language learners, and students with disabilities) for success in school and for graduation from high school ready for college and work, and with skills to meet the literacy demands of high-growth, high-wage jobs. Another commenter suggested that the final notice include access to high-quality school libraries as part of the criteria.

Discussion: Advancing the literacy skills of all students, particularly students from low-income families, English language learners, and students with disabilities, is the foundation for many of the criteria in the Race to the Top competition. For example, a State will be judged on the extent to which it has made progress over the past several years in each of the four education reform areas, and used its ARRA and other Federal and State funding to pursue such reforms (*see* criterion (A)(3)(i)). A State will be judged on the extent to which it has demonstrated a track record of improving student achievement overall and by student subgroup in reading/language arts and mathematics, decreasing the achievement gaps between subgroups in reading/language arts and mathematics, and increasing high school graduation rates (*see* criterion (A)(3)(ii)). We believe that applicants must necessarily place priority on improving and advancing the literacy skills of students if they are to adequately address these criteria, and, therefore, do not believe that a separate competitive preference priority focused on literacy is necessary. Additionally, States and LEAs may determine in partnership the roles school libraries can play in advancing the State's reform goals.

Changes: None.

Early Learning

Comment: Numerous commenters expressed concern that the NPP did not include a priority for, or otherwise require applicants to address, early learning in the context of the four reform areas. Several commenters highlighted the importance of early childhood education in improving student achievement and closing achievement gaps, and some cited research indicating that the most effective time to intervene to close achievement gaps is during the preschool years. Many commenters requested that the final notice include a competitive preference priority focused on early learning programs. One commenter stated that a competitive preference priority on early learning should focus on increasing the number of low-income children in high-quality pre-K programs. Other commenters recommended requiring a quality early learning strategy as part of a State's plan for turning around struggling schools. A number of commenters suggested that such a strategy could include expanded pre-K funding and programs, aligned standards and assessments for pre-K through third grade, links between longitudinal data systems and pilot ''Quality Rating and Improvement Systems'' to improve instruction, and increasing the availability of credentialed pre-K through third-grade teachers.

Another commenter recommended that States be required to address the following issues to strengthen the quality of early care and education programs: (1) Appropriate compensation to attract and retain talented administrators and teachers in early care and education programs; (2) the need for a technological infrastructure to establish a data-driven decision-making system, as well as to document the benefits of early care and education services; (3) creation of a State-level advisory body to develop a State early learning plan, monitor the implementation of the plan and recommend adjustments to strengthen strategies as the plan is implemented; and (4) creation of a panel, that includes providers, to determine the true cost of supporting a quality early care and education system.

A few commenters recommended adding an invitational priority to the final notice focusing on the coordination of preschool services (including Head Start services and services provided under the Individuals with Disabilities Education Act (IDEA)) in order to ensure that more young children begin school ready to learn.

Discussion: The Department agrees that expanding access to high-quality early learning programs is a key strategy in an overall effort to raise student achievement, particularly for high-need students. We agree that the Race to the Top program should encourage States to increase the quality of existing early learning programs and expand access to high-quality early learning programs, particularly for children from low-income families. Therefore, we are adding an invitational priority focused on early learning to this final notice.

We do not believe that States should be required to include an early learning focus in their applications or that States should be given competitive preference points for doing so. Nor do we believe that quality early learning strategies should be required to be part of a State's plan for turning around struggling schools, given that efforts to turn around struggling schools focus primarily on improving educational outcomes for students currently enrolled in the Nation's persistently lowest-achieving schools. We believe that an invitational priority will encourage applicants to consider how their reform efforts can be strengthened by focusing on activities that promote school readiness and ensure that all children have access to high-quality early learning programs.

With regard to the request that States be required to address the issues that one commenter stated were necessary for strengthening the quality of early care and education programs, a State that chooses to include a focus on early learning in its application could include activities addressing the educational needs of young children in its State reform plan. We note, however, that funds could not be used to address issues related to early child care needs, absent an educational component, because the purpose of Race to the Top is for States and LEAs to address educational reforms. Given the variation in State needs and priorities, we do not believe that it would be appropriate to require all applicants to follow the commenter's recommendations.

In response to the recommendation to add an invitational priority focusing on the coordination of preschool services, this focus is already included in priority 5, P–20 Coordination, Vertical and Horizontal Alignment, which encourages State reform plans to address how early childhood programs, K–12 schools, postsecondary institutions, and other State agencies and community partners will coordinate to create a more seamless P–20 route for students.

Changes: We have added a new invitational priority 3—Innovations for Improving Early Learning Outcomes, which states, ''The Secretary is particularly interested in applications that include practices, strategies, or programs to improve educational outcomes for high-need students who are young children (pre-kindergarten through third grade) by enhancing the quality of preschool programs. Of particular interest are proposals that support practices that (i) improve school readiness (including social, emotional, and cognitive); and (ii) improve the transition between preschool and kindergarten.''

School Climate and Culture

Comment: Several commenters recommended that the final notice include a priority to encourage States to implement policies and take actions intended to improve school climate, such as citizenship training, anti-bullying, or service learning programs that may improve academic achievement, school attendance, and graduation rates. One commenter recommended adding an invitational priority for States that implement evidence-based measures to improve student discipline, stating that there is a well-documented link between school safety/school discipline and improved academic outcomes. Several commenters specifically recommended that we provide for States to address school-wide systems of positive behavioral interventions and supports and stated that improving school climate is integral to improving the achievement of the lowest performing students. Another commenter stated that unless the Department designates school climate as a top priority, equal to that of academic improvement, schools are extremely unlikely to focus on improving school climate. A few commenters recommended encouraging States to collect data on school environments. Other commenters suggested that States support and recognize schools that provide opportunities for students to practice their education in real-world situations that lead to civic engagement. The commenters stated that States should ensure that, in policy and funding decisions, schools know that they are to be honored, as well as held accountable, for creating a caring, welcoming, safe environment.

Other commenters strongly recommended that the final notice include language that would require schools to address the needs of the whole child, including by providing character education; instruction in social, emotional, and physical wellness; civic education and engagement; arts education; community-based learning; and opportunities for parent involvement. One commenter stated that it is essential for schools to work in collaboration with health, social, civic, faith-based, business and community organizations in order to successfully educate the whole child. One commenter expressed concern that the proposed priorities emphasize math, reading, and science at the expense of the other core academic subjects and argued that there should be an equal emphasis on the social, emotional, and creative development of students. Another commenter stated that efforts to shift education to address the needs of the whole child should be part of, and fully integrated into, a well-rounded core curriculum of academic instruction. Finally, one commenter stated that the proposed priorities incorrectly omit any reference to reducing the use of punitive measures in schools, and recommended that the final notice emphasize the Secretary's policy on reducing the use of restraints, seclusion, and corporal punishment.

Discussion: We agree that a positive school climate that includes policies and measures to improve discipline can contribute to improving academic achievement, school attendance, and graduation rates. We also agree that it is important to address the needs of the whole child and to work in collaboration with other agencies and community organizations in order to successfully educate the whole child. Therefore, we are changing priority 6, School-Level Conditions for Reform, Innovation, and Learning to include school climate and school culture as examples of areas in which an LEA could provide flexibility and autonomy to its schools in order to create conditions for reform, innovation, and learning. The language in new paragraph (vi) of this priority acknowledges the importance of creating school climates and cultures that remove obstacles to, and actively support, student engagement and achievement; the language in new paragraph (vii) of the priority focuses on implementing strategies to effectively engage families and communities in supporting the academic success of their students.

In addition, we note that the final notice addresses issues of school climate and culture in several ways. First, invitational priority 4, Expansion and Adaptation of Statewide Longitudinal Data Systems, invites States to include school climate and culture measures in extending and adapting their statewide longitudinal data systems. Consistent with commenters' examples of school policies and programs to improve school climate, we also have included references to ''service learning'' and ''experiential and work-based learning opportunities'' in the definition of *increased learning time,* as examples of activities that contribute to a well-rounded education. And we have included in our school intervention turnaround and transformation models for the persistently lowest-achieving schools (*see* criterion (E)(2) and

Appendix C) the need to address students' social and emotional needs and to create healthy school climates and cultures. We do not, therefore, believe that a new separate priority focusing on school climate and culture is necessary.

We acknowledge that positive behavioral interventions and supports, as well as other systemic programs and policies that address bullying, student harassment, and disciplinary problems, are important to consider in ensuring that students have a safe and supportive environment in which to learn. However, we do not believe it is necessary to include this level of detail in this final notice and, therefore, decline to make the changes requested by the commenters.

Finally, in response to the comment that the notice does not reference reducing the use of punitive measures, on July 31, 2009, the Secretary encouraged each State to review its current policies and guidelines regarding the use of restraints and seclusion in schools to ensure that every student is safe and protected and, if appropriate, develop or revise its policies and guidelines. We believe that this is the proper approach to addressing this issue, rather than in a notice for a competitive grant program for which all States will not necessarily apply or receive funding. It would be appropriate for States that choose to address priority 6 to include, in their reform plans, a focus on ensuring that policies and guidelines address the use of restraints and seclusions in schools to ensure that every student is safe and protected.

Changes: We have revised priority 6 to include as examples of the autonomies and flexibilities a State's participating LEAs may provide to its schools: Creating school climates and cultures that remove obstacles to, and actively support, student engagement and achievement and implementing strategies to effectively engage families and communities in supporting the academic success of their students.

Charter Schools

Comment: Several commenters recommended that the final notice include an absolute priority requiring States to expand charter schools.

Discussion: We do not believe an absolute priority for charter schools is necessary because States already will be evaluated against criteria that support the development of high-quality charter schools. Criterion (F)(2) focuses on charter schools. Specifically, criterion (F)(2)(i) considers the extent to which a State has a charter school law that does not prohibit or effectively inhibit increasing the number of high-performing charter schools in the State or otherwise restrict student enrollment in charter schools. Criterion (F)(2)(ii) considers the extent to which the State has laws, statutes, regulations, or guidelines regarding how charter school authorizers approve, monitor, hold accountable, reauthorize, and close charter schools. Under criterion (F)(2)(iii), a State will be evaluated based on the extent to which its charter schools receive equitable funding and a commensurate share of local, State, and Federal revenues. Finally, criterion (F)(2)(iv) addresses the extent to which a State provides charter schools with funding for facilities, assistance with facilities acquisition, access to public facilities, the ability to share in bonds and mill levies, or other supports; and the extent to which a State does not impose any facility-related requirements on charter schools that are stricter than those applied to traditional public schools. All applicants will be rated against these criteria, among others.

Changes: None.

Dropout Recovery

Comment: One commenter expressed concern that the NPP did not include targeted investments for dropout recovery programs or provide States and LEAs with direction on innovative models to re-engage youth who have dropped out of school. The commenter stated that the recovery of high school dropouts must be a central component of any serious systemic school reform effort. Several commenters stated that it is important to recognize that students who fail to thrive in traditional settings need additional supports to graduate from high school and that, without strategic approaches that intentionally include re-engagement efforts, districts will not serve this population effectively.

Another commenter recommended that the final notice include a competitive preference priority for serving students who are still in school, but are off-track to graduate and those who have disengaged from school and dropped out. The commenter noted that educational continuity and stability are also needed for children in foster care. One commenter recommended establishing a competitive preference priority for applicants that include data-driven strategies to re-engage high-school students who fail to graduate on time and recommended that the final notice encourage States to coordinate Race to the Top funding with funding they receive through other sources such as programs under the Workforce Investment Act.

Discussion: We agree that there is a need to increase efforts to re-engage youth who have dropped out of school and to help students who are off-track to graduate stay in school. We have addressed the needs of these students in several ways. First, as noted elsewhere, we are changing criterion (E)(2) (regarding States' plans to enable their LEAs to implement one of the four school intervention models) to include credit-recovery programs and re-engagement strategies as methods that can be used by LEAs to increase high school graduation rates (see Appendix C). Second, we are adding a new definition of *high-need students* and including in the definition, among others, students who are performing far below grade level, those who leave school before receiving a regular high school diploma, and those at risk of not graduating with a diploma on time. Third, as noted in the discussion of priority 4, we are inviting States to extend and adapt their statewide longitudinal data systems to include data from programs that serve at-risk students and from dropout prevention programs. Fourth, we are adding a reference to horizontal alignment in priority 5. Horizontal alignment is the coordination of services across schools, State agencies, and community partners, and we note that it is important in ensuring that high-need students have access to the broad array of opportunities and services they need and that are beyond the capacity of a school itself to provide. We also note that priority 6, School-Level Conditions for Reform, Innovation, and Learning, specifically refers to the need to provide comprehensive services to high-need students (*see* paragraph (v)). Therefore, we believe that this final notice adequately addresses the needs of students off-track to graduate who are still in school and those who have disengaged from school and dropped out, and that it is unnecessary to add a competitive preference priority focused on these specific youth.

With regard to the comment that the final notice encourage coordinating ARRA funding with other funding streams, we believe this issue is addressed in criterion (A)(2)(i)(d), which will evaluate the extent to which a State has the capacity to use Race to the Top funds, as described in the State's budget and budget narrative, to accomplish the State's plan and meet its targets, including, where feasible, by coordinating, reallocating, or ''repurposing'' education funds from other Federal, State, and local sources to

align with the State's Race to the Top goals.

Changes: None.

Students With Disabilities and English Language Learners

Comment: One commenter encouraged the Department to add invitational priorities that focus on policy development and implementation (versus data collection and analysis) for special education and English language acquisition, including the development of high-quality and innovative programs of teacher preparation and professional development in these areas, in order to encourage States to meet the needs of students with disabilities and English language learners more effectively. Another commenter expressed disappointment that the priorities did not thoroughly take into account the needs of English language learners. One commenter strongly urged the Department to ensure that English language learners are not overlooked in State plans, but are explicitly identified in all areas, including through efforts to improve standards and assessments, close achievement gaps, increase graduation rates, and ensure college readiness.

Discussion: The needs of students with disabilities and English language learners are addressed in many of the selection criteria and are especially highlighted everywhere the term *high-need student* is used; the new definition of this term includes students with disabilities and English language learners. All applicants for Race to the Top grants will need to consider how they currently work to meet or plan to meet the unique needs of these students based on the criteria set forth in this final notice.

In addition, this final notice recognizes and specifically references the unique needs of students with disabilities and English language learners in the following areas: (a) Priority 4 encourages State plans to expand statewide longitudinal data systems to include or integrate data from special education and English language learner programs; (b) criterion (C)(3)(iii) will be used to assess the extent to which States make their data systems available and accessible to researchers so that they have information to evaluate the effectiveness of instructional materials, strategies, and approaches for educating different types of students, such as students with disabilities and English language learners; and (c) criterion (D)(3) will be used to examine States' plans to increase the number and percentage of highly effective teachers teaching in hard-to-staff subjects and specialty areas, such as special education and language instruction educational programs (as defined under Title III of the ESEA). In addition, the measures used to document increases in achievement, closing achievement gaps, and increasing graduation rates, all require data to be disaggregated by subgroups, including the students with disabilities and limited English proficient students subgroups (*see* criteria (A)(1)(iii) and (A)(3)(ii)).

Therefore, we believe that this final notice ensures that students with disabilities and English language learners are not overlooked in State reform plans and that it is unnecessary to add an invitational priority focused on students with disabilities and English language learners.

Changes: None.

Curriculum, Instruction, Assessments, Professional Development

Comment: One commenter stated that the proposed priorities have little to do with improving curriculum, instruction, assessments, or professional development and recommended that in the final notice, the Department give priority to developing and implementing core school improvement activities, particularly school-based collaborative activities to improve teaching.

Discussion: We disagree with the commenter's statement that the proposed priorities have little to do with improving curriculum, instruction, assessments, or professional development. In order to receive a Race to the Top grant, States must demonstrate that they have made and will continue to drive significant improvement in student outcomes, including making substantial gains in student achievement, closing achievement gaps, improving high school graduation rates, and ensuring that students are prepared for success in college and careers. To accomplish this, a State would have to focus on improving curriculum, instruction, assessments, and professional development. Furthermore, absolute priority 1 requires all applicants to address comprehensively each of the four education reform areas specified in the ARRA—enhancing standards and assessments, improving the collection and use of data, increasing teacher effectiveness and achieving equity in teacher distribution, and turning around struggling schools. In addressing each of these reform areas, States will necessarily have to focus on improving curriculum, instruction, assessments, and professional development.

Furthermore, criteria (B)(3), (C)(3)(ii), (D)(2)(iv)(a), and (D)(5) explicitly focus on professional development. Criterion (B)(3) focuses on, among other activities, professional development to support the transition to new standards and assessments; as noted elsewhere, criterion (C)(3)(ii) has been added to focus on professional development for teachers, principals and administrators on using instructional improvement systems to support continuous instructional improvement; criterion (D)(2)(iv)(a) refers to using teacher and principal evaluations to inform relevant professional development; and criterion (D)(5) focuses on the need for States and LEAs to provide effective data-informed professional development, coaching, induction, and common planning and collaboration time to teachers and principals that are, where appropriate, ongoing and job-embedded.

Changes: None.

Research-Based Practice

Comment: One commenter recommended adding an invitational priority to encourage States to adopt programs that have been demonstrated to be effective through rigorous research. The commenter stated that priority should be given to States that identify resources to help their LEAs select programs that are supported by the best available empirical evidence.

Discussion: Criterion (A)(2)(i)(b) will be used to judge the extent to which a State has the capacity to support its participating LEAs in successfully implementing the education reform plans the State has proposed through such activities as identifying promising practices, evaluating these practices' effectiveness, and ceasing ineffective practices. In addition, criteria (C)(2) and (C)(3) focus on gathering and using data to support continuous improvement, including a specific focus on making the data available and accessible to researchers to evaluate the effectiveness of instructional materials, strategies, and approaches. We believe these criteria address the commenter's concerns and, therefore, that it is unnecessary to add the invitational priority suggested by the commenter.

Changes: None.

Using Data To Inform Practice

Comment: One commenter urged the Department to add a competitive preference priority for establishing an ''evidence-based learning cycle'' to improve system-wide policy and student achievement results. The commenter recommended that the

competitive preference priority encourage States to: (1) Design robust formative and summative evaluations on their Race to the Top programs; (2) gather data on the highest-priority teacher and principal actions, and school-level and classroom-level practices that differentiate fast-improving schools and classrooms from other schools and classrooms; and (3) document these practices so that other teachers, school leaders, and State and local policymakers can access and use these tools and evidence to drive a continuous cycle of improvement in other schools, classrooms, and systems.

Another commenter recommended adding the development of longitudinal data systems as a competitive preference priority in order to accelerate development and implementation of next-generation, user-oriented data systems that provide timely, useful data for teachers and principals to use in managing performance and improving student achievement; prioritize academic data with an emphasis on leading predictive indicators; include routine data inquiry processes and training to support educators in the effective interpretation and use of data that result in improved student achievement; and enhance State and local capacity to use data and improve the systematic integration and use of data over time.

Discussion: The evidence-based learning cycle and the user-oriented data systems proposed by the commenters are similar in concept to criteria (C)(2) and (C)(3). Criteria (C)(2) and (C)(3) focus on the use of data from the State's statewide longitudinal data system and the local instructional improvement systems to support continuous improvement both within and outside of the classroom. In addition, priority 4 focuses on expanding statewide longitudinal data systems to include or integrate data from a variety of sources, including, for example, human resources, school finance, and other relevant areas with the purpose of connecting and coordinating all parts of the system to inform continuous improvement practices. Therefore, we do not believe it is necessary to make the changes recommended by the commenters.

Changes: None.

Flexibility in Operating Conditions

Comment: One commenter recommended that the Department include an invitational priority for applicants that commit to implementing the reforms and providing flexible operating conditions for their schools.

Discussion: We agree that flexibility in operating conditions is an important strategy to facilitate reform efforts. That is why we included priority 6, School-Level Conditions for Reform, Innovation, and Learning, which focuses on flexibilities and autonomies that an LEA provides to its schools in order to create the conditions for reform, innovation, and learning.

Changes: None.

Priority 1: Absolute Priority—Comprehensive Approach to Education Reform:

General Comments

Comment: Numerous commenters expressed support for absolute priority 1 and its focus on ensuring that States comprehensively address each of the four education reform areas and take a systemic approach to education reform. The commenters stated that this approach will encourage school systems around the country to implement much-needed changes that will improve student outcomes. One commenter stated that this approach sets a much higher bar for State applications than is typically required of competitive grant programs and was supportive of this approach. Another commenter encouraged the Department to award Race to the Top grants only to those States that pursue significant comprehensive and systemic reforms. However, one commenter expressed concern that this approach would encourage States to lower standards rather than provide incentives for States to improve their educational standards and put in place the reforms necessary to improve educational outcomes.

Discussion: We appreciate the support for absolute priority 1 and its focus on a comprehensive and systematic approach to addressing the four education reform areas specified in the ARRA. We do not agree with the commenter that a comprehensive and systematic approach to the four reform areas will encourage States to lower standards. The focus on improving student achievement, decreasing achievement gaps, and increasing high school graduation rates, and the use of sound measures, such as the results from the NAEP, will help ensure that States do not lower their standards. In addition, unlike in other competitive programs, we are rewarding States that have already created the conditions for reform and improved student outcomes and have a strong foundation for implementing plans going forward. States that have lowered their standards will not clear the high bar that we have set for awards under the Race to the Top program.

As noted elsewhere, we are adding to this final notice a new section (A), State Success Factors. We are revising a number of the selection criteria from proposed section (E) (Overall Selection Criteria) and including them as State Success Factors Criteria (A). The purpose of this change is to provide States with the opportunity to begin their proposals with clear statements of their integrated, coordinated, statewide reform agendas. In order to be consistent with this change, we are changing the language in priority 1 to provide that, in addition to addressing the four education reform areas, State applications also must address the State Success Factors Criteria. Consistent with this focus on the State Success Factors Criteria, we are adding clarifying language and removing the reference to the four reform areas in the title of absolute priority 1.

With regard to the use of NAEP scores to measure increasing student achievement, we are removing this reference in priority 1 because, as noted elsewhere, the new section on State Success Factors describes how increases in student achievement and closing achievement gaps across subgroups will be measured. State Success Factors Criteria (A)(1)(iii) and (A)(3)(ii) specify that when evaluating increases in student achievement and gap-closing, reviewers will examine results in reading/language arts and mathematics based on the NAEP and on the assessments required under the ESEA.

Changes: Absolute priority 1 has been revised to read: ''To meet this priority, the State's application must comprehensively and coherently address all of the four education reform areas specified in the ARRA as well as the State Success Factors Criteria in order to demonstrate that the State and its participating LEAs are taking a systemic approach to education reform. The State must demonstrate in its application sufficient LEA participation and commitment to successfully implement and achieve the goals in its plans; and it must describe how the State, in collaboration with its participating LEAs, will use Race to the Top and other funds to increase student achievement, decrease the achievement gaps across student subgroups, and increase the rates at which students graduate from high school prepared for college and careers.''

Competitive Preference Priority 2: Emphasis on Science, Technology, Engineering, and Mathematics (STEM):

Comment: Numerous commenters expressed support for including an emphasis on STEM education as a competitive preference priority. The

commenters noted that major developments in medicine, energy, and agriculture are dependent on innovations in STEM fields and stated that engaging students in STEM education programs is the most effective way to improve the Nation's economy and maintain America's global leadership. One commenter recommended changing the priority to an absolute priority and another commenter recommended adding selection criteria related to STEM education.

However, many commenters stated that designating STEM as a competitive preference priority implies that STEM subjects are more important than other subjects and recommended omitting or changing the STEM priority to an invitational priority. One commenter asked why the Department chose to emphasize STEM subjects over other subjects.

Numerous commenters expressed concern that including a competitive preference priority on STEM education would lead to a narrowing of the curriculum. One commenter expressed concern that a competitive preference priority emphasizing STEM education might encourage STEM-only programs, as opposed to STEM-focused programs in which the content is integrated into various curricular areas. The commenter expressed concern that the priority would prohibit States from applying data-driven reform and school achievement interventions that do not focus on STEM. Another commenter recommended changing the priority to give States the option of using data to develop plans that meet the needs of their low-performing schools.

Discussion: We appreciate the support expressed for including a competitive preference priority on STEM education. Ensuring American competitiveness in a global economy requires significant improvements in STEM education. As the commenters noted, professionals in STEM fields are major contributors to the American economy in such areas as medicine, agriculture, and energy. Science-based industries are in need of skilled workers, and we believe a competitive preference priority on STEM will help schools produce a generation of Americans who can meet this demand. Therefore, we decline to eliminate priority 2 or to re-designate priority 2 as an invitational priority. We did not intend for an emphasis on STEM education to result in a narrowing of the curriculum. Rather, our intent was to focus attention on the need to develop and implement rigorous courses of study in STEM fields, assist teachers in providing effective and relevant instruction in those fields, and prepare more students for advanced study and careers in STEM. While we believe increasing the focus on STEM education is important, we do not believe that an emphasis on STEM education should be required as part of the core work that States are required to address in their reform plans for the Race to the Top program. Therefore, we decline to change the emphasis on STEM education to an absolute priority or include selection criteria emphasizing STEM education. With regard to commenters' concerns that emphasizing STEM education might encourage STEM-only programs, as opposed to STEM-focused programs, we note that this notice specifically refers to preparing and assisting teachers in integrating STEM content across grades and disciplines. The priority will not prohibit States from using data from areas other than STEM education to drive reform, nor should it discourage them from doing so.

Changes: None.

Comment: Two commenters recommended that the final notice clarify the meaning of ''a rigorous course of study,'' as used in priority 2, by providing examples of what the Department considers to be rigorous courses of study. The commenters suggested Advanced Placement courses and STEM-intensive courses, such as those offered in many career and technical education programs, as examples of rigorous courses of study. One commenter recommended including a reference to career preparatory coursework. Two commenters recommended the final notice include an incentive for States that assess the alignment of rigorous courses of study in STEM subjects with other courses of study in a school's curriculum.

Discussion: The Department believes that States should have the flexibility to determine the content and focus of a rigorous course of study in STEM subjects and, therefore, declines to add examples of rigorous courses of study in priority 2. In determining the rigor of a course in STEM subjects, local decision-makers will likely assess how STEM subjects are integrated and aligned with other courses offered in a State or LEAs' current programs of study. Therefore, we do not believe that it is necessary to provide incentives for doing so.

Changes: None.

Comment: A few commenters recommended that the final priority reference additional STEM-capable community partners such as youth-serving community organizations, ''valued-added intermediaries,'' and public broadcasting entities. One commenter strongly recommended that the Department provide guidelines for selecting STEM-capable partners. Another commenter noted that non-school settings, such as museums and science centers, offer designed spaces and programs to engage students and encourage them to pursue and develop interests in scientific inquiry that may positively influence academic achievement and expand students' sense of career options.

Discussion: To meet priority 2, applicants must cooperate with industry experts, museums, universities, research centers, or other STEM-capable community partners in preparing and assisting teachers to integrate STEM content across grades and disciplines, to promote effective and relevant instruction, and to offer applied learning opportunities for students. We do not believe it is appropriate to be more specific about the STEM-capable partnerships that States should form given that the resources and needs vary considerably across schools and communities; such decisions are best left to local decision makers. Therefore, we decline to include additional examples of STEM-capable partnerships or to provide guidelines for selecting STEM-capable partners, as requested by commenters.

Changes: None.

Comment: One commenter recommended that the Department revise priority 2 to explicitly include computer science as part of STEM education. The commenter stated that computer science is often confused with technology literacy and this confusion leads to teaching basic skills instead of core concepts and problem solving. The commenter noted that computer science provides students with a fundamental understanding of computing, exposure to professional fields, and opportunities to develop computational thinking skills.

Discussion: STEM education includes a wide-range of disciplines, including computer science. We believe that States should have the flexibility to define the specific courses of study in mathematics, the sciences, technology, and engineering, based on the needs and available resources of the State, as well as the advice of industry experts, museums, universities, research centers, and other STEM-capable community partners. Therefore, we decline to change priority 2 to specify that computer science is a part of STEM education, as requested by the commenter.

Changes: None.

Comment: One commenter recommended that the Department require States to implement the recommendations of the National Mathematics Advisory Panel regarding K–8 mathematics teacher preparation programs and licensing requirements. The commenter stated that teacher preparation programs and licensing requirements for K–8 mathematics teachers should address arithmetic, geometry, measurement, and algebra. Another commenter recommended requiring States to provide funds for improving State licensing requirements in order to ensure that K–8 teachers master core mathematics content. One commenter recommended that the Department require in-service training for K–8 mathematics teachers. Another commenter recommended that the Department revise priority 2 in order to ensure that teachers in high-risk, low-performing schools are provided with professional development opportunities, mentoring, and the necessary guidance to ensure that rigorous courses of study in STEM subjects are taught in these schools.

Discussion: We do not believe that it would be appropriate for the Department to require States to implement the recommendations of the National Mathematics Advisory Panel regarding mathematics teacher preparation programs and licensing requirements; decisions regarding teacher preparation programs and licensing requirements are best left to State and local officials to make depending on the unique needs and circumstances in each State. With regard to the recommendation to require in-service training and professional development, mentoring, and guidance in STEM subjects to teachers in high-risk, low-achieving schools, we note that this final notice includes several criteria that address the professional development needs of teachers, including criteria (B)(3), (C)(3)(ii), (D)(2)(iv)(a), and especially (D)(5), which focuses on the extent to which States provide effective support to teachers and principals. We believe that these criteria adequately address the commenter's concerns regarding professional development; States addressing the STEM competitive preference priority will have ample opportunities to address professional development needs in their responses to these criteria. We therefore decline to change priority 2 in the manner recommended by the commenter.

Changes: None.

Comment: A few commenters recommended that the Department encourage States to recruit, train, and provide alternative pathways for STEM professionals to join the teaching force as full-time teachers, co-teachers, or professional development providers. The commenters noted that STEM professionals in the classroom would help students understand the career opportunities available for individuals with knowledge in STEM subjects. One commenter recommended providing additional credit to States that use ''informal science education centers'' as resources for professional development.

Discussion: We agree with commenters that efforts should be made to recruit and train STEM professionals to join the teaching force as teachers and that having such professionals in the classroom would help students understand the career opportunities available in STEM fields. Criterion (D)(1), which assesses the extent to which a State has high-quality pathways for aspiring teachers and principals, addresses this concern. To the extent that the informal science education centers, referred to by one commenter, provide professional development as an alternative route to certification, States that permit use of such centers would be given credit under criterion (D)(1)(i). Therefore, we decline to give additional credit to States that use such centers as recommended by one commenter.

Changes: None.

Comment: One commenter recommended that the Department invite States to strengthen their early childhood education programs by including STEM education in their State reform plans for early learning programs.

Discussion: As noted elsewhere, we are adding an invitational priority for early learning programs (*see* priority 3), which includes a focus on improving young children's school readiness, and a competitive preference priority for STEM education (*see* priority 2). States that choose to address either of these priorities could include a description of efforts to ensure that early learning program standards and curricula include developmentally appropriate science, pre-numeracy, and numeracy content in order to help prepare young children to succeed in STEM-related areas when they enter school.

Changes: None.

Comment: One commenter recommended that the Department encourage States to provide high-level STEM curricula to advanced students in earlier grades than is typically the norm. The commenter noted that local policies and practices typically inhibit acceleration options and leave advanced students unchallenged.

Discussion: With regard to the commenter's recommendation that the Department encourage States to provide high-level STEM curricula to advanced students in earlier grades than is typical, States will have opportunities to include such concepts in their applications, if they so desire, through priority 6, which focuses on LEAs creating the conditions for reform and innovation by providing their schools with flexibilities and autonomies; through criterion (B)(3), which addresses instructional issues relating to enhanced standards; and by addressing competitive preference priority 2, which focuses on STEM education.

Changes: None.

Comment: One commenter urged the Secretary to encourage States to open statewide, public, residential high schools that focus on math and science.

Discussion: To the extent that a public residential high school would be considered an innovative school, we note that criterion (F)(2)(v) encourages States to enable LEAs to operate such innovative, autonomous public schools. Therefore, we do not believe that additional language in priority 2 is needed to address the commenter's recommendation.

Changes: None.

Comment: One commenter stated that the availability of up-to-date laboratory equipment plays an important role in STEM learning and requested that the Department clarify whether Race to the Top funds could be used to purchase laboratory equipment and technological tools to implement STEM programs. The commenter stated that the quality and quantity of equipment is inadequate in most schools, particularly in schools with high concentrations of at-risk students.

Discussion: The Race to the Top program provides States and LEAs with significant freedom to use Race to the Top funds to meet the goals outlined in their State reform plans. Laboratory equipment would be an allowable use of funds under the Race to the Top program.

Changes: None.

Comment: One commenter urged the Department to encourage States to develop a common set of core STEM standards and assessments. In addition, the commenter recommended that the Department encourage and reward States that enhance their high school graduation requirements to include four years of STEM courses.

Discussion: The Department is encouraging States to develop a common set of high-quality K–12 standards that are internationally benchmarked and that build toward

college- and career-readiness by the time of high school graduation. In addition, the Department is encouraging States to develop and implement common, high-quality assessments that are aligned with those standards. Thus, criterion (B)(1) assesses the extent to which a State has demonstrated its commitment to adopting a common set of high-quality standards, and criterion (B)(2) assesses the extent to which the State has demonstrated its commitment to improving the quality of its assessments. It is a State's responsibility to determine the content of those standards and assessments, including whether to develop a common set of core STEM standards and assessments. Likewise, States are responsible for establishing high school graduation requirements. Thus, whether or not four years of STEM courses are included as a requirement for graduation from high school is a decision that is made by States, not the Federal Government.

Changes: None.

Comment: Several commenters recommended that the Department require STEM instruction to be consistent with the principles of universal design for learning. The commenters noted that universal design for learning is defined in section 103(24) of the Higher Education Opportunity Act of 2008 (Pub. L. 110–315), as a structure that provides flexibility in instruction that accommodates, supports, and maintains high achievement expectations for all students, including students with disabilities and English language learners.

Discussion: Paragraph (ii) in priority 2 focuses on promoting STEM education that is effective, relevant, and includes applied learning opportunities for students. To the extent that such instruction can be provided consistent with the principles of universal design, we encourage States to do so. However, we do not believe it would be appropriate to require all instruction to be consistent with the principles of universal design for learning as recommended by the commenters.

Changes: None.

Comment: A few commenters recommended that the Department promote racial, economic, and gender integration in STEM programs. These commenters stated that programs funded by the Department have an obligation to be inclusive and remove discriminatory barriers. One commenter noted that STEM programs should be included in schools that serve low-income students to ensure that such students have access to STEM programs. Another commenter recommended that the Department reiterate that recipients of Race to the Top funds should remove obstacles that might discourage female students from enrolling and completing STEM programs.

Discussion: We agree with these commenters that all students should have access to rigorous courses of study in STEM programs. Paragraph (iii) in priority 2 specifically refers to State plans addressing the needs of underrepresented groups and of women and girls in the areas of science, technology, engineering, and mathematics. Therefore, we do not believe that additional language needs to be added to priority 2 to address the commenters' concerns.

Changes: None.

Comment: Two commenters recommended that the final notice reference advanced laboratory work, service learning, project-based learning, and work-based learning as examples of ''applied learning opportunities.'' The commenters stated that providing such examples would help clarify the meaning of applied learning opportunities as it is used in priority 2. One commenter recommended that the Department clarify that applied learning opportunities could occur during regular school hours, or before or after the regular school day.

Discussion: A State seeking to meet priority 2 is required to cooperate with industry experts, museums, universities, research centers, and other STEM-capable community partners to ensure that instruction is relevant and that students are provided with opportunities to apply what they have learned in the classroom. Such cooperative work with experts in STEM fields should provide a State with ample examples of applied learning opportunities. In addition, as noted elsewhere, we are adding a definition of *increased learning time;* this definition specifically references service learning and experiential and work-based learning and encourages such learning to occur during or outside of regular school hours. As such, we do not believe it is necessary to include examples of applied learning opportunities in priority 2, which could limit, rather than promote ideas and strategies to improve or enhance STEM education programs.

Changes: None.

Comment: One commenter recommended that priority 2 be changed to require State reform plans to describe how technology will be incorporated as a required component in STEM education programs. The commenter also recommended requiring State reform plans to include online access to high-quality STEM courses and instructors, remediation for low-performing students through interactive instructional software, virtual field trips, and online connections to STEM professionals.

Another commenter noted that programs supported by universities use technology and multimedia to improve teaching and learning of STEM subjects and recommended that universities and the business sector work in partnership with schools to prepare students for postsecondary education and workplace success.

Discussion: We agree that the approaches that commenters discussed can be useful in implementing STEM programs. However, we believe such decisions are best left to local officials who understand the needs and available resources in their schools and communities. We decline, therefore, to make the changes that the commenters recommend.

Changes: None.

Comment: One commenter asked how the Department will determine whether a State's application meets the competitive preference priority. The commenter asked specifically whether a ''pilot'' project focused on STEM education, rather than a comprehensive STEM program, would meet priority 2. Another commenter recommended that the Department require a State's proposed STEM programs to be evidence-based.

Discussion: Priority 2 describes the three elements that a State's reform plan must address to meet priority 2. These elements include the need to (i) offer a rigorous course of study in STEM subjects; (ii) cooperate with industry experts, museums, universities, research centers, or other STEM-capable community partners to prepare and assist teachers in integrating STEM content across grades and disciplines, in promoting effective and relevant instruction, and in offering applied learning opportunities; and (iii) prepare more students for advanced study and careers in science, technology, engineering, and mathematics, including by addressing the needs of underrepresented groups and of women and girls in STEM areas. We are clarifying that, to meet the priority, the State's application must have a *high-quality plan* to address each of these elements. We do not believe it is necessary to require that a State's proposed STEM program be evidence-based in order to meet this priority; reviewers will judge the quality of the program that a State proposes, which will necessarily include the extent to

which the State's proposed STEM education program is evidence-based.

Changes: We have revised the priority to specify that, to meet this priority, the State's application must have a high-quality plan to address the areas specified in the priority.

Comment: One commenter stated that a significant investment is necessary to successfully improve student performance in STEM subjects and recommended that the Department revise priority 2 to provide a preference to States with the infrastructure to demonstrate results.

Discussion: We do not believe that preference should be given to States that already have the infrastructure in place to evaluate and demonstrate results. As part of its application, each State must provide a detailed budget and accompanying budget narrative describing how the State plans to use Race to the Top funds to accomplish the State's reform plan and meet its targets. The detailed plan for using grant funds must include, among other things, the key goals, the key activities to be undertaken, the rationale for the activities, and the timeline for implementing the activities (*see* application requirements). A State that includes a focus on STEM education must, therefore, include in its proposed budget how it plans to use grant funds or other Federal, State, and local funds to meet its goals related to improving STEM education.

Changes: None.

Priority 4—Invitational Priority—Expansion and Adaptation of Statewide Longitudinal Data Systems (Proposed Priority 3):

Comment: A number of comments were received on priority 4 that were similar to the comments received on criterion (C)(1), regarding implementing a statewide longitudinal data system; criterion (C)(2), regarding accessing and using State data; and criterion (C)(3), regarding using data to improve instruction.

Discussion: In some cases we have responded to comments received in response to priority 4 under section (C), Data Systems to Support Instruction. This enabled us to group similar comments and concerns in order to be more responsive to the commenters.

Changes: None.

Comment: One commenter recommended changing the title of this priority to ''Expansion, Adaptation, and Appropriate Utilization of State Longitudinal Data Systems.''

Discussion: We do not believe the lengthier title recommended by the commenter is necessary, and therefore, decline to change the title of priority 4.

Changes: None.

Comment: One commenter recommended that priority 4 be eliminated. The commenter stated that Race to the Top funds should be used to improve teaching and not for expanding data systems.

Discussion: Establishing a statewide longitudinal data system that provides data on student achievement or student growth to teachers and principals, as well as policymakers, researchers, and other stakeholders, is key to driving education reform in general, and improvements in the classroom, in particular. Therefore, we decline to eliminate priority 4.

Changes: None.

Comment: Several commenters recommended that priority 4 be changed from an invitational priority to a competitive preference priority because of the importance of linking data from various program areas with statewide longitudinal data systems. Several commenters stated that expanding and linking data systems are essential to achieving comprehensive reform in the four ARRA education reform areas, and therefore, recommended changing the priority to an absolute priority.

Discussion: We believe that priority 4 is appropriately designated as an invitational priority because it extends the work that States are already doing to address the criteria related to fully implementing statewide longitudinal data systems. A State will already be judged on the extent to which it has a statewide longitudinal data system that includes all of the America COMPETES Act elements (*see* criterion (C)(1)) and the extent to which it has a high-quality plan to ensure that data from the State's statewide longitudinal data system are used to support decision-makers in the continuous improvement of policy, instruction, operations, management, resource allocation, and overall effectiveness (*see* criterion (C)(2)). While we believe that the focus of priority 4 is important, it is not part of the core work that States must do to address the four education reform areas. Therefore, we decline to re-designate priority 4 as an absolute priority or as a competitive preference priority.

Changes: None.

Comment: One commenter requested clarification about the data that are required to meet this priority and the questions these data should be able to answer.

Discussion: Criterion (C)(1) will examine the extent to which a State has a statewide longitudinal data system that includes all of the America COMPETES Act. The purpose of priority 4 is to reward States that go beyond the 12 elements of the America COMPETES Act to connect their statewide longitudinal data systems to other data or data systems that may exist independently from a State's statewide longitudinal data system. The information that will be responsive to this priority will depend on each State's current statewide longitudinal data system, the extent to which it is already connected to other data or data systems, and the types of questions related to policy, practice, or overall effectiveness that a State needs to answer in order to implement its reform agenda. We believe that this purpose could have been stated more clearly in the priority and, therefore, are adding clarifying language.

Changes: We have changed the end of the last sentence in the first paragraph of the priority as follows: ''* * * with the purpose of connecting and coordinating all parts of the system to allow important questions related to policy, practice, or overall effectiveness to be asked, answered, and incorporated into effective continuous improvement practices.''

Comment: One commenter noted that statewide longitudinal data systems could be expanded in a number of ways such as including additional data from within the agency, from other State agencies, from other States, or from management systems that track and allocate resources. The commenter recommended that the priority include this clarification. Another commenter recommended that the priority encourage States to link their longitudinal data systems with data from other State agencies.

Discussion: While the commenter noted several ways in which statewide longitudinal data systems could be expanded, we do not believe that it is necessary to include this information in the priority, nor to encourage States to link their longitudinal data systems with data from other agencies. How States expand their data systems will depend on the current needs, resources, and capabilities of each State's statewide longitudinal data system. We remind States that they must consider how to protect student privacy as data are shared across agencies. Successful applicants that receive Race to the Top grant awards will need to comply with the Family Educational Rights and Privacy Act (FERPA), including 34 CFR Part 99, as well as State and local requirements regarding privacy.

Changes: None.

Comment: Many commenters recommended that statewide longitudinal data systems include student-level data on transfers, chronic

absenteeism, and in- and out-of-school suspensions, as well as school dropout rates, dropout and re-enrollment data, and data on students completing P–16 programs. One commenter recommended that data on ''student mobility'' be included in all data gathering and reporting. Other commenters strongly recommended that State longitudinal data systems include measures of school safety, culture, and climate.

Discussion: Applicants for Race to the Top grants will already be judged on the extent to which the State has a statewide longitudinal data system that includes all of the America COMPETES Act elements (*see* criterion (C)(1)). Those elements include, among other, student level enrollment, demographic, and program participation information; and student-level information about the points at which students exit, transfer in, transfer out, dropout, or complete P–16 education programs. It would not, therefore, be appropriate to include these elements in priority 4, which is focused on expanding statewide longitudinal data systems. However, we believe that it is appropriate to reference in priority 4 linking data from at-risk and dropout prevention programs, school climate and culture programs, and information on student mobility. Such data will complement and expand the data that States will be collecting through the America COMPETES Act elements. Therefore, we are adding language to the priority to refer to at-risk and dropout prevention programs, school climate and culture programs, and information on student mobility. For clarity, we also are adding a parenthetical following ''human resources.''

Changes: We have added the phrase ''at-risk and dropout prevention programs, and school climate and culture programs, as well as information on student mobility'' following ''early childhood programs'' in priority 4. We also have added ''(*i.e.,* information on teachers, principals, and other staff)'' following ''human resources.''

Comment: None.

Discussion: Throughout this notice, we have used the term ''English language learner,'' rather than ''limited English proficient,'' whenever possible. During our internal review, we noted that we inadvertently used ''limited English proficient'' in priority 4. Therefore, we are changing ''limited English proficient,'' to ''English language learner'' in priority 4.

Changes: We have replaced ''limited English proficiency'' with ''English language learner'' in priority 4.

Comment: Two commenters recommended that statewide longitudinal data systems include data on all postsecondary students, including adults who are enrolled part-time, taking non-credit courses, or participating in remedial programs. These commenters also recommended that statewide longitudinal data systems include data on participants in other educational and workforce training programs such as adult basic education programs. Several commenters recommended referencing data on career placements and State employment wage records as areas in which States should expand their systems.

Discussion: As priority 4 already references postsecondary data, we do not believe it is necessary to add specific detail about the types of postsecondary data that States should collect. Nor do we believe that it is necessary to reference data on career placements and State employment wage records. States that believe such data are important to their overall reform strategy can certainly propose to expand their statewide longitudinal data base by adding these elements.

Changes: None.

Comment: Two commenters referred to the statement in the proposed priority stating that the Secretary was interested in applications in which States propose working together to adapt statewide longitudinal data systems, rather than having each State build such systems independently. The commenters requested guidance on how States should work together and asked for clarity about whether one State should be designated as the lead and what would happen if only one of the States in the partnership is successful in receiving a Race to the Top award.

Discussion: States that propose to work together to adapt their statewide longitudinal data systems should include these proposed efforts in their reform plan and show how these efforts are coordinated with the State's larger reform efforts. When developing their plans, States should propose alternative options should one of the States not be awarded Race to the Top funds and be unable to devote other funds to achieve the outlined goals.

Changes: None.

Priority 5—Invitational Priority—P–20 Coordination, Vertical and Horizontal Alignment (Proposed Priority 4):

Comment: Several commenters recommended that priority 5, regarding P–20 coordination, include an emphasis on aligning a State's educational system with other State agencies and community organizations. The commenters stated that such ''horizontal'' alignment is just as important as ''vertical alignment,'' particularly for high-need students. One commenter recommended that the Department require State reform plans to provide information about how all parts of the State's education system will work to improve student achievement and the overall quality of schools, and how the State's education system will work with other supporting agencies and institutions to address the needs of all students. The commenter also recommended that State reform plans address how the improvement process will be managed effectively both within the educational system and across supporting agencies and institutions.

Numerous commenters stated that community-based organizations play a key role in assisting youth at the secondary level, particularly in helping them transition to postsecondary education, and therefore, should be included as partners in creating a seamless P–20 route for students. A few commenters stated that the educational system should work with child welfare, juvenile justice, and criminal justice agencies to help re-engage high school dropouts.

Discussion: We agree that priority 5 would be strengthened by including a focus on coordinating educational systems with other State agencies and community organizations that provide services to students that are beyond the capacity of schools to provide. This would include, for example, community-based organizations that serve youth, as well as child welfare, juvenile justice, and criminal justice agencies, as mentioned by commenters. Therefore, we are revising the priority, as well as the title of the priority, to reflect a focus on the ''horizontal alignment'' of the educational system with other agencies and community organizations. Applicants that choose to address priority 5 should include in their State reform plans how all parts of the education system will coordinate their work to create a more seamless P–20 route for students—both vertically, to ensure that students exiting one level of the education system are prepared for success in the next, as well as horizontally, to ensure that services across schools, State agencies, and community partners are coordinated and aligned.

With regard to the comment that State reform plans address how the improvement process will be managed effectively, we note that criterion (A)(2) focuses on the extent to which States have built strong statewide capacity to

implement, scale up, and sustain their proposed reform plans.

Changes: We have changed the title of priority 5 to: P–20 Coordination, Vertical and Horizontal Alignment. In addition we have added ''and other State agencies and community partners (*e.g.,* child welfare, juvenile justice, and criminal justice agencies)'' following ''organizations'' in the first sentence of the priority. Finally, we have added the following sentence at the end of the priority: ''Horizontal alignment, that is, coordination of services across schools, State agencies, and community partners, is also important to ensure that high-need students (as defined in this notice) have access to the broad array of opportunities and services they need and that are beyond the capacity of the school itself to provide.''

Comment: Many commenters recommended changing priority 5 from an invitational priority to a competitive preference priority, stating that P–20 alignment efforts are key to improving student transitions, and ultimately, student success. A few commenters recommended changing priority 5 from an invitational priority to an absolute priority. One commenter stated that coordination across and within systems can improve instruction, service delivery, and communication, and thus create an environment that encourages innovation.

Discussion: We believe that priority 5 is appropriately designated as an invitational priority because it extends beyond the core K–12 focus of the Race to the Top program. States will already be judged on the extent to which they set forth a comprehensive and coherent reform agenda for improving student outcomes statewide (*see* criterion (A)(1)) and the extent to which they enlist strong statewide support and commitment for their plans from a broad group of stakeholders, which may include other State agencies, nonprofit organizations, and community-based organizations (*see* criterion (A)(2)(ii)). While we believe that the focus of priority 5 is important, it is not part of the core work that States must do to address the four education reform areas. Therefore, we decline to re-designate priority 5 as an absolute priority or a competitive preference priority.

Changes: None.

Comment: Several commenters recommended that priority 5 encourage collaboration between K–12 schools, higher education, and workforce development organizations in order to create pathways to college and work. One commenter stated that partnerships with workforce development organizations would add relevance to classroom instruction and help develop school-work partnerships.

Discussion: We agree with the commenters and are changing ''workforce organizations'' to ''workforce development organizations'' to be clear that such organizations are important to creating a more seamless P–20 route for students. We also are including careers as an example of a critical transition point.

Changes: We have changed ''workforce organizations'' to ''workforce development organizations.'' In the parenthetical following ''each point where a transition occurs,'' we have changed ''postsecondary'' to ''postsecondary/careers.''

Comment: Two commenters recommended including family engagement in each State's P–20 plan.

Discussion: As part of its overall reform plan, States will be judged on the extent to which they have enlisted strong statewide support and commitment from a broad array of stakeholders, which includes community organizations, such as parent-teacher associations. Therefore, we do not believe it is necessary to add family engagement in this priority, as recommended by the commenters. We also note that priority 6 specifically focuses on flexibilities and autonomies for school-level reform, including those related to implementing strategies to effectively engage families and communities in supporting the academic success of their students (*see* paragraph (vii) in priority 6).

Changes: None.

Comment: One commenter recommended that the reference to vertical alignment in this priority include multiple education pathways to graduating from high school, such as alternative education programs, general educational development (GED) programs, and community college programs. Another commenter recommended that priority 5 focus on alignment between the traditional education system and alternative education programs for high school dropouts. Two commenters urged the Department to include adult education programs in this priority, stating that adult education programs play a key role in the P–20 route for some students, particularly English language learners.

Discussion: Priority 5 refers to K–12 schools, postsecondary institutions, workforce development organizations, and other State agencies and community partners, which would encompass the programs referenced by the commenters. We do not believe that the notice needs to include additional references to these programs or to other specific types of schools or programs. Therefore, we decline to make the changes requested by the commenters.

Changes: None.

Comment: Many commenters highlighted the importance of improving the transition from early childhood to K–12 programs. One commenter asked that States be allowed to focus on coordination between early childhood and elementary school exclusively and without penalty for excluding middle school, high school, and post-secondary education in their plans. One commenter recommended that the Department more explicitly identify the ways in which early childhood and higher education sectors should participate in States' reform strategies and provide guidance on how cross-system alignment will be evaluated in the peer review process. Two commenters recommended that SEAs work with State early childhood advisory councils to improve the transition from early childhood programs to K–12 programs.

Discussion: As discussed elsewhere, we are adding a new invitational priority 3 on improving early educational outcomes for high-need students who are young children, which includes a focus on improving transitions between preschool and kindergarten.

With regard to the comment asking whether States could focus on the transition between early childhood and elementary school exclusively without penalty for excluding middle and high school transitions, and the comment regarding how alignment will be evaluated in the peer review process, we note that States will be judged on the extent to which their plans set forth comprehensive and coherent reform agendas for improving student outcomes statewide (*see* criterion (A)(1)), and on the extent to which States have enlisted strong statewide support and commitment for their plans from a broad group of stakeholders, which may include IHEs and agencies providing early childhood education (*see* criterion (A)(2)(ii)). States that choose to address priority 5 should discuss how to coordinate all parts of their systems to create more seamless P–20 routes for students—both vertically, to ensure that students exiting one level of the education system are prepared for success in the next, and horizontally, to ensure that services across schools, State agencies and community partners are coordinated and aligned.

The ways in which early childhood and higher education programs participate in States' reform strategies

will vary from State to State depending on the needs and resources in each State. Therefore, we decline to include in priority 5 specific ways in which these sectors should participate in their State's reform plans, as requested by one commenter.

We agree that one way to improve transitions from early childhood programs to K–12 programs is for SEAs to work with State early childhood advisory councils. We are not including specific examples of processes the State may use to improve transitions across the P–20 system; we believe such decisions are best left to local decision-makers.

Changes: None.

Comment: Two commenters recommended adding a reference in this priority to middle school transitions (*i.e.,* elementary to middle school and middle to high school) because these transitions can be particularly challenging with the increased expectations for student performance and responsibility, often in environments that are far less personalized than elementary schools.

Discussion: We agree that transitions to and from middle school can be challenging. Ensuring smooth transitions from elementary to middle school and from middle school to high school would be important aspects of creating a seamless P–20 route for students. The fact that priority 5 does not specifically reference the transitions to and from middle school does not mean that State reform plans should not include efforts to improve these important transitions. We note that the parenthetical in priority 5 provides examples of critical transition points before and after K–12 and is not meant to exclude transition points within K–12 that States may address within their core Race to the Top reform plans.

Changes: None.

Comment: A few commenters requested that priority 5 include a requirement to coordinate early childhood programs that serve children from birth to age five. These commenters pointed to research documenting the importance of high quality education in the first three years of life.

Discussion: We agree that the Race to the Top program should recognize the importance of early learning programs in preparing children for success in school. Therefore, as noted elsewhere, we are adding priority 3 to focus on improving early educational outcomes for high-need students who are young children (pre-kindergarten through third grade). Because Race to the Top focuses its efforts primarily on States and LEAs, an early childhood educational focus starting in pre-kindergarten seems most applicable. The Department has other programs that will focus exclusively and comprehensively on children younger than pre-kindergarten age.

Changes: None.

Comment: One commenter recommended that States include private schools in developing their plans to create a more seamless P–20 route for students. The commenter noted that many students attend both public and private schools at various times in their educational careers.

Discussion: There is nothing that would preclude a State from including in its plan efforts to improve coordination with private schools. We note that nothing in the Race to the Top program requires a State that receives funds under Race to the Top to include private schools in the four reform areas. Because the Race to the Top program is directed to improving public K–12 education, we decline to include a reference to private schools in priority 5, which addresses a more seamless P–20 route for students.

Changes: None.

Comment: One commenter asked whether the focus of priority 5 is on developing a P–20 data system. Another commenter asked how the data elements in a P–20 system would differ from a P–16 system's required elements.

Discussion: Priority 5 focuses on improving all parts of the education system by coordinating within the educational system (*e.g.*, between early childhood programs, K–12 schools, postsecondary institutions) and between the educational system and other State agencies and community partners (*e.g.*, child welfare, juvenile justice, and criminal justice agencies). Priority 5 is not focused on P–20 data systems; that is the focus of priority 4, Expansion and Adaptation of Statewide Longitudinal Data Systems.

Under criterion (C)(1), States will be judged on the extent to which they have a statewide longitudinal data system that includes the America COMPETES Act elements. Beyond these 12 elements, the Department has not specified any additional elements that States must include in their statewide longitudinal data systems.

Changes: None.

Comment: One commenter recommended that States use longitudinal data to evaluate and improve the effectiveness of programs designed to facilitate vertical alignment in the education system. Two commenters recommended that the Department include an incentive in this priority for States and LEAs to learn from LEAs with outstanding records in data development and reporting in order to improve the vertical alignment of the State's education system.

Discussion: We agree that longitudinal data could be used to evaluate and improve the effectiveness of programs designed to improve transitions from one level of the education system to another. We also agree that States and LEAs should learn from each other on using data to improve the vertical alignment of educational systems. Priorities 3, 4, and 5 encourage States to undertake such practices. We note that States receiving Race to the Top funds, along with their LEAs and schools, are expected to identify and share promising practices, make work freely available within and across States, make data available in appropriate ways to stakeholders and researchers, and help all States focus on continuous improvement of student outcomes.

Changes: None.

Priority 6—Invitational Priority—School-Level Conditions for Reform, Innovation, and Learning (Proposed Priority 5).

General:

Comment: Numerous commenters expressed support for priority 6. While some commenters stated that it was appropriate for priority 6 to be an invitational priority, numerous other commenters recommended changing priority 6 to a competitive preference priority stating that the conditions listed for reform and innovation are critical to supporting school reform efforts. One commenter stated that it is important to give priority to school-level conditions for reform because reform is most evident when changes are implemented at the local level, where student learning can be directly and immediately influenced.

Several commenters urged the Department to make priority 6 a competitive preference priority in order to ensure that districts create the preconditions for dramatically improving student achievement. Other commenters stated that the flexibilities and autonomies listed in the priority are essential to school success and that it is highly unlikely that any State will turn around low-performing schools without these ingredients. Another commenter stated that LEA actions are fundamental to enabling schools to turn around and that if this priority was a competitive preference priority, it would motivate LEAs to undertake challenging reforms. Lastly, one commenter recommended that the priority be changed to an absolute priority.

Discussion: States may choose to address priority 6, which examines the

extent to which a State's participating LEAs are broadly creating the conditions for reform and innovation by providing schools with flexibilities and autonomies. All States, however, will be rewarded for flexibilities and autonomies that are provided to schools in the highest need situations—turning around persistently lowest-achieving schools—as part of criterion (E)(2). In addition, criterion (F)(2) will assess the extent to which States ensure successful conditions for high-performing charter schools and other innovative schools. Therefore, we do not believe it is necessary to change priority 6 to an absolute or competitive preference priority.

Changes: None.

Comment: A few commenters noted that priority 6 focuses on school-level conditions for reform and innovation but does not speak to the conditions that are necessary for student learning. The commenters recommended that the title and content of the priority be changed to also focus on creating the school-level conditions for learning. One commenter stated that school-level conditions for reform should be clearly defined in the notice to ensure that all of the comprehensive learning opportunities necessary for school success are in place.

Discussion: We agree with the commenters that priority 6 should emphasize reform and innovation in the service of learning, and thus are adding ''learning'' to the title of the priority. We also are clarifying, in the text of the priority, that the Secretary is interested in applications in which the State's participating LEAs create the conditions for reform and innovation, as well as the conditions for learning. We decline to provide an exhaustive list of school-level conditions for reform as requested by one commenter as such conditions will vary depending on the unique needs of schools and communities. Therefore, priority 6 only includes examples of flexibilities and autonomies that an LEA might provide to its schools in order to help create the conditions for reform, innovation, and learning. We also are making a few technical edits for clarity.

Changes: We have changed the title of priority 6 to ''School-Level Conditions for Reform, Innovation, and Learning.'' We have added the phrase ''seek to create the conditions for reform and innovation as well as the conditions for learning. * * *'' following ''The Secretary is particularly interested in applications in which the State's participating LEAs.''

Comment: One commenter stated that in order to meet priority 6, States should describe the ways in which their participating LEAs provide schools, in particular turnaround schools, with flexibilities and autonomies conducive to reform and innovation.

Discussion: Under criterion (E)(2), States must describe the ways in which they will support their LEAs to implement the flexibilities provided in the school intervention models (described in Appendix C) for their persistently lowest-achieving schools. Therefore, in addressing priority 6, a State should describe other flexibilities and autonomies that its LEAs currently provide, or plan to provide, to their schools in order to create the conditions for reform, innovation, and learning.

Changes: None.

Comment: One commenter recommended that priority 6 be changed to reach beyond LEA-school governance to include State-LEA flexibility and autonomy. The commenter stated that emphasis should be placed on demonstrating how changes in governance and rules affect school reform efforts and instructional innovations. The commenter further recommended that we add examples of flexibilities and autonomies conducive to reform and innovation such as coordinated planning between categorical programs and budgets, changing education delivery models to increase productivity, and more efficiently using existing learning time and resources.

A few commenters recommended that the Department provide additional regulatory waivers and flexibilities to improve the coordination of funds and create the conditions for systemic reforms and instructional innovations. One commenter stated that Federal funding and regulatory flexibility could have a significant effect on State and LEA reform efforts and suggested that funds be competitively awarded in return for a State meeting a number of key requirements.

Discussion: The Department is placing particular emphasis on these school-level flexibilities because their effectiveness has been shown in a number of educational settings and because they are related to efforts to turn around struggling schools, which is a priority of the ARRA. We are, however, open to State innovation around exploring further flexibilities with their LEAs and, to the extent that such flexibilities are in place, the State could describe them in response to criterion (F)(3), Demonstrating Other Significant Reform Conditions. We also note that under criterion (A)(2)(i)(d), a State will be evaluated based on its capacity to accomplish its plan and targets by coordinating, reallocating, or repurposing education funds from other Federal, State, and local sources where feasible. We, therefore, believe it is unnecessary to add to priority 6 the language regarding coordinated planning between categorical programs and budgets and changing delivery models suggested by the commenter.

In response to commenters who recommended that the Department provide additional regulatory waivers and flexibilities, we note that such waivers and flexibilities are often limited by statute. However, the Department fully supports efforts to coordinate the use of funds in order to make the most efficient and effective use of limited resources and will continue to consider States' requests for waivers that are permissible under current Federal statutes and regulations.

Changes: None.

Comment: A few commenters recommended that the list of flexibilities and autonomies conducive to reform and innovation include providing high-quality, engaging curricula and instruction that focus on real-world problem solving. The commenters also recommended that instruction be consistent with the principles of universal design for learning.

Discussion: Several Race to the Top selection criteria established in this final notice emphasize an approach to curriculum and instruction that is based on an evidence-driven cycle of continuous instructional improvement (*see* criteria (B)(3), (C)(3), and (D)(5)). Because this issue is addressed directly in the criteria, we do not believe it is necessary to reference specific principles used to design curricula or instruction (*i.e.*, universal design for learning).

Changes: None.

Comment: A few commenters requested that priority 6 clearly state that the flexibilities and autonomies provided to schools must not include waiving the program requirements under the IDEA.

Discussion: There is nothing in priority 6 to suggest that LEAs would be permitted to waive program requirements required under other Federal laws and regulations, including those required by the IDEA. Therefore, we believe it is unnecessary to add the language requested by the commenters.

Changes: None.

Comment: One commenter requested that the final notice provide examples of flexibilities and autonomies that LEAs could provide to schools to improve early learning. The commenter provided numerous examples, including

increasing the use of Title I funds for early learning programs and permitting the use of school facilities for early learning programs and family centers.

Discussion: Several of the flexibilities and autonomies included in priority 6 are applicable to early learning—for example, flexibility in selecting staff (paragraph (i)) and controlling the school's budget (paragraph (iii)). Therefore, we do not believe that examples specifically applicable to early learning are necessary. We note that, as discussed elsewhere in this notice, we are adding an invitational priority (Priority 3) focused on early learning. An applicant who chooses to address the early childhood priority could choose to include flexibilities, such as those recommended by the commenter, in its application.

Changes: None.

Comment: Numerous commenters recommended that the list of flexibilities and autonomies conducive to reform and innovation include charter schools and charter school autonomies. Several of these commenters recommended that States be rewarded for their past and proposed efforts to support charter school flexibilities and, conversely, that States should lose points if they do not provide adequate school-level autonomy or are implementing efforts to restrict charter school flexibility. One commenter suggested that we clarify that flexibilities and autonomies conducive to reform and innovation do not include policies that would exempt charter schools or other non-traditional public schools from open enrollment mandates or from requirements that they be subject to and rated by the same academic achievement standards as traditional public schools.

Discussion: As part of its application, a State is already asked to address several criteria to ensure that it is creating the conditions for high-quality charter schools. (*See* criterion (F)(2)). Therefore, we decline to include additional criteria related to charter schools in priority 6. We also decline to add language specifying the flexibilities and autonomies that LEAs may provide to charter schools. State and local governments possess the authority to authorize charter schools and as such, requirements for charter school admissions are primarily State and local matters.

Changes: None.

Selecting Staff (Paragraph (i))

Comment: One commenter recommended that paragraph (i) of this priority specifically refer to schools having the flexibility to select ''leadership team members.'' Another commenter stated that school principals must have the authority to replace consistently low-performing educators and suggested changing paragraph (i) to clarify that principals should be given the authority to select and replace staff.

Discussion: We decline to add ''leadership team members'' to paragraph (i) in priority 6 because we are unsure to whom the term refers. With regard to the suggestion that we refer specifically to principals selecting and replacing staff, we note that there may be other school leaders or groups of school staff responsible for hiring staff (*e.g.*, department chairs; a panel of teachers, parents, and the principal; an executive in a private management organization). Therefore, we decline to make the change proposed by the commenters.

Changes: None.

Increased Learning Time (Paragraph (ii))

Comment: Many commenters expressed support for reform efforts that put in place new structures and formats for the school day or year in order to expand learning time. Commenters provided many examples of activities that should be conducted during expanded learning time including extra-curricular pursuits, experiential learning, enrichment activities, family and community engagement, recreational activities, and activities that support students' transition between grade levels. Other commenters focused on the use of expanded learning time for academic supports, and as a strategy to improve student achievement, close achievement gaps, and support struggling schools. One commenter stated that priority 6 should include other flexibilities such as expanding opportunities for youth that include, but are not limited to, a longer school day. Several commenters recommended clarifying that expanded learning time includes after-school and summer school programs. Another commenter strongly recommended that the final notice clarify that expanded learning time includes strategies that go beyond those that mirror the instruction provided to students during the school day. Other commenters stated that it is important for the Department to acknowledge that expanded learning time includes increasing educators' learning time for activities such as professional development that is collaborative, on-site, and tailored to the needs of school staff and leadership, and to allow teachers to plan and learn together.

Discussion: We appreciate the numerous comments we received on increasing learning time. We acknowledge that the term, ''expanded learning time'' is typically used to refer to programs that redesign the school day, week, and year to provide additional hours of learning time, and that ''extended learning time'' is typically used to describe before school, after school, and summer programs. We, therefore, are defining a new term, *increased learning time*, to indicate the need for schools to provide additional time for academic work to improve the proficiency of students in core academic subjects, as well as for additional subjects and enrichment activities that can contribute to a well-rounded education. We agree with commenters that teachers could also use the additional time to collaborate, plan, and engage in professional development.

Changes: We have replaced ''expanded learning time'' with ''increased learning time.'' We also have added a definition of *increased learning time* in the definitions section of this notice to read as follows: ''Increased learning time means using a longer school day, week, or year schedule to significantly increase the total number of school hours to include additional time for (a) instruction in core academic subjects, including English; reading or language arts; mathematics; science; foreign languages; civics and government; economics; arts; history; and geography; (b) instruction in other subjects and enrichment activities that contribute to a well-rounded education, including, for example, physical education, service learning, and experiential and work-based learning opportunities that are provided by partnering, as appropriate, with other organizations; and (c) teachers to collaborate, plan, and engage in professional development within and across grades and subjects.'' [2]

[2] Research supports the effectiveness of well-designed programs that expand learning time by a minimum of 300 hours per school year. (See Frazier, Julie A.; Morrison, Frederick J. ''The Influence of Extended-year Schooling on Growth of Achievement and Perceived Competence in Early Elementary School.'' Child Development. Vol. 69 (2), April 1998, pp.495–497 and research done by Mass2020.) Extending learning into before- and after-school hours can be difficult to implement effectively, but is permissible under this definition with encouragement to closely integrate and coordinate academic work between in-school and out-of school. (See James-Burdumy, Susanne; Dynarski, Mark; Deke, John. ''When Elementary Schools Stay Open Late: Results from The National Evaluation of the 21st Century Community Learning Centers Program.'' *http://www.mathematica-mpr.com/publications/redirect_PubsDB.asp?strSite=http://epa.sagepub.com/cgi/content/abstract/29/4/296* Educational Evaluation and Policy Analysis, Vol. 29 (4), December 2007, Document No. PP07–121.)

Comment: Many commenters recommended that priority 6 focus on removing barriers to innovative approaches to serving students in after-school and summer school programs. The commenters stated that schools should be encouraged to allow the use of school buildings for summer programs. Other commenters recommended requiring LEAs to coordinate funding streams for after-school and summer school programs, such as those tied to Title I, 21st Century Community Learning Centers, and other Federal, State, and local funds in order to maximize impact, improve efficiencies, and provide comprehensive services.

Discussion: Priority 6 focuses on creating the conditions for reform, innovation, and learning at the school level and includes a list of the types of flexibility and autonomy that LEAs may provide to schools; the list provides examples and is not exhaustive. We do not believe it is necessary to include the very specific flexibility of removing barriers to using school buildings for after-school and summer school programs. Likewise, flexibilities that permit coordinating funding streams for after-school and summer school programs are already covered in paragraph (iii) of the priority, which references placing budgets under the school's control.

Changes: None.

Comment: One commenter recommended that LEAs be encouraged to form partnerships with providers of out-of-school-time programming that have proven outcomes and that can bring innovative approaches to support true reform. Another commenter recommended that States ensure that nonprofit partners have the opportunity to apply for extended learning funds in partnership with one or more struggling schools in order to maximize competition and increase the quality of programs provided. One commenter recommended requiring States to ensure that expanded learning time models do not limit staffing to existing teachers. The commenter stated that flexibility should be provided to engage educators outside of the school such as tutors, mentors, individuals in teaching fellowship programs and alternative certification programs, and volunteers from the community, business, and industry.

Discussion: Developing local partnerships can be an effective strategy to move local school reform agendas forward, particularly in providing comprehensive services to high-need students. However, we believe it would be inappropriate to require States to form partnerships with nonprofit organizations or individuals outside of the school; such decisions are best left to local decision-makers who understand the unique needs of their schools and the resources available in their communities. We are changing the language in paragraph (v) regarding comprehensive services to high-need students to include examples of how such services might be provided to high-need students.

Changes: The parenthetical in paragraph (v) now reads, ''(*e.g.*, by mentors and other caring adults; through local partnerships with community-based organizations, nonprofit organizations, and other providers).''

Comment: One commenter supported expanded learning time but stated that educators should not be forced to work longer hours for the same compensation and that adjustments to work schedules should be determined locally between the district and educators and bargained where collective bargaining agreements exist. A few commenters stated that collaboration among labor, management, and parents is critical for expanded learning time models to succeed.

Discussion: Decisions about work hours and compensation are determined at the local level. As with all educational reform efforts, we believe that collaboration among stakeholders is critical to success.

Changes: None.

Comment: One commenter recommended that the final notice provide a clear picture of how strategies for expanded learning time and comprehensive services for high-need students fit together as part of a broader approach to reform and recommended that language be added to encourage applications that demonstrate how States and LEAs will align their strategies to produce results.

Discussion: It will be up to each applicant to describe how its plan for reform is comprehensive and coherent and will increase student achievement, reduce achievement gaps, and increase graduation rates. Absolute priority 1 specifically requires that States comprehensively address each of the four education reform areas specified in the ARRA and demonstrate that the State and its participating LEAs are taking a systemic approach to education reform. Applicants who choose to address priority 6 should address how their approach to meeting this priority fits into the State's overall reform efforts.

Changes: None.

Budgets (Paragraph (iii))

Comment: One commenter recommended revising paragraph (iii) regarding placing budgets under the schools' control to ensure that teachers and parents are involved in making budget decisions.

Discussion: The process that a school or LEA uses to establish its budget is a local matter. Therefore, we decline to add the language requested by the commenter.

Changes: None.

Credit Based on Student Performance (Paragraph (iv))

Comment: Several commenters expressed support for awarding credit to students based on student performance instead of instructional time and providing multiple pathways to a graduation with a regular high school diploma. One commenter recommended that funds be used to encourage State policies that allow middle or high school students to receive high school graduation credit or to meet a subject area requirement earlier than typically would be expected. The commenters advocated for options that create flexibility for students without sacrificing rigorous learning and cited school-work partnerships, diploma-plus programs, and dual enrollment (high school-community college) programs as examples of innovative approaches to creating multiple options that help students graduate from high school and pursue additional educational goals.

Discussion: We believe that the commenters' recommendations are all addressed in paragraph (iv), which provides for ''awarding credit to students based on student performance instead of instructional time.'' We, therefore, do not see a need to add the commenter's recommended language in priority 6.

Changes: None.

Comprehensive Services (Paragraph (v))

Comment: A few commenters noted that instruction and services for high-need students cannot be provided by traditional education systems alone and recommended adding language to the priority to emphasize the importance of community-based organizations and nonprofit organizations in providing comprehensive services to high-need students. One commenter stated that the final notice should clarify that the goal of State and local educational agencies should be to build a comprehensive picture of children's progress—academically, socially, and in terms of health and well-being. One commenter stated that in order to provide

comprehensive services to high-need students, States must create a safety net of wrap-around services designed to increase student success and focus on both community- and district-level conditions.

Another commenter suggested using the term ''comprehensive supports'' rather than ''comprehensive services,'' stating that ''comprehensive supports'' includes services and has more salience with educators. Another commenter recommended clarifying that comprehensive services for high-need students address the health, safety, social, emotional, behavioral, physical, and educational needs of a child.

Discussion: We agree with the commenters that high-need students often require a broad array of services that are beyond the capacity of the school itself to provide, and that community-based organizations and nonprofit organizations play an important role in meeting these needs. As noted in an earlier comment regarding the role of community-based organizations and nonprofit organizations in schools that provide increased learning time, we are changing paragraph (v) to reference community-based organizations and nonprofit organizations.

With regard to comments concerning the need for comprehensive services and creating a safety net of wrap-around services with involvement of both communities and districts, we note that priority 5 focuses on the need to coordinate services across schools, State agencies, and community partners in order to ensure that high-need students have access to the broad array of opportunities and services they need (*see* the discussion on priority 5).

We decline to change the term ''comprehensive services'' to ''comprehensive supports,'' as requested by one commenter; we do not agree that the two terms are substantively different or that one term has more salience for educators than the other. We also decline to specify the array of services included in ''comprehensive services'' because, by doing so, we could inadvertently restrict the range of services that a State may determine are necessary to serve high-need students.

Changes: None.

II. Requirements

Eligibility Requirements

Eligibility Requirement (a): State Fiscal Stabilization Fund (Stabilization) Phase 1 and 2:

Comment: Many commenters expressed support for the eligibility requirement that States have their State Fiscal Stabilization Fund program Phase 1 and Phase 2 applications approved in order to be eligible for a Race to the Top award. Other commenters expressed concern that States may have difficulty obtaining approval of their Stabilization Phase 2 applications in time to submit a Race to the Top application. One commenter expressed concern that the Department's approval of Stabilization Phase 2 applications may occur too late for a State to apply during Phase 1 of the Race to the Top competition. One commenter specifically noted the difficulty in satisfying the data requirements for Stabilization Phase 2 in time to apply for the Race to the Top competition. Some commenters requested information pertaining to the timing of Stabilization Phase 2 applications and the Race to the Top competition.

Discussion: The eligibility requirement pertaining to the approval of Stabilization applications is being changed to require only that the State have approved Stabilization Phase 1 and Phase 2 applications by the time the State is awarded a Race to the Top grant. Thus, a State's Stabilization Phase 2 application will not need to be approved at the time it prepares or submits its Race to the Top application.

Changes: Eligibility requirement (a) has been changed to read: ''A State must meet the following requirements in order to be eligible to receive funds under this program. (a) The State's applications for funding under Phase 1 and Phase 2 of the State Fiscal Stabilization Fund program must be approved by the Department prior to the State being awarded a Race to the Top grant.''

Eligibility Requirement (b): Linking Student Data to Teachers and Principals:

Comment: Numerous commenters expressed their support for evaluating teachers and principals based on student achievement or growth. These commenters suggested that the final notice should require States to use student growth data in teacher and principal evaluations. Several commenters offered their support for the requirement that a State not have any barriers to linking student achievement or student growth data to teacher and principal evaluations. These commenters specifically noted that teachers should be judged by their effectiveness, not by their credentials or years of service.

Several commenters, however, claimed that there is a lack of research or evidence demonstrating that the use of such data for teacher and principal evaluations has any positive impact on teacher, principal, or student performance. A few commenters disagreed with the Department's reference to research indicating that teacher qualifications, including certification status and years of experience, are not accurately predictive of teacher quality. Other commenters identified research explaining the difficulty in disaggregating student achievement data to determine a teacher's effect from other variables. One commenter suggested that States should pass laws requiring a peer reviewed validation of any value-added methodology before including student achievement data as part of any evaluation or compensation mechanism and further argued that such laws should not constitute a State barrier under the eligibility requirements.

Discussion: As indicated in the NPP, we believe that research clearly shows that teacher and principal quality are critical contributors to student learning. The Department believes that student achievement and student growth data are meaningful measures of teacher and principal effectiveness, and therefore, should be considered as a part of a rigorous, transparent and fair evaluation system. Consequently, legal barriers to linking data about student achievement or student growth to teachers and principals for evaluation purposes effectively prevents schools from having the core information systems they need to serve students well. For these reasons, we decline to make substantive changes to eligibility requirement (b).

Changes: None.

Comment: Several commenters asked whether teacher or principal contracts or local collective bargaining agreements that prohibit the use of student achievement data for teacher and principal evaluations would constitute a State barrier, thus making a State ineligible for the Race to the Top competition. One commenter noted that one specific State lacks control over teacher and principal evaluation systems.

Discussion: The Department has revised eligibility requirement (b) to clarify that the State must not have any legal, statutory, or regulatory barriers at the State level to linking student achievement or student growth data to teachers and principals for purposes of evaluation. Therefore, a State would be eligible to apply for a Race to the Top grant even if a teacher or principal contract or collective bargaining agreement at the local level prohibited the use of student achievement or student growth data for evaluation purposes.

Changes: Eligibility requirement (b) has been changed to read: ''At the time the State submits its application, there must not be any legal, statutory, or regulatory barriers at the State level to linking data on student achievement (as defined in this notice) or student growth (as defined in this notice) to teachers and principals for the purpose of teacher and principal evaluation.''

Comment: One commenter suggested limiting the eligibility requirements pertaining to linking student achievement data to teacher and principal evaluations to exclude educators working in early learning or child care programs. This commenter claimed that teacher and principal evaluation systems would not be applicable to a State's proposal emphasizing early learning initiatives.

Discussion: The Department believes that student growth data are strong measures of teacher effectiveness across the spectrum from preschool to grade 12. While traditional student achievement and student growth data may not be routinely collected in early learning settings, relevant student achievement and student growth data are available in other forms. Child outcome data should not be the only measures of teacher effectiveness in early learning settings, but can provide useful information to improve the effectiveness of early childhood educators and administrators when coupled with other quantitative and qualitative indicators.

Changes: None.

Comment: One commenter recommended that the notice clarify what level of change to a State law regarding linking data on student achievement or student growth to teachers and principals would be necessary in order to be eligible for Race to the Top funds. For example, one commenter asked if legislation to remove a barrier to linking student achievement data to teachers and principals would need to be enacted prior to applying for Race to the Top funds or whether the introduction of such legislation would be adequate to the meet eligibility requirements. Another commenter asked whether a State would need to enact legislation adopting its plan in its State education code to be eligible to apply for Race to the Top funds.

Discussion: Eligibility requirement (b) contemplates only existing laws; a State will not be able to establish its eligibility based on intent to change those laws. There is no requirement in the ARRA or in this notice requiring States to enact legislation adopting their Race to the Top plans.

Changes: None.

Comment: Some commenters suggested that States should be eligible for the Race to the Top competition even if barriers exist to linking student achievement or student growth data to teachers and principals for evaluation purposes, so long as the State's reform plan only includes LEAs and charter schools that allow such linkages. One commenter argued that the eligibility requirement is unfair because LEAs without such prohibitions would not receive Race to the Top funds if they were situated in a State with such barriers.

Discussion: Under eligibility requirement (b), States are required to demonstrate that they do not have any legal, statutory, or regulatory barriers at the State level to linking student achievement or student growth data to teachers and principals for the purpose of evaluations. States that have such barriers are not eligible for Race to the Top awards. Race to the Top is meant to provide an incentive for statewide reform and improvements, and is a competitive grant program encouraging States to be bold and innovative. While individual LEAs and charter schools in States with barriers may be ready and eager to use student growth data to identify and improve teacher and principal effectiveness, Race to the Top focuses on the extent to which the State's conditions and plans lead to statewide impact.

Changes: None.

Comment: Numerous commenters argued that one specific State's law, which prohibits linking teacher and student achievement data, should not disqualify it from applying for the Race to the Top competition. Some of these commenters argued that the State's law does not prohibit data linking between students and teachers at the district level where personnel decisions are made, and therefore should not make the State ineligible for Race to the Top funds. One commenter, however, specifically stated their support for the data linkage eligibility requirement with respect to the State.

Another commenter argued that an existing statute regulating the use of student achievement data in tenure determinations in another State should not make the State ineligible to apply for the Race to the Top competition. The commenter argued that the statute does not prohibit use of student test data in annual teacher performance reviews or for tenure consideration.

Discussion: As stated earlier, the Department believes that student growth should be one significant measure of several when evaluating teacher and principal effectiveness. State level data linkage barriers unduly restrict schools and LEAs from using student achievement or student growth data to identify and improve teacher and principal effectiveness. The Department also believes that schools and LEAs should have the ability to choose to use student achievement and student growth data in this manner. For this reason, the Department declines to exempt any one State from this requirement and encourages States to lift legal, statutory, and regulatory barriers that prohibit these linkages.

The Department notes that this notice requires the State's Attorney General to certify that the State has no legal, statutory, or regulatory barriers at the State level to linking student achievement or student growth data to teachers and principals for the purpose of evaluations.

Changes: None.

Eligibility Overall

Comment: Multiple commenters suggested adding an eligibility requirement to limit eligibility for Race to the Top funds to States that meet the requirements in their FY 2007 Annual Performance Report under the IDEA. Those commenters noted that States unable to meet basic IDEA requirements should not be eligible to apply for Race to the Top funds.

Discussion: Race to the Top is a competitive grant program intended to improve educational outcomes for all students. The Department already has a mechanism to monitor States' progress, as reported in their Annual Performance Reports, in meeting the targets in their State Performance Plan under the IDEA. Therefore, we decline to include the requirement suggested by the commenter as an eligibility requirement in the Race to the Top competition.

Changes: None.

Comment: One commenter suggested the Department consider the number of outstanding audits and audit exceptions against a State for any Federal education program as part of the Race to the Top program eligibility determination. One commenter suggested that if awards were given to States with audit exceptions, conditions should be imposed on the award of funds, including onsite monitoring.

Discussion: The Department has taken extraordinary measures to ensure accountability in the use of all ARRA funds, including the Race to the Top program, so that all dollars are used wisely and accounted for in a transparent manner. Indeed, as explained in the Reporting section of this final notice and the notice inviting

applications, successful applicants must comply with the ARRA annual reporting requirements in section 14008 of the ARRA and quarterly reporting requirements in section 1512(c) of the ARRA, which are designed to ensure thorough and public oversight of the expenditure of ARRA funds. The Department has established a Recovery Act Web site and hotline for members of the public to report suspected misuse of funds. Additionally, the Department has other mechanisms and protections in place to enforce and monitor progress and resolution of any prior audit findings from other programs. Accordingly, we do not believe it is necessary to add requirements pertaining to States that have audit exceptions.

Changes: None.

Application Requirements

Reorganization of the Application Requirements

Comment: None.

Discussion: In order to streamline the application requirements and the criteria and reduce burden for applicants, we are removing from this final notice proposed application requirements that were duplicative of the criteria. The remaining application requirements are being renumbered, accordingly. For instance, proposed application requirement (c) concerning the level of State funding for education is being removed from the final application requirements but is still being retained in criterion (F)(1)(i); and proposed application requirement (d) concerning support from stakeholders is being removed but is still being retained in criterion (A)(2)(ii). In addition, we are revising the application requirements to make minor editorial changes, providing internal cross references to relevant portions of the notice, and reorganizing application requirement (e) to better clarify the components of this requirement.

Changes: We have removed proposed application requirements (c) and (d). We have reordered the application requirements accordingly. We have made minor editorial changes to provide better clarification to this section, have clarified that the Governor must sign the assurances in Section IV of the application, and have reorganized application requirement (e).

Comment: Some commenters recommended providing benchmarks or statutory tests to help provide consistency in how State Attorneys General determine and certify their State's eligibility for Race to the Top. Some commenters suggested that the Department provide a ''test'' for Attorneys General to apply to their State law to determine eligibility.

Discussion: Under application requirement (f) (proposed application requirement (h)), the State's Attorney General is asked to certify that the State has no legal, statutory or regulatory barriers at the State level with respect to eligibility requirement (b). We interpret this to mean State constitutions, case law, statutes, or regulations. Interpretation of a State's laws falls uniquely within the expertise of the State Attorney General and therefore, we leave this task to the Attorney General. The Department notes that the certification requirement does not seek a formal legal opinion. Instead, the Department provides forms in the application for Attorneys General to sign certifying that (a) the description of, and statements and conclusions in the application concerning State law, statute, and regulation in its application are complete, accurate, and constitute a reasonable interpretation of State law, statute and regulation; and (b) that the State does not have any legal, statutory, or regulatory barriers at the State level to linking data on student achievement or student growth to teachers and principals for the purpose of teacher and principal evaluations. The certification of the Attorney General addresses this requirement. The applicant may provide explanatory information, if necessary.

In addition, we note that we are changing application requirement (f) to be consistent with the changes to eligibility requirement (b), as discussed earlier, and separating application requirement (f) into two subparagraphs.

Changes: Application requirement (f) has been made consistent with eligibility requirement (b), as discussed earlier, and separated into two subparagraphs.

High-Need LEAs

Comment: Many commenters had difficulty interpreting proposed application requirement (e)(2) that would have required States to explain in their budget plans how it will use Race to the Top funds to give priority to high-need LEAs over and above the participating LEA share.

Discussion: First, the Department notes that it inadvertently neglected to use the statutory definition of high-need LEA in the NPP, as found in section 14013(2) of the ARRA. Accordingly, and as discussed in this notice, we are changing the definition of *high-need LEA* to reflect the statutory definition: ''[an LEA] that serves not fewer than 10,000 children from families with incomes below the poverty line; or for which not less than 20 percent of the children served by the LEA are from families with incomes below the poverty line.''

Consistent with section 14006(c) of the ARRA, States must subgrant 50 percent of their grant awards to participating LEAs, based on the LEAs' relative share of Title I, Part A allocations in the most recent year. We have clarified in application requirement (c)(2) that, because all Race to the Top grants will be made in 2010, relative shares will be based on total funding received in FY 2009, including both the regular Title I, Part A appropriation and the amount made available by the ARRA.

Consistent with section 14005(c)(4) of the ARRA, application requirement (c)(2) requires a State to include in its application a budget detailing how the State will use Race to the Top funds to ''give priority to high-need LEAs'' beyond the base amount provided to all participating LEAs. States have flexibility to determine the meaning of ''give priority to,'' which could include, for example, additional funding, more comprehensive technical assistance, coordination of State or local social services for students in such LEAs, expanded professional development, and larger incentives for teachers and principals who agree to work in these LEAs.

Changes: Application requirement (c)(2) has been revised to include: ''(**Note:** Because all Race to the Top grants will be made in 2010, relative shares will be based on total funding received in FY 2009, including both the regular Title I, Part A appropriation and the amount made available by the ARRA).''

Reporting Requirements

Comment: Several commenters raised questions concerning accountability for Race to the Top funds. One commenter praised the proposed requirements but wanted greater detail on how we would ensure ''successful on-the-ground implementation'' of the Race to the Top program. One strategy suggested by the commenter was to withhold funds from States that do not meet the commitments they make in their Race to the Top applications. Other commenters recommended that Race to the Top funds be conditioned on meeting performance goals as reflected in the annual reports, or that the Department withhold funds from those States not meeting their commitments. Two commenters requested flexibility for States to revise their State plans to encourage continuous improvement.

Discussion: The Reporting Requirements section in this final notice explains that the Department plans to both support and carefully monitor State and LEA progress in meeting their goals, timelines, budgets, and annual performance targets. If we determine that a State is not meeting one or more of the requirements for this program, the Department may take a range of actions to remedy the situation, including placing the State in high-risk status, putting the State on reimbursement payment status, or delaying or withholding funds. The Department also recognizes that States may wish to, or need to, revise their Race to the Top plans occasionally to take into account changing circumstances; such revisions will be subject to approval by the Secretary. The Department recognizes that many of the accountability requirements of the Race to the Top program differ from those of the ESEA, and that winning States will be adding a new layer of goal-setting, performance measurement, and data collection to their existing accountability systems. Finally, to provide greater clarity and completeness to the Reporting Requirements section, we are including the reporting requirements contained in sections 1512(c) and 14008 of the ARRA.

Changes: We have added the reporting requirements contained in sections 1512(c) and 14008 of the ARRA.

Comment: One commenter argued that the Department may not use written performance agreements or cooperative agreements to monitor a State's progress because, they claimed, ARRA only allows grants monitoring. Another commenter stated that the Department should be a full participant in the Race to the Top program and, therefore, that Race to the Top awards should be cooperative agreements, rather than grants.

Discussion: The Department intends to support States and LEAs through technical assistance, evaluations, and other mechanisms to facilitate them in meeting their goals, timelines, budgets, and annual performance targets. Contrary to the assertion by one commenter, the Department has the authority under the Federal Grant and Cooperative Agreement Act of 1977 (31 U.S.C. Chapter 63) to use written performance agreements or cooperative agreements to monitor Race to the Top grantee performance. As stated in the NPP and reiterated in this notice, the Department may require grantees to enter into a written performance or cooperative agreement with the Department as a condition of receiving the grant; a final determination will be made at the time of grant awards. We do not believe it is necessary to arbitrarily require these agreements for all grantees because the determination whether to use a cooperative agreement as the award instrument is based on the nature of the relationship and the activities to be performed by the grantee, and is therefore highly case specific.

Changes: None.

Program Requirements

Evaluation

Comment: In response to the NPP's request for advice on the best way to conduct an evaluation of the Race to the Top program, many commenters recommended that States conduct their own Race to the Top evaluations. These commenters believed that the likely breadth of variation in Race to the Top plans would make it difficult to conduct a national evaluation, and that State-level evaluations would provide the kind of detailed feedback needed to support continuous improvement. However, another commenter asserted that a relatively small number of States were expected to receive a Race to the Top award and, according to the commenter, that a national evaluation is a far more efficient method than using Race to the Top funds to pay for individual State-led evaluations. Another commenter emphasized the importance of a national evaluation of the Race to the Top program using State data. A few commenters recommended that we carry out both national and State-level evaluations of the Race to the Top program.

Other commenters requested information on funding for Race to the Top evaluations, and two commenters recommended that up to 10 percent of Race to the Top awards be available to support those evaluations. One commenter expressed concern that the reporting requirements were focused on outcomes only, and did not include a description of the processes used to achieve those outcomes. Finally, four commenters suggested that a national evaluation should focus on identifying promising or best practices, while two commenters recommended the inclusion of ''process metrics'' to ensure that best practices can be fully documented to facilitate dissemination and adoption by others.

Discussion: The Department appreciates this advice on how to structure an evaluation plan for the Race to the Top program. As described later in this notice, the Institute of Education Sciences (IES) will conduct a series of national evaluations of Race to the Top State grantees. The Department's goal for these evaluations is to ensure that its studies not only assess program impacts but also provide valuable information to State and local educators to help inform and improve their practices. We are not requiring through this notice that Race to the Top grantee States conduct independent evaluations. However, they are free to propose, within their applications, to use funds from Race to the Top to support independent evaluations. A full explanation of the Race to the Top evaluation plan is included in the Program Requirements section of this notice and the notice inviting applications.

Changes: We have revised the Program Requirements section to reflect the evaluation requirements for all States that win a Race to the Top grant. Specifically, this notice has been revised to require State grantees to participate in a series of national evaluations that will be conducted by IES. This notice has been revised to reflect that these evaluations will involve components described further in this notice, including surveys, case studies, and evaluation of outcomes. We have further clarified that States have the option of conducting additional evaluations using Race to the Top funds or other funds. We have also revised this notice to reflect that State grantees, LEAs, and schools are expected to identify and share promising practices and make data available to help all States focus on continuous improvement.

Participating LEA Scope of Work

Comment: None.

Discussion: The Program Requirement concerning Participating LEA Scope of Work is addressed in the discussion for Section A, State Success Factors.

Change: The Program Requirement section is revised to include a requirement on Participating LEA Scope of Work.

Making Work Available

Comment: Two commenters suggested that the Department require that any new educational materials developed by Race to the Top State grantees be made available as open educational resources. One of these recommended that all outputs be open source and royalty-free. Several other commenters expressed concern about copyrighted intellectual property, proprietary systems, and the rights of contractors or partners, and that a requirement to share all outputs would preclude States from entering into contracts or licensing agreements or would conflict with agreements already in place. A commenter noted that one

specific State relies on subscriptions to copyrighted services for data warehousing and would have to build new systems to share data tools freely with the public. Two commenters suggested using the exclusion in the Statewide Longitudinal Data Systems grant program to protect intellectual property and proprietary products in Race to the Top.

Discussion: We understand and agree with the concerns about proprietary information in the context of the proposed requirement that States and LEAs make available materials developed with Race to the Top funds. We are revising the Program Requirements section entitled *Making Work Available* to provide that such materials must be available ''unless otherwise protected by law or agreement as proprietary information.'' We also have clarified that this agreement applies to work developed under this grant.

Changes: The *Making Work Available* requirement has been revised to read as follows: ''Unless otherwise protected by law or agreement as proprietary information, the State and its subgrantees must make any work (*e.g.*, materials, tools, processes, systems) developed under its grant freely available to others, including but not limited to by posting the work on a Web site identified or sponsored by the Department.''

State Summative Assessments

Comment: None.

Discussion: The Program Requirement concerning State summative assessments is addressed in the discussion for Section B, Standards and Assessments.

Changes: The Program Requirement Section is revised to include a program requirement on State summative assessments.

Technical Assistance

Comment: One commenter expressed support for the requirement that States participate in the Department's technical assistance activities. This commenter also suggested that technical assistance be provided by the federally supported research and development infrastructure, such as the regional labs. Another commenter argued that because successful implementation may be difficult, the Department should devote more resources and personnel to providing clear and fair technical assistance. One commenter recommended that the Department provide States with funds to cover the estimated costs of participating in technical assistance.

Discussion: The Department intends to conduct extensive technical assistance activities related to Race to the Top grants and will utilize to the extent feasible all available resources, including federally supported research centers and regional laboratories, to support those activities. In addition, we will work to minimize the cost of this technical assistance to participants.

Changes: None.

Using Subgroups Under NAEP and the ESEA

Comment: None.

Discussion: The application requirement concerning use of subgroups under NAEP and the ESEA for reporting achievement gains and for setting future targets is addressed in the discussion for Section A, State Success Factors.

Changes: We have added new paragraph (g) in the application requirements that explains the subgroup data that a State must provide in various parts of the application.

A. State Success Factors

Definitions: college enrollment, involved LEAs, participating LEAs.

Comments regarding the preceding definitions are addressed, as appropriate, below.

New Selection Criterion (A)(1)(i)

Comment: None.

Discussion: As noted elsewhere, we are adding a new section, ''State Success Factors,'' to the beginning of the Selection Criteria section in order to provide an opportunity for States to begin their Race to the Top proposals with a clear statement of their comprehensive and coherent statewide reform agendas. We are adding criterion (A)(1)(i) which will be used to assess the extent to which a State is successful in articulating the State's reform agenda.

Changes: Criterion (A)(1) begins: ''*Articulating the State's education reform agenda and LEAs' participation in it:* The extent to which—(i) The State has set forth a comprehensive and coherent reform agenda that clearly articulates its goals for implementing reforms in the four education areas described in the ARRA and improving student outcomes statewide, establishes a clear and credible path to achieving these goals, and is consistent with the specific reform plans that the State has proposed throughout its application.''

Selection Criteria (A)(1)(ii) and (iii): Participating LEAs (proposed criteria (E)(3)(iv) and (E)(4)):

Note: A number of comments common to criteria (A)(1)(iii) and (A)(3)(ii) are addressed in the discussion of (A)(3)(ii) later in this notice.

Comment: Many commenters requested clarification regarding funding for LEAs under the Race to the Top program, State discretion to select participating LEAs, and whether LEAs may decline Race to the Top funding. Many commenters questioned whether State applications may exclude LEAs that are not committed to part or all of a State's Race to the Top plan. One commenter recommended giving States complete control over how Race to the Top funds are spent by participating LEAs, claiming that the State, not the LEA, will be held accountable for meeting Race to the Top goals and targets. Other commenters suggested that Race to the Top funds should be awarded only to LEAs that sign an agreement or otherwise fully agree to implement its State's Race to the Top plans. One commenter asked whether LEAs receiving a share of the 50 percent of Race to the Top funds distributed on the basis of the Title I, Part A formula under the ESEA are required to participate in the Race to the Top program. Several commenters asked if LEAs would be subject to Race to the Top requirements even if they declined to participate.

Discussion: In response to these comments, and because LEAs are ultimately responsible for implementing many of the items in a State's Race to the Top plan, we have made a number of changes to provide great clarity on how LEAs can be involved in a State's plan. First, we are providing that LEAs can be included in States' Race to the Top projects at one of two levels: as ''participating LEAs'' or as ''involved LEAs.''

Participating LEAs, as defined in this notice, means LEAs that choose to work with the State to implement all or significant portions of the State's Race to the Top plan, as specified in each LEA's agreement with the State. Each participating LEA that receives funding under Title I, Part A will receive a share of the 50 percent of a State's grant award that the State must subgrant to LEAs, based on the LEA's relative share of Title I, Part A allocations in the most recent year, in accordance with section 14006(c) of the ARRA. Any participating LEA that does not receive funding under Title I, Part A (as well as one that does) may receive funding from the State's other 50 percent of the grant award, in accordance with the State's plan.

States do not have the discretion to select participating LEAs; instead, each LEA will make the decision to sign on to the State's plan as a participating

LEA. All LEAs that agree to work with the State, and that sign valid agreements stating their commitment to implement all or significant portions of the State's plan (as defined by the State) must be included in the State's plan. States do have the flexibility to develop detailed reform plans in which LEAs must choose whether to participate. States also have the authority to define the ''significant portions'' of their Race to the Top plans that LEAs must agree to implement in order to qualify as participating LEAs. As described earlier, States that receive a Race to the Top grant must use at least 50 percent of the award to provide subgrants to their participating LEAs based on their relative shares of funding under Part A of Title I of the ESEA for the most recent year. Because all Race to the Top grants will be made in 2010, relative shares will be based on total funding received in FY 2009, including both the regular Title I, Part A appropriation and the amount made available by ARRA. The remaining funds will be available to the State for State-level activities and for disbursement to participating LEAs (regardless of their Title I eligibility), involved LEAs, or other entities, consistent with the State's plan. A State has no obligation to provide Race to the Top funds, benefits, or supports to non-participating LEAs.

Participating LEAs must in turn use their funding in a manner that is consistent with the State's plan and its MOU or other binding agreement with the State. States may establish more detailed rules on uses of funds provided they are consistent with the ARRA, the terms of the grant award, and the Department's applicable administrative regulations. Although participating LEAs will receive subgrants from the State as described earlier, Race to the Top funds are not governed by the Title I restrictions on the uses of funds.

As described earlier, participating LEAs agree to implement all or a significant portion of State's Race to the Top plans. However, other LEAs may choose to work with the State to implement those specific portions of the State's plan that require statewide or nearly statewide implementation, such as transitioning to a common set of K–12 standards. We have defined these LEAs in this notice as *involved LEAs.* As defined, involved LEAs do not receive a share of the 50 percent of a State's grant award that it must subgrant to LEAs in accordance with section 14006(c) of the ARRA, but States may provide other funding to involved LEAs under the State's Race to the Top grant in a manner that is consistent with the State's application.

In general, involved LEAs are not included in, and are not subject to, the requirements of a State's Race to the Top plan.

It is important to note that this notice does not require LEAs to participate in a State's plan (whether as participating or as involved LEAs) or give States the authority to impose such a requirement. Rather, through the definitions of *participating LEA* and *involved LEA,* we are setting the parameters for what LEAs must do to be eligible for certain funding streams. In addition, through absolute priority 1, the Department is specifying that States will only be awarded grants if they demonstrate sufficient LEA participation and commitment to successfully implement and achieve the goals of their plans; and through criteria (A)(1)(ii) and (A)(1)(iii), this notice sets forth the terms by which reviewers will award points to each State based on the participation and commitment of their LEAs.

Changes: We have added two new definitions to this notice. The definition of *participating LEAs* clarifies that participating LEAs choose to work with the State to implement all or significant portions of the State's Race to the Top plan, as specified in each LEA's agreement with the State. Each participating LEA that receives funding under Title I, Part A will receive a share of the 50 percent of a State's grant award that the State must subgrant to LEAs, based on the LEA's relative share of Title I, Part A allocations in the most recent year, in accordance with section 14006(c) of the ARRA. Any participating LEA that does not receive funding under Title I, Part A (as well as one that does) may receive funding from the State's other 50 percent of the grant award, in accordance with the State's plan.

The definition of *involved LEAs* clarifies that such LEAs choose to work with the State to implement those specific portions of the State's plan that necessitate full or nearly-full statewide implementation, such as transitioning to a common set of K–12 standards (as defined in this notice). Involved LEAs do not receive a share of the 50 percent of a State's grant award that it must subgrant to LEAs in accordance with section 14006(c) of the ARRA, but States may provide other funding to involved LEAs under the State's Race to the Top grant in a manner that is consistent with the State's application.

Comment: Many commenters recommended that the Department define ''participating school'' in the final notice.

Discussion: Participating LEAs are responsible for determining the roles and responsibilities of their schools in Race to the Top activities; these should be consistent with the LEA's agreement with the State. Consequently, we do not believe that there is a need for a definition of participating school in this notice.

Changes: None.

Comment: Commenters requested additional clarification pertaining to how States would identify and account for LEA participation and support in State reform plans. Multiple commenters recommended that participating LEAs and charter schools formally declare their support in writing as part of the Race to the Top application. One commenter recommended requiring States to list all the LEAs that requested to be included in designing and developing the State plan.

Discussion: Proposed criterion (E)(3)(iv) was included to elicit information about the extent of the commitment to and participation of LEAs in a State's Race to the Top plan. Because we believe that States should begin their Race to the Top proposals with clear statements of their entire reform agendas, and because LEA implementation is a central component of that agenda, we are moving this criterion into the new ''State Success Factors'' section. Furthermore, to add clarity, we are dividing the proposed criterion into two revised criteria. In this final notice, criterion (A)(1)(ii) addresses the level of commitment among participating LEAs, while criterion (A)(1)(iii) addresses the extent of LEA participation.

Because the extent of LEA participation should be measured partly by the expected effects on student outcomes statewide, we have incorporated into criterion (A)(1)(iii) the language from proposed criterion (E)(4) regarding a State's goals for increasing student achievement, decreasing achievement gaps, and increasing graduation rates. As discussed later, we also include new criterion (A)(1)(iii)(d) regarding increasing college enrollment and credit accumulation.

In addition, as evidence to support the State's response to criteria (A)(1)(ii) and (A)(1)(iii), Appendix A to this notice asks States for the following information: (1) An example of the State's standard participating LEA MOU and description of variations used, if any; (2) the completed summary table indicating which specific portions of the State's plan each LEA is committed to implementing and relevant summary statistics; (3) the completed summary table, indicating which LEA leadership signatures have been obtained; (4) the completed summary table, indicating

the numbers and percentages of participating LEAs, schools, K–12 students, and students in poverty; (5) tables and graphs that show the State's goals, overall and by subgroup, requested in criterion (A)(1)(iii), together with the supporting narrative; and (6) the completed detailed table, by LEA, that includes the information requested in criteria (A)(1)(ii) and (A)(1)(iii).

As discussed in greater detail elsewhere in this notice, the Department is providing a sample MOU (see Appendix D) to assist States and LEAs during this process.

Changes: Criterion (A)(1)(ii) specifies that reviewers will evaluate the extent to which the participating LEAs are strongly committed to the State's plans and to effective implementation of the four education reform areas, as evidenced by Memoranda of Understanding (MOUs) (as set forth in Appendix D) or other binding agreements between the State and its participating LEAs (as defined in this notice) that include—

(a) Terms and conditions that reflect strong commitment by the participating LEAs (as defined in this notice) to the State's plans;

(b) Scope-of-work descriptions that require participating LEAs (as defined in this notice) to implement all or significant portions of the State's Race to the Top plans; and

(c) Signatures from as many as possible of the LEA superintendent (or equivalent), the president of the local school board (or equivalent, if applicable), and the local teachers' union leader (if applicable) (one signature of which must be from an authorized LEA representative) demonstrating the extent of leadership support within participating LEAs (as defined in this notice).

In addition, criterion (A)(1)(iii) specifies that LEA participation will be evaluated based on the extent to which the LEAs that are participating in the State's Race to the Top plans (including considerations of the numbers and percentages of participating LEAs, schools, K–12 students, and students in poverty) will translate into broad statewide impact, allowing the State to reach its ambitious yet achievable goals, overall and by student subgroup, for—

(a) Increasing student achievement in (at a minimum) reading/language arts and mathematics, as reported by the NAEP and the assessments required under the ESEA;

(b) Decreasing achievement gaps between subgroups in reading/language arts and mathematics, as reported by the NAEP and the assessments required under the ESEA;

(c) Increasing high school graduation rates (as defined in this notice); and

(d) Increasing college enrollment (as defined in this notice) and increasing the number of students who complete at least a year's worth of college credit that is applicable to a degree within two years of enrollment in an institution of higher education.

Finally, Appendix A, Evidence and Performance Measures, has been revised to specify the evidence that States must submit when responding to criteria (A)(1)(ii) and (A)(1)(iii).

Memoranda of Understanding (MOUs)

Comment: Many commenters requested clarification regarding the MOUs between States and participating LEAs, including the purpose, requirements, and expected contents of the MOUs.

Discussion: We agree with the commenters that additional clarification is needed on the purpose and content of the MOUs. As discussed earlier, we are clarifying in criterion (A)(1)(ii) the elements of the MOU or other binding agreements that reviewers will consider in evaluating LEA commitment. We also are adding a new requirement that clarifies the expectations for the Participating LEA scope of work. Finally, we are including in Appendix D to this final notice a model MOU to provide further guidance to States in preparing these agreements with their LEAs.

Changes: We have added to the program requirements a new *Participating LEA Scope of Work* requirement, which clarifies that the agreements signed by participating LEAs (as defined in this notice) must include a scope-of-work section. The scope of work submitted by LEAs and States as part of their Race to the Top applications will be preliminary. Preliminary scopes of work should include the portions of the State's proposed reform plans that the LEA is agreeing to implement. If a State is awarded a Race to the Top grant, its participating LEAs (as defined in this notice) will have up to 90 days to complete final scopes of work, which must contain detailed work plans that are consistent with their preliminary scopes of work and with the State's grant application, and should include the participating LEAs' specific goals, activities, timelines, budgets, key personnel, and annual targets for key performance measures. We have added a new Appendix D to this notice which provides a model MOU that States may use in developing these agreements.

Comment: One commenter suggested that final agreements with participating LEAs should be based on the actual amount of funding a State receives and, therefore, that States should not be required to provide detailed MOUs with their applications.

Discussion: The Department agrees that LEAs should not have to provide final agreements detailing their precise activities at the time that States apply, and as discussed earlier, we are clarifying in the new *Participating LEA Scope of Work* requirement that States will have 90 days after the receipt of a grant to negotiate the final scope of work agreements with their participating LEAs. However, we believe that it is critical that LEAs indicate, at the time they sign their MOU in connection with the State's application, which parts of the State's plan they will participate in implementing. Peer reviewers must have this information in order to determine, under criterion (A)(1)(ii), whether the State's participating LEAs are indeed strongly committed to the State's plan. We also note that, because we are providing nonbinding budget ranges in the notice inviting applications and encouraging States to propose budgets that match the plans they propose, States should have some sense of the expected funding available for LEAs before they apply for their grants.

Changes: None.

Comment: One commenter recommended that the Department accept a signed ''certification of consultation,'' rather than an MOU. The commenter stated that such a certification would be the more appropriate method for demonstrating agreement in the commenter's State.

Discussion: We understand that States may have processes and procedures other than an MOU that they use to establish agreements with their LEAs. As long as such certifications or agreements are binding, they may be included in a State's application as evidence of its LEAs' commitment to its reform plan. We are adding language in criterion (A)(1)(ii) to make this clear.

Changes: Criterion (A)(1)(ii) provides that participating LEAs' commitment to the State's plans may be evidenced by an MOU or other binding agreement.

Comment: A few commenters stated that it would be burdensome and time-consuming to require MOUs between an SEA and its LEAs with required signatories, and suggested that the Department allow SEAs to design and propose a stakeholder input process in accordance with State and local needs. One commenter requested clarification

as to whether a State's Race to the Top application must include an MOU with each LEA or whether an outline of what would be covered in an MOU with an LEA would suffice.

Discussion: The Department acknowledges that requiring States to develop and obtain signed MOUs for submission with Race to the Top applications on a short timeline will be a challenge. However, strong LEA participation in State Race to the Top plans is essential if those plans are to have a broad impact on student outcomes. To assist States in this work, we are providing, as part of the application package and Appendix D in this notice, a model MOU that States can adapt or use in signing agreements with their participating LEAs.

With regard to the question of whether a State's Race to the Top application must include an MOU with each LEA or whether an outline of what would be covered in an MOU with an LEA would suffice, criterion (A)(1)(ii) makes clear that the MOUs included in a State's application will be used as evidence of LEAs' commitment to the State's plan. Therefore, in order to receive maximum points on criterion (A)(1)(ii), a State should have an MOU for each participating LEA. However, in acknowledgement of the short timeline, we are clarifying in the new *Participating LEA Scope of Work* requirement that a State need only include preliminary scopes of work from its participating LEA in its application. States will have up to 90 days after receiving a grant award to obtain the final scope of work from participating LEAs. States also can use this time to reach agreements with additional participating LEAs.

Changes: We have included in Appendix D to this notice a model MOU that States can adapt or use for their LEAs who will be participating LEAs. In addition, we have added a new *Participating LEA Scope of Work* requirement in order to clarify that the MOUs need only include a preliminary scope of work, which must be finalized within 90 days of the State receiving a Race to the Top award. This requirement also clarifies that winning States can reach agreements with additional participating LEAs within 90 days of the State receiving a Race to the Top award.

Comment: Several commenters requested that the MOU between the State and its LEAs require the signature of the president of the local PTA units and State charter school membership associations. Another commenter requested that State union leaders be required to approve the State's entire application.

Discussion: The Department agrees that Race to the Top plans would benefit from input and involvement by parents, teachers, and the organizations that represent them. Thus, at the State level, criterion (A)(2)(ii) includes teachers' unions, parent-teacher organizations, and charter school membership associations among the broad group of stakeholders from which a State could obtain statements or actions of support to demonstrate statewide commitment to its Race to the Top plan. In addition, at the LEA level, criterion (A)(1)(ii)(c) specifies that LEA leadership support will be evaluated based on the number of signatures gathered from among the superintendent (or equivalent), school board president (or equivalent, if applicable), and teachers' union leader (if applicable).

Changes: None.

Comment: Two commenters recommended removing the phrase ''ambitious yet achievable'' in proposed criterion (E)(4) on the grounds that it might encourage States to set a low bar and that it reflects a step backward from current ESEA accountability requirements emphasizing 100 percent proficiency for all students. A number of commenters requested that the Department provide more guidance on expectations for State targets.

Discussion: We are retaining the ''ambitious yet achievable'' language in criterion (A)(1)(iii) (proposed criterion (E)(4)). The Department believes that this language strikes the right balance between encouraging States to set a high bar for Race to the Top goals while recognizing that real change in education is difficult and takes time. The purpose of this language is to encourage realistic thinking and planning that connects specific activities to specific achievable results. Further, the Department believes that the competitive aspect of the Race to the Top program will prevent States from setting low bars.

Changes: None.

Comment: One commenter objected to our proposal that in responding to proposed criterion (E)(4), regarding targets for improved student outcomes, States submit an estimate of the State's expected levels of future performance were the State not to receive Race to the Top funding; this commenter argued that a State's goal should be the same with or without additional funding. Another commenter requested clarification as to how such outcomes should be estimated.

Discussion: Because this requested piece of evidence was confusing to States, we have decided not to include it in the final notice.

Changes: The final notice does not ask States to provide estimates of their expected levels of future performance were they not to receive funds under this program.

Selection Criterion (A)(2)(ii): Stakeholder Support (proposed criterion (E)(3)):

Comment: We received many comments on the list of stakeholders in proposed criterion (E)(3) from which States could enlist support and commitment for their State plans. Many commenters welcomed the broad list of stakeholders; in particular, several commenters expressed appreciation for including teachers' unions in the list of stakeholders given the need for teacher and school staff support to effectively implement Race to the Top reforms. A few commenters recommended adding principals to the list of stakeholders. Some commenters recommended that States obtain the signature of union leaders on their applications, while another recommended that teachers' unions not be given ''veto power'' over statewide or local plans.

Discussion: We agree with commenters that it is important for States to obtain support for their reform plans from teachers and principals, and that this should include a State's teachers' union or statewide teachers' association. As stewards of the teaching workforce, teachers' unions have a critical role to play in education reform. Therefore, in this final notice, criterion (A)(2)(ii)(a) (proposed criterion (E)(3)) specifically identifies teachers and principals, which include a State's teachers' union or statewide teachers' association, as stakeholders whose support will earn States points. However, we decline to require States to obtain signatures from union leaders in order to apply for a Race to the Top Grant.

Note that for clarity, we have moved ''charter school authorizers'' from this list to the list in criterion (A)(2)(ii)(b), regarding other critical stakeholders.

Changes: Criterion (A)(2)(ii)(a) provides for evaluation of a State's application based on the extent to which it has a high-quality plan to use the support from its teachers and principals, which include the State's teachers' unions or statewide teacher associations, to better implement its plans.

Comment: Some commenters stated that State plans should not include elements that potentially undermine collective bargaining agreements.

Discussion: We agree with the comment that State reform plans should

not undermine collective bargaining agreements. We also believe that Race to the Top may lead to forward-thinking approaches that change how LEAs and teachers' unions work together within the framework of collective bargaining. Of course, any changes to collective bargaining agreements must be collectively bargained.

Changes: None.

Comment: Many commenters recommended that other stakeholder groups be included in proposed criterion (E)(3) as groups from which States should obtain support and commitment for their State plans. Commenters recommended that the following groups be included: State legislatures, charter school associations, parent and family organizations, parent-teacher associations, Parent Information and Resource Centers, youth-serving community-based organizations (CBOs) and other community groups, CBOs serving Native American tribes, higher education leaders and providers, members of the business community, private and faith-based school leaders, students, local education funds, value-added intermediaries, public broadcasting entities, municipal leaders, teachers and principals who have successfully turned around schools, school service providers, guidance counselors, statewide after-school networks, and statewide teacher associations.

Discussion: We appreciate the broad and diverse group of stakeholders that commenters identified as important to States' reform efforts. Obviously, the stakeholders from which a State should garner support for its reform plan will vary based, to a large extent, on the unique needs of the State and its LEAs. While we cannot include all of the stakeholders recommended by commenters in this notice, we believe it is important to include several examples for illustrative purposes and to encourage States, as appropriate to their unique contexts, to solicit broad support. We are, therefore, designating proposed criterion (E)(3)(ii) as criterion (A)(2)(ii)(b), and adding ''charter school authorizers'' from proposed criterion (E)(3)(i), as well as additional stakeholders from whom the State may want to obtain support for its plans.

Changes: Criterion (A)(2)(ii)(b) reads as follows: ''Other critical stakeholders, such as the State's legislative leadership; charter school authorizers and State charter school membership associations (if applicable); other State and local leaders (*e.g.,* business, community, civil rights, and education association leaders); Tribal schools; parent, student, and community organizations (*e.g.,* parent-teacher associations, nonprofit organizations, local education foundations, and community-based organizations); and institutions of higher education.''

Comment: Some commenters viewed proposed criterion (E)(3) as an opportunity to be involved in developing a State's reform plan. One commenter recommended adding language to the final notice to require LEA participation in the development of the State plan, while another commenter proposed that States develop their plans in consultation with civil rights leaders, parents, and community groups that are representative of the State's population, and document such consultation. Other commenters recommended that the Department award additional points for State plans that coordinate and integrate support from education, health, nutrition, social services, and juvenile justice stakeholders, or for demonstrating a broad spectrum of stakeholder support.

Discussion: There is no requirement that a State involve its LEAs, or any other persons or groups, in developing its reform plan. However, given that the success of a State's plan depends, to a large extent, on the support and commitment of its LEAs to implement the plan, we strongly encourage States to work together with their LEAs in developing their State plan. Similarly, we believe that committed and interested stakeholders can make the difference in a reform's success or failure. We decline to require States to develop their plans with any specific stakeholders or to award additional points for plans that coordinate with specific groups or agencies, as recommended by commenters. We believe the decision on who to work with in developing a State plan is best left to States.

Changes: None.

Comment: A number of commenters expressed concern that requiring support or input from a broad range of stakeholders could lead to less rigorous, ''watered-down'' plans if States were to satisfy all the different groups with their competing interests. Some of these commenters recommended eliminating the provision on stakeholder support from the final notice, while others suggested clarifying that ''buy-in'' from all stakeholders is not required. Several commenters requested a definition of ''statewide support.''

Discussion: Race to the Top does not require States to work with specific stakeholders (other than LEAs) or obtain their support and commitment in order to be eligible for a grant. Instead, States will earn points for demonstrating stakeholder support under criterion (A)(2)(ii). In addition, we note that the list of proposed stakeholders in criterion (A)(2)(ii)(b) is illustrative. We believe that this list provides sufficient clarity regarding the phrase ''statewide support'' and, therefore, decline to define it in this notice.

Changes: None.

Comment: Some commenters requested that the Department include in the final notice examples of the specific kinds of evidence that should be used to demonstrate stakeholder support. For example, one commenter suggested that evidence of support should include strong letters of commitment from teachers' unions; another commenter suggested that States provide documentation that plans were developed with stakeholder support.

Discussion: We agree that it would be helpful to specify the evidence that a State should submit to demonstrate the strength of its support from a broad range of stakeholders. To give further guidance as to how States should respond to this criterion, we are revising criterion (A)(2)(ii) to clarify that reviewers will judge the extent to which a State has a high-quality plan to use its stakeholder support to better implement its Race to the Top plans, as evidenced by the strength of its stakeholders' statements or actions of support. We are also clarifying in Appendix A to this notice that States should provide the key statements or actions of support and a summary of them in their applications.

Changes: We have added to the introduction in criterion (A)(2)(ii), the following: ''Use support from a broad group of stakeholders to better implement its plans, as evidenced by the strength of the statements or actions of support from—.'' We have changed the requested evidence in Appendix A to require that States provide ''a summary in the narrative of the statements or actions and inclusion of key statements or actions in the Appendix'' when responding to this criterion.

Selection Criterion (A)(2): Building State Capacity (proposed criterion (E)(5)):

Comment: A number of commenters expressed support for criterion (A)(2) (proposed criterion (E)(5)), which focuses on a State's plan to build statewide capacity to implement, scale up, and sustain its reform plan. One commenter in particular emphasized the importance of plan implementation. This commenter claimed that States

often make empty promises and fail to deliver on their grant applications.

Discussion: We agree that the Race to the Top competition must judge States' capabilities to implement their plans, as well as the quality of the plans themselves. To emphasize this point, we are moving most of the criteria in proposed criterion (E)(5) to criterion (A)(2)(i), in which the Department will evaluate the extent to which a State has a high-quality plan to ensure it has the capacity necessary to implement its proposed Race to the Top plans. We are adding a criterion regarding State leadership. We are also including in criterion (A)(2)(i)(c) (proposed (E)(5)(i)) more specific examples of activities that support effective and efficient grant administration, such as budget reporting and monitoring, performance measure tracking and reporting, and fund disbursement.

Changes: Criterion (A)(2)(i)(a) has been added to address the extent to which a State has a high-quality plan to provide strong leadership and dedicated teams to implement the statewide education reforms plans the State has proposed. Criterion (A)(2)(i)(c) incorporates with minor changes the language from proposed criterion (E)(5)(i) and now reads: ''Providing effective and efficient operations and processes for implementing its Race to the Top grant in such areas as grant administration and oversight, budget reporting and monitoring, performance measure tracking and reporting, and fund disbursement.''

Comment: Some commenters supported proposed criterion (E)(5)(ii) and its focus on ensuring the dissemination of best practices.

Discussion: We agree that supporting LEAs to implement the State's reform plans and disseminate successful practices is critical to a State's reform efforts. Therefore, we are re-designating proposed criterion (E)(5)(ii) as criterion (A)(2)(i)(b) and adding examples of State activities that will help LEAs successfully implement reform plans, such as identifying promising practices, evaluating the effectiveness of these practices, ceasing ineffective practices, and widely disseminating and replicating effective practices.

Changes: We have re-designated proposed criterion (E)(5)(ii) as criterion (A)(2)(i)(b) and added additional text for clarity and completeness. Criterion (A)(2)(i)(b) now reads as follows: ''Supporting participating LEAs (as defined in this notice) in successfully implementing the education reform plans the State has proposed, through such activities as identifying promising practices, evaluating these practices' effectiveness, ceasing ineffective practices, widely disseminating and replicating the effective practices statewide, holding participating LEAs (as defined in this notice) accountable for progress and performance, and intervening where necessary.''

Comment: Some commenters suggested that the Department require coordination between State agencies and education-related organizations, for example, to share and scale up the adoption of successful Race to the Top strategies. Other commenters requested clarification regarding the collaboration contemplated by the Department in proposed criterion (E)(5)(iv), which would examine the quality of a State's plan to collaborate with other States on key elements of a State's application. Another commenter suggested that the Department strengthen this collaboration requirement.

Discussion: We agree that States and LEAs should partner with and learn from outside organizations, other agencies, and other States and LEAs whenever doing so would help them improve student outcomes. However, commenters' confusion over the Department's intentions around collaboration convinced us that reviewers would be best able to reliably score State applications if collaboration were evaluated in the context of specific plans rather than as a stand-alone portion of a State's application. In other words, to the extent that a State improves the quality of its plan in response to a given criterion by collaborating with others, the State will receive credit under that criterion for having a high-quality plan. In addition, in situations where there is especially clear value to collaboration among States, such as in the development of common standards and assessments (see criteria section B), we have specifically encouraged collaboration. We have therefore removed from this notice the more general criterion on collaboration (proposed criterion (E)(5)(iv)).

Changes: We have removed proposed criterion (E)(5)(iv), regarding collaboration with other States, from this final notice.

Comment: Some commenters emphasized the need for States to ensure that LEAs have sufficient resources to implement reforms.

Discussion: We agree with the commenters that LEA activities are central to Race to the Top and that LEAs will need sufficient resources to make their activities a success. In the NPP, proposed application requirement (e) required a State to include a budget that detailed, among other things, how it would use grant funds and other resources to meet targets and perform related functions. In this notice, we have retained that application requirement (re-designated as application requirement (c)), but also included language in criterion (A)(2)(i)(d) directing reviewers to evaluate how the State will use its Race to the Top funds to accomplish its plans and meet its targets. We also note that, under section 14006(c) of the ARRA, States must subgrant at least 50 percent of their Race to the Top grant to participating LEAs based on LEAs' relative shares of funding under Part A, Title I of the ESEA. In addition, States have considerable flexibility in awarding or allocating the remaining 50 percent of their Race to the Top awards, which are available for State-level activities, disbursements to LEAs, and other purposes as the State may propose in its plan.

Changes: Criterion (A)(2)(i)(d) provides for the evaluation of the extent to which the State has a high-quality plan for using the funds for this grant, as described in the State's budget and accompanying budget narrative, to accomplish the State's plans and meet its targets, including, where feasible, by coordinating, reallocating, or repurposing education funds from other Federal, State, and local sources so that they align with the State's Race to the Top goals.

Comment: A number of commenters expressed concern regarding proposed criterion (E)(5)(v), which focuses on the extent to which States coordinate, allocate, or repurpose funds from other sources to align with the State's Race to the Top goals. One commenter suggested that it was beyond the scope of the Race to the Top program to suggest that non-ARRA funds be reallocated to meet the goals of the Race to the Top program. A number of commenters requested that the Department add the phrase ''consistent with program requirements'' after proposed criterion (E)(5)(v) to ensure that reallocation of funds does not violate the program requirements of the IDEA.

Discussion: In response to concerns raised by many commenters regarding a State's ability or authority to repurpose education funds from other sources to align with a State's Race to the Top plan, we are adding ''where feasible'' in proposed criterion (E)(5)(v). We also are re-designating proposed criterion (E)(5)(v) as criterion (A)(2)(d) and adding additional text for clarity and completeness. However, we continue to believe that States need to focus and align their education funding resources for maximum impact consistent with

existing program requirements, and that Race to the Top should encourage States to leverage the improved use of all available resources, regardless of the source, to support effective, comprehensive changes in State and local education systems. In this context, consideration of the extent to which a State is willing to realign available resources in support of Race to the Top goals is not only appropriate, but necessary.

Changes: We have re-designated criterion (E)(5)(v) as criterion (A)(2)(d) and clarified that States will be judged based on their coordination, reallocation, or repurposing of education funds so that they support Race to the Top goals ''where feasible.''

Comment: One commenter recommended amending proposed criterion (E)(5)(iii) to include fiscal resources, rather than ''economic resources'' in the list of resources that States should use to continue Race to the Top reforms after the grant funding. Another commenter recommended clarifying that grant activities should be continued only if there is evidence of success.

Discussion: We agree that ''fiscal'' is a better word than ''economic'' to describe the financial resources that a State will use to continue Race to the Top reforms after the period of Race to the Top funding has ended. Therefore, we are changing proposed criterion (E)(5)(iii) to refer to fiscal resources and re-designating criterion (E)(5)(iii) as criterion (A)(2)(i)(e). In addition, we are adding language to criterion (A)(2)(i)(e) to clarify that post-Race to the Top grant planning applies only to continuing support for Race to the Top activities for which there is evidence of success.

Changes: We have re-designated proposed criterion (E)(5)(iii) as criterion (A)(2)(i)(e) and revised the criterion to read as follows: ''Using the fiscal, political, and human capital resources of the State to continue, after the period of funding has ended, those reforms funded under the grant for which there is evidence of success.''

Selection Criterion (A)(3): Demonstrating Significant Progress in Raising Achievement and Closing Gaps (proposed criteria (E)(1) and (E)(4)):

Note: This section includes issues common to criteria (A)(1)(iii) and (A)(3)(ii).

Comment: None.

Discussion: The ARRA emphasizes the importance of States demonstrating significant progress in meeting the objectives of the four assurance areas. In the NPP, proposed criterion (E)(1)(i) asked States to describe their progress in each of the four education reform areas generally, proposed criterion (E)(1)(ii) asked States to describe how they have used ARRA and other Federal and State funding to pursue reforms in these areas, and proposed criterion (E)(1)(iv) asked States to describe the successes they have had in increasing student achievement, closing achievement gaps, and increasing graduation rates. In order to reduce redundancy and the burden on States, we are combining proposed criteria (E)(1)(i) and (E)(1)(ii) into one criterion and designating it as criterion (A)(3)(i). We are also designating proposed criterion (E)(1)(iv) as criterion (A)(3)(ii). Both of these revised criteria are now part of the State Success Factors section. We believe this reorganization more logically groups our requests for information regarding progress. We have also added, in criterion (A)(3)(ii), that States may report progress since ''at least'' 2003 to allow a longer data history for States that have such data (all States have NAEP and ESEA data since 2003, but not all States participated in all of NAEP prior to 2003). Further changes to criterion (A)(3)(ii) are discussed later in this section.

Changes: We have combined proposed criteria (E)(1)(i) and (E)(1)(ii) into one criterion, designated (A)(3)(i), and designated proposed criterion (E)(1)(iv) as criterion (A)(3)(ii). Criterion (A)(3) now evaluates a State based on the extent to which the State has demonstrated its ability to—

(i) Make progress over the past several years in each of the four education reform areas, and used its ARRA and other Federal and State funding to pursue such reforms;

(ii) Improve student outcomes overall and by student subgroup since at least 2003, and explain the connections between the data and the actions that have contributed to—

(a) Increasing student achievement in reading/language arts and mathematics, both on the NAEP and on the assessments required under the ESEA;

(b) Decreasing achievement gaps between subgroups in reading/language arts and mathematics, both on the NAEP and on the assessments required under the ESEA; and

(c) Increasing high school graduation rates.

Comment: A number of commenters objected to our proposal that States demonstrate progress in increasing student achievement and closing the achievement gap using the National Assessment of Educational Progress (NAEP). Some of these commenters asserted that the NAEP provides an incomplete and distorted view of student achievement, particularly the achievement of students with disabilities. Another commenter noted that the NAEP does not include high school results. Others expressed concern that using the NAEP data would only encourage teaching to a test or would conflict with the NAEP's purpose as an outside and valid measurement. Several commenters stated that, in addition to the NAEP, the Department should allow States to demonstrate achievement gains on assessments or achievement measures under the ESEA, such as the annual proficiency scores and targets used to determine adequate yearly progress (AYP), including proficiency rates broken down by subgroup. One commenter stated that it would be particularly unfair to require a State to use NAEP data where the State could demonstrate that it has more rigorous assessments. Other commenters suggested the final notice permit States to include other measures to demonstrate achievement gains.

Discussion: The Department proposed using NAEP results to measure State progress in increasing student achievement and decreasing achievement gaps because NAEP is the only national measure of student achievement that is comparable across States. The limitations of the NAEP, as pointed out by commenters, are well-known: It is not aligned to State content standards, does not include high school results, and may not provide accurate achievement information for students with disabilities and certain other subgroups. Also, the NAEP is not administered annually, limiting the number of data points available for measuring progress toward Race to the Top goals. However, the ability of NAEP to compare progress across States and to be a consistent measure over time remains a compelling reason to use it for Race to the Top. Accordingly, we believe that including data from both the NAEP and the annual State assessments required under the ESEA will provide a more complete and valid picture of State progress to date and States' goals for increasing student achievement and decreasing achievement gaps. We are incorporating with some revisions the language from proposed criteria (E)(1)(iv) and (E)(4) into criteria (A)(3)(ii) and (A)(1)(iii) to reflect this decision. In addition, we are specifying in application requirement (g) that when describing data for the assessments required under the ESEA, the State should note any factors (*e.g.,* changes in cut scores) that would impact the comparability of data from one year to the next. We also note that

including more than one assessment should significantly reduce any risks of teaching to the test. As a result, we do not believe that including this use of the NAEP in Race to the Top will affect NAEP's validity or utility as an objective measure of student achievement, as suggested by commenters.

Regarding the comment that we should allow States to demonstrate achievement gains on assessments or achievement measures under the ESEA, such as the annual proficiency scores and targets used to determine AYP, we note that States already issue annual reports on AYP status for schools and LEAs, including proficiency rates for all schools; there is no need to duplicate this reporting by requiring its inclusion in a State's annual Race to the Top report. However, States that desire to include AYP data (or other measures) in their annual Race to the Top reports would be free to do so.

Changes: Proposed criteria (E)(1)(iv) and (E)(4) have been redesignated as criteria (A)(3)(ii) and (A)(1)(iii), respectively. They have been revised to consider both NAEP and ESEA assessment results when evaluating increases in student achievement and decreases in achievement gaps in reading/language arts and mathematics; criterion (A)(3)(ii) considers these in terms of historic gains (since at least 2003), while criterion (A)(1)(iii) considers them in terms of future goals in light of the participation of the State's LEAs in the State's reform plans. The evidence requested in Appendix A has also been revised to conform with the criteria. We have also added application requirement (g), which we discuss in more detail later in this notice.

Comment: Many commenters recommended modifications or additions to the achievement measures for assessing past progress and setting future targets in proposed criteria (E)(1)(iv) and (E)(4). Other commenters supported the NPP's emphasis on increasing student achievement, narrowing achievement gaps, and increasing graduation rates. One key area of concern for several commenters was dropout recovery and prevention, with one commenter recommending that the Department supplement existing measures on graduation rates in proposed criteria (E)(1)(iv) and (E)(4)(iii) with targets for decreasing the number of young people aged 18 to 24 without a high school diploma. Other commenters recommended that States set targets and report on the percentage of low-income and minority 9th grade students who graduate from high school in four years, the number of low-income and minority students who are on track to be college- and career-ready, and increases in the percentage of low-income and minority students being taught by effective teachers. Other commenters recommended the addition of targets for early childhood education, such as goals for kindergarten readiness and third-grade reading and mathematics. A few commenters suggested that in evaluating Race to the Top applications, the Department consider the extent to which a State has ambitious annual targets for increasing college enrollment and completion rates or increasing college and career readiness.

Discussion: The Department acknowledges that many measures could demonstrate progress toward Race to the Top goals. We especially agree that increasing college enrollment is an important area that should be reviewed in the context of Race to the Top. We are, therefore, adding criterion (A)(1)(iii)(d), which examines the extent to which a State's LEA participation will allow the State to reach its ambitious yet achievable goals for increasing college enrollment and credit accumulation. We are also adding a definition of *college enrollment* to help States respond appropriately to this criterion.

After careful consideration of the comments, the Department believes that this new criterion, in combination with the proposed measures—which focus on reading, mathematics, and increasing graduation rates—reflect the right emphasis on key areas that States can report on with some validity and comparability. Further increasing the number of measures would increase data collection and reporting burdens on States and LEAs, many of which have not been collecting data in the areas suggested by commenters. States that want to include their own supplemental measures and targets are free to do so, and the ongoing expansion of State data systems, which is supported by the Race to the Top program and encouraged under invitational priority 4, will likely facilitate future indicators and targets in such areas as early childhood, drop-out prevention, and student mobility.

Changes: We have added criterion (A)(1)(iii)(d), which rewards States whose LEA participation will translate into broad statewide impact, allowing the State to reach its ambitious yet achievable goals, overall and by student subgroup, for increasing college enrollment (as defined in this notice) and increasing the number of students who complete at least a year's worth of college credit that is applicable to a degree within two years of enrollment in an institution of higher education. We have also added a definition of *college enrollment,* which refers to the enrollment of students who graduate from high school consistent with 34 CFR 200.19(b)(1) and who enroll in an institution of higher education (as defined in section 101 of the Higher Education Act, Public Law 105–244, 20 U.S.C. 1001) within 16 months of graduation.

Comment: Many commenters requested that the Department ensure that State applicants set targets for all core academic subjects reported by the NAEP, and not only in reading and mathematics, as in proposed criteria (E)(4)(i) and (ii).

Discussion: The final notice continues to focus on reading and mathematics achievement, partly to ensure consistency with ESEA assessment requirements and partly to promote comparability, since all States have NAEP and ESEA assessment results dating back to at least 2003 in those subjects. The Department notes, however, that these are minimum expectations; States may include assessment results in other subjects both to demonstrate past progress and to measure Race to the Top performance going forward.

Changes: None.

Comment: Many commenters recommended that States focus more narrowly on specific student groups in crafting their State Plans to raise student achievement and close achievement gaps, including among high-need students.

Discussion: We agree with the commenters that closing achievement gaps is an urgent national priority. Proposed criterion (E)(4) asked States to set ambitious yet achievable goals for closing achievement gaps, as well as for increasing student achievement and graduation rates overall and by subgroup. Criterion (A)(1)(iii) in this final notice retains these provisions and includes similar subgroup-specific goals in new criterion (A)(1)(iii)(d), regarding college enrollment and credit accumulation. This final notice also includes new language in criterion (A)(3)(ii) specifying that States' recent gains in increasing student achievement and graduation rates will be evaluated both overall and by student subgroup. We leave it to States to determine which of the subgroups in their student populations need the most attention.

Changes: Criterion (A)(3)(ii) rewards States that have demonstrated the ability to improve student outcomes overall and by student subgroup since at least 2003 and explain the connections

between the data and the actions that have contributed to—

(a) Increasing student achievement in reading/language arts and mathematics, both on the NAEP and on the assessments required under the ESEA;

(b) Decreasing achievement gaps between subgroups in reading/language arts and mathematics, both on the NAEP and on the assessments required under the ESEA; and

(c) Increasing high school graduation rates.

Comment: A number of commenters suggested that the Department should not ask States to report data disaggregated by the student subgroups in section 303(b)(2)(G) of the NAEP but rather use the student subgroups as described in section 1111(b)(2)(C)(v)(II) of the ESEA. Others emphasized the importance of disaggregating data by subgroup, including race and gender.

Discussion: We agree with the need to clarify the subgroups for which States must report achievement data given the differences in reporting achievement data by subgroups under the NAEP versus under the ESEA. As discussed earlier, we are adding new paragraph (g) in the application requirements that explains the subgroup data that a State must provide in various parts of the application. Specifically, when addressing items in the criteria for student subgroups with respect to the NAEP, the State must provide data using the NAEP subgroups as described in section 303(b)(2)(G) of the National Assessment of Educational Progress Authorization Act (20 U.S.C. 9622) (*i.e.,* race, ethnicity, socioeconomic status, gender, disability, and limited English proficiency); and when addressing items in the criteria for student subgroups with respect to high school graduation rates, college enrollment and credit accumulation rates, and the assessments required under the ESEA, the State must provide data for the subgroups described in section 1111(b)(2)(C)(v)(II) of the ESEA (*i.e.,* economically disadvantaged students, students from major racial and ethnic groups, students with disabilities; and students with limited English proficiency). We note that States are required under section 1111(b)(3)(C)(xiii) of the ESEA to also report achievement data disaggregated by gender and migrant status.

Changes: As discussed earlier, we have added new paragraph (g) in the application requirements, which specifies that when addressing issues related to assessments required under the ESEA or subgroups in the selection criteria, the State must meet the following requirements:

(1) For student subgroups with respect to the NAEP, the State must provide data for the NAEP subgroups described in section 303(b)(2)(G) of the National Assessment of Educational Progress Authorization Act (*i.e.*, race, ethnicity, socioeconomic status, gender, disability, and limited English proficiency). The State must also include the NAEP exclusion rate for students with disabilities and the exclusion rate for English language learners, along with clear documentation of the State's policies and practices for determining whether a student with a disability or an English language learner should participate in the NAEP and whether the student needs accommodations;

(2) For student subgroups with respect to graduation rates, college enrollment and credit accumulation rates, and the assessments required under the ESEA, the State must provide data for the subgroups described in section 1111(b)(2)(C)(v)(II) of the ESEA (*i.e.*, economically disadvantaged students, students from major racial and ethnic groups, students with disabilities, and students with limited English proficiency); and

(3) When asked to provide information regarding the assessments required under the ESEA, States should refer to section 1111(b)(3) of the ESEA; in addition, when describing this assessment data in the State's application, the State should note any factors (*e.g.*, changes in cut scores) that would impact the comparability of data from one year to the next.

Comment: One commenter recommended that the Department clarify that States must still meet AYP targets as required by the ESEA, even as they set new targets based on NAEP scores for Race to the Top accountability purposes. Another expressed concern that these criteria would tie State accountability goals and reporting to NAEP, which would conflict with ESEA requirements that link accountability to State-based standards and assessments.

Discussion: The Department does not believe that additional language is required to clarify that States must still meet existing ESEA requirements. Neither the ARRA nor this final notice affects States' compliance with and obligations under the ESEA.

Changes: None.

B. Standards and Assessments

Definitions: Common set of K–12 standards and *high-quality assessment.* Comments regarding the preceding definitions are addressed, as appropriate, below.

Selection Criterion (B)(1): Developing and adopting common standards (Proposed Selection Criterion (A)(1)):

Comment: Commenters were divided in their reactions to the criterion under which the Department would evaluate States' applications based on their commitment to adopt a common set of K–12 standards (as defined in this notice). Many commenters supported this criterion. Some suggested procedures that should be followed in the process of developing standards, including the need for broad participation from representatives of all student subgroups within a State prior to formal adoption of standards.

A few commenters, however, were opposed to the adoption of common standards for various reasons, such as a lack of evidence that common standards will benefit students and the potential cost of adopting new content standards. One commenter urged removing participation in a consortium as a necessary condition of funding because of concerns that the size and the complexity of the relationships in a consortium may have the potential for conflicts of interest. Some commenters regarded the proposed criterion as punitive. A few commenters suggested making participation in common standards an invitational priority in the interest of making adoption truly voluntary. Another commenter expressed concern that a criterion under which States would be rewarded for their commitment for adopting a common set of K–12 standards will preempt what, up to now, has been a State-led process and would call into question the voluntary nature of State adoption of standards.

Many commenters argued that States should be excused from the requirement to adopt common core standards if their current standards are as rigorous as common standards. One commenter suggested that the Department include in the final notice an additional criterion to provide recognition for those States with rigorous standards and improved student achievement. Another recommended an external review focused on rigor, college and career readiness and international benchmarking to determine whether adoption of a common set of K–12 standards is necessary.

Discussion: We appreciate commenters' support for this criterion. The Department believes that States' adoption of common sets of K–12 standards will provide a foundation for more efficient and effective creation of the instructional and assessment resources needed to implement a coherent system of teaching and

learning. We do not agree that an external review is needed to determine whether States' adoption of common K–12 standards is necessary.

Some readers appear to have been confused about the role of the criteria. One mistakenly believed that joining a consortium was a condition of funding under Race to the Top. This is not the case. Criteria are used to evaluate grant applications and applicants. States receive points for the strength and content of their responses to the criteria. In this program, we proposed that States' applications would be evaluated and receive points for demonstrating their commitment to improve standards by participating in a consortium of States working toward jointly adopting common K–12 standards. Thus, States with stronger proposals would receive more points; however, a State could receive a grant even without getting any points for this criterion. An individual State that chooses not to participate in a consortium for the development and adoption of common standards is eligible to apply for funds, but the application will not receive points under this criterion. A State that chooses not to join a consortium could describe its accomplishments in response to new criteria (F)(3) under which it could earn points for other significant reform conditions that have contributed to increased student achievement, narrowed achievement gaps, or other important outcomes. We decline to make participation in common standards an invitational priority for which a State would receive no points in the competition, rather than a selection criterion. We believe that common internationally benchmarked standards that prepare students for college and careers are a critical foundation for students' education and, therefore, are a component of a State's application deserving of evaluation and points in the competition.

We agree that there is potential for conflicts of interest to arise within consortia, but believe there are ways for consortia to mitigate such conflicts and that removal of the criterion on these grounds is not warranted.

Changes: None.

Comment: Several commenters recommended that the Department clarify in the final notice whether the reference to common standards refers specifically to the common core standards currently being developed jointly by members of the National Governors Association and the Council of Chief State School Officers. Others recommended that the guidelines be modified to recognize other multi-State consortia that have defined or adopted common standards. One commenter requested recognition of the national collaborative of State leaders developing national standards and assessments in arts education.

Discussion: In this program, the phrase ''common standards'' does not refer to any specific set of common standards, such as the common core standards currently under development by members of the National Governors Association and the Council of Chief State School Officers. The Department declines to make changes in order to endorse any particular standards-development consortium.

Changes: None.

Comment: Several commenters recommended that we clarify the meaning of ''a significant number of States'' within a consortium. One recommended that the number of States be set at a minimum of three if the quality of their common standards is comparable to the common standards developed by members of the National Governor's Association and the Council of Chief State School Officers. Others suggested that instead of a minimum number, the criterion should focus on the importance or potential impact of the proposed work.

Discussion: The goal of common K–12 standards is to replace the existing patchwork of State standards that results in unequal expectations based on geography alone. Some of the major benefits of common standards will be the shared understanding of teaching and learning goals; consistency of data permitting research on effective practices in staffing and instruction; and the coordination of information that could inform the development and implementation of curriculum, instructional resources, and professional development. The Department believes that the cost savings and efficiency resulting from collaboration in a consortium should be rewarded through the Race to the Top program when the impact on educational practices is pronounced. And generally, we believe that the larger the number of States within a consortium, the greater the benefits and potential impact. We decline to define the term ''significant number of States'' by providing a particular number of States. We are providing additional information in Appendix B regarding how this selection criterion will be scored by reviewers and adding a cross reference to Appendix B in criterion (B)(1) to emphasize that States' evidence will be evaluated using Appendix B.

Changes: The term ''significant number of States'' has been clarified in the Scoring Rubric (*see* Appendix B) so that, on this aspect of the criterion, a State will earn ''high'' points if its consortium includes a majority of the States in the country, and ''medium'' or ''low'' points if its consortium includes one-half of the States in the country or less. Additionally, we have added a reference to this in criterion (B)(1) by adding the parenthetical ''(as set forth in Appendix B)'' after ''evidenced by.''

Comment: Many commenters expressed concern regarding the proposed timeline for the adoption of common standards by June 2010. Commenters urged delay of the adoption target date in order to allow adequate time for activities such as local review and evaluation of the common standards, legislative or administrative action required for adoption, and broad stakeholder participation. Several pointed out that the proposed timeline for adoption of common standards by June 2010 conflicts with the timeline agreed to by governors and State chiefs currently participating in one consortium for the development of common standards. One commenter objected that the Race to the Top process does not allow States enough time to review the final standards from that consortium before submitting a grant application. Others questioned apparent differences for Phase 1 applicants and Phase 2 applicants regarding the actual adoption of common standards.

Discussion: The Department recognizes that States need as much time as possible to review, evaluate, and adopt common K–12 standards. We are therefore extending the deadline for adopting standards as far as possible, while still allowing the Department to comply with the statutory requirement that the Department obligate all Race to the Top funds by September 30, 2010. The new deadline in this criterion for adopting common K–12 standards is August 2, 2010, or, at a minimum, by a later date in 2010 specified by the State. As described in the Scoring Rubric, States that meet the August 2, 2010 target date will earn more points for this criterion; a State that has a high-quality plan to adopt common standards by a later date in 2010 will earn some points for this criterion. In addition, we have clarified that Phase 1 applicants must demonstrate commitment to and progress toward adoption by August 2, 2010, or, at a minimum, by a later date in 2010 specified by the State, and that Phase 2 applicants must demonstrate adoption by that date in order to earn the most points for this criterion. We understand that adoption of standards is a legal process at the State level, and

fully expect that implementation of the standards will follow a thoughtful, deliberate course in subsequent year(s). For any State receiving funds, the Department will monitor the State's progress in meeting its goals and timelines as established in its plan, including States' progress towards adoption of common standards.

Changes: We have revised the deadline in criterion (B)(1) regarding adoption of a common set of K–12 standards. Phase 1 applicants will be evaluated based on their high-quality plans demonstrating commitment to and progress toward adopting a common set of K–12 standards by August 2, 2010, or, at a minimum, by a later date in 2010 specified by the State. Phase 2 applicants will be evaluated based on whether they adopt such standards by August 2, 2010, or at a minimum, by a later date in 2010 specified by the State in a high-quality plan toward which the State has made significant progress. Both Phase 1 and Phase 2 applicants will also be evaluated on their commitment to implementing the standards after the deadline in a well-planned way.

We also have revised and reorganized criterion (B)(1) non-substantively for purposes of clarity. When describing how a State can demonstrate its commitment to developing standards we have changed the phrase, ''improving the quality of its standards'' to ''adopting a common set of high-quality standards, as evidenced by * * *''. In criterion (B)(1)(ii)(a), we also have removed the qualifier to a common set of K–12 standards (''that are internationally benchmarked and that build toward college and career readiness by the time of high school graduation * * *'') because it is redundant with similar language in criterion (B)(1)(i)(a).

Comment: Several commenters recommended that the Department clarify in the final notice the evidence necessary for criterion (B)(1), asking whether participation in a standards development consortium or an expression of intent to participate in such a consortium, such as a Memorandum of Agreement, is sufficient. One commenter suggested that a State should be allowed to provide whatever evidence it believes is appropriate to demonstrate its efforts to address this criterion.

Discussion: We agree that the evidence for this criterion should be clearer, and have made some revisions to the evidence requested for that purpose. The evidence requested is shown in Appendix A of this notice. We do not agree with the commenter that a State should provide whatever evidence it believes is appropriate to demonstrate its efforts to address this criterion.

Changes: We have clarified some of the requested evidence for criterion (B)(1). We request that a State supply a copy of the Memorandum of Agreement, executed by the State, showing that it is part of a standards consortium, and provide the number and names of States participating in the consortium. A State should provide a copy of the final standards, or if the standards are not yet final, a copy of the draft standards and anticipated date for completing the standards. A State should also provide documentation that the standards are or will be internationally benchmarked. For Phase 1, States must provide a description of the legal process in the State for adopting standards, and the State's plan, current progress, and timeframe for adoption. For Phase 2, States must show evidence that they have adopted the standards; or, if the State has not yet adopted the standards, provide a description of the legal process in the State for adopting standards, and the State's plan, current progress, and timeframe for adoption. States may provide additional evidence beyond that requested.

Comment: One commenter asked what national and international benchmarks are required under criterion (B)(1).

Discussion: The Department is not requiring that common standards adopted by State applicants be benchmarked to *particular* international standards, but the standards should be supported by evidence that they are internationally benchmarked.

Changes: We have revised criterion (B)(1)(i) to clarify that the K–12 standards adopted by the State should be ''supported by evidence that they are'' internationally benchmarked.

Comment: A few commenters requested more detail regarding the desired characteristics of college and career ready standards. Some suggested that the Department require specific types of evidence to meet this criterion, such as measurement of the skills needed to succeed in non-remedial college courses, validation by the postsecondary system or involvement of postsecondary faculty in development of the standards and assessments.

Discussion: Criterion (B)(1) focuses on States' development and adoption of common K–12 standards that build toward college and career readiness. By using these terms, we mean that the standards should build on content knowledge and skills regarded as essential for success in college and the workforce. The Department recognizes that many kinds of documentation could reasonably support the claim that common standards build toward college and career readiness and prefers to leave the selection of appropriate documentation to the States.

Changes: None.

Definition of Common Set of K–12 Standards

Comment: We received several recommendations to modify the definition of *common set of K–12 standards.* Some commenters suggested that the definition of *common set of K–12 standards* should refer to 21st century skills; English language proficiency standards aligned to the language arts standards; and standards for science, technology, and engineering. Another commenter recommended expanding the definition to include standards currently shared across States, such as the American Diploma Project standards or ACT College Benchmarks. Other commenters recommended that the definition clearly specify whether the common standards should include standards for each high school grade or for each high school course. One commenter asked if the term ''standard'' refers to a broad statement about content or to a discrete concept or skill.

Discussion: It is up to States participating in the development of common standards to determine the content and scope of the standards, whether to organize the standards for high school by grade or by course, and whether the statement of each standard is focused broadly on general concepts or narrowly on particular skills. Therefore, we decline to make the changes recommended by the commenters.

Changes: None.

Comment: Commenters requested clarification of what it means for the common standards to be ''identical'' across all States in a consortium given that a State may supplement the common standards with additional standards. Some commenters suggested changing the definition to refer to standards that are ''aligned,'' across States, rather than ''identical.'' Other commenters suggested that the additional standards adopted by a State should be more stringent than the common standards, foster innovation, or focus on particular skills of local relevance.

Discussion: Some commenters appeared to be confused by the term ''identical'' when it was qualified by the possible addition of a supplementary group of standards that could vary across States in a consortium. The term

''identical'' refers to the common standards and not the supplementary standards and would not permit the standards to be ''aligned'' across States in a consortium, as recommended by one commenter. Upon further reflection, we believe that there may be reasons for the common standards to be slightly different across States (*e.g.,* States may use slightly different terms to refer to the same concepts or may have a particular format which would require slight changes in language) and therefore, are changing ''identical'' to ''substantially identical.'' The Department believes that it is unnecessary to include in the definition additional requirements for the supplementary standards, such as being more rigorous or fostering innovation, and therefore, declines to change the definition as requested by commenters.

Changes: We have changed ''identical'' to ''substantially identical'' to clarify that a common set of K–12 standards are ''substantially identical'' across all States in a consortium.

Selection Criterion (B)(2): Developing and Implementing Common, High-quality Assessments (Proposed Selection Criterion (A)(2)):

Comment: A number of commenters supported the Department's proposal to evaluate a State's commitment to improving the quality of its assessments by participating in a consortium of States developing common high-quality assessments (as defined in this notice) aligned with the consortium's common set of K–12 standards. However, other commenters requested that the Department remove this criterion, stressing that the Department has overemphasized standardized testing and that the ESEA has stressed reading and math to the detriment of other subjects. One commenter asserted that a State should not have to join a consortium if its own assessment is of high quality. Another commenter questioned why we would encourage States to change current assessment programs; this commenter suggested that we not replace current assessments until there is certainty about which aspects of current testing need change so as to not waste resources and risk development of low-quality assessments. Another commenter suggested the Department support the improvement of State and local assessment systems rather than pressuring States to ''swap one standardized test for another.''

Discussion: The Department believes that consortia of States, by pooling resources, will be able to produce significantly higher-quality assessments more cost-effectively than any one State could produce alone. Significant improvement of student outcomes can be realized when high-quality assessments aligned to common standards inform and support teacher instruction and, thus, student learning. An individual State that chooses not to participate in a consortium for the development and adoption of assessments aligned to common standards is eligible to apply for funds, but the application will not receive points for this criterion.

We understand commenters' concerns about the overemphasis of standardized testing, but believe that educators need good information about what students know and can do so that they can guide their students' learning, and adjust and differentiate their instruction appropriately. This information needs to come, in part, from academic assessments.

With respect to support for local assessments, criteria (B)(3) and (C)(3) provide opportunities for focus on local assessments and instructional improvement systems. Criterion (B)(3) evaluates a State on the extent to which it has a high-quality plan for supporting statewide transition to and implementation of enhanced standards and high-quality assessments and provides examples of State or LEA support activities, including implementation of high-quality instructional materials and assessments. In responding to this criterion, States could propose to support development of local assessments, including formative and interim assessments, that would assist in the transition to new statewide standards and assessments. Criterion (C)(3) evaluates a State on the extent to which it has a high-quality plan to increase the acquisition, adoption, and use of local instructional improvement systems (as defined in this notice); supports LEAs and schools that are using instructional improvement systems; and makes data from these systems available and accessible to researchers. Instructional improvement systems may include local assessment data.

Changes: None.

Comment: Several commenters opposed the provision in criterion (B)(2) that asked a State to describe the extent to which its consortium working on developing common high-quality assessments includes a ''significant number of States,'' recommending instead that the criterion focus only on the quality of the assessments. One commenter recommended that the criterion evaluate the extent to which the consortium has the potential to have a significant national impact, including consideration of the number and diversity of students in participating States, or the ability of participating States to serve as exemplars for statewide reform, rather than focus on the number of participating States.

Discussion: The Department believes that the cost savings and efficiency resulting from collaboration in a consortium should be rewarded through Race to the Top when the impact on educational practices is pronounced. Generally, we believe that the larger the number of States within a consortium, the greater the benefits and potential impact. While the other measures suggested by the commenters could be valuable, they would not be as objective a measure for the reviewers to consider when evaluating a State's plan. We are providing information about the scoring of this criterion in the Scoring Rubric set forth in Appendix B. Additionally, we are adding a cross reference to Appendix B in criterion (B)(2) to emphasize that States' evidence will be evaluated using Appendix B.

Changes: The term ''significant number of States'' has been clarified in the Scoring Rubric (*see* Appendix B) so that, on this aspect of the criterion, a State will earn ''high'' points if its consortium includes a majority of the States in the country, and ''medium'' or ''low'' points if its consortium includes one-half of the States in the country or less. Additionally, we added the parenthetical ''(as set forth in Appendix B)'' after ''evidenced by'' in criterion (B)(2).

In addition, we have made some non-substantive changes to this section for clarity. We have replaced ''whether'' with ''to the extent to which'' in criterion (B)(2); we have added ''as evidenced by (i) the State's participation * * *''; and we have removed the phrase ''that are internationally benchmarked'' when we refer to a common set of K–12 standards because the phrase is unnecessary and redundant with language in criterion (B)(1)(i)(a).

Comment: Many commenters suggested that the Department consider additional factors in examining a State's commitment to developing common assessments. One commenter recommended that States submit evidence from assessment developers demonstrating that the assessments are valid and reliable for English language learners, as well as showing the research base for use of accommodations. Another commenter suggested that the criterion explicitly encourage States to develop a more comprehensive local assessment system.

Discussion: Members of an assessment consortium are responsible for ensuring that assessments are developed to meet the definition of *high-quality assessments* (as defined in this notice), including the requirement that assessments are of high technical quality and include students with disabilities and English language learners. Local assessments can be addressed in response to other criteria, such as criterion (B)(3) and (C)(3) as previously discussed.

Changes: None.

Comment: A number of commenters requested that the Department clarify in the final notice how an applicant should describe its strategy for and commitment to joining a common assessments consortium and implementing common assessments. One commenter suggested that States demonstrate compliance with this criterion by developing a timeline for when assessments would be aligned to the common standards. Two commenters asked if States can include the cost of additional assessments, such as formative and benchmark assessments, in addition to summative tests in its application. Another commenter suggested that we evaluate States' progress in relation to developing common assessments on a regular basis and that reports should be provided on these evaluations.

Discussion: It is not necessary for a State to describe its strategy for joining a common assessments consortium; the evidence for this criterion focuses on a State's participation in a consortium that intends to develop high-quality assessments. The minimum evidence for which a State will receive points for this criterion is described in detail in Appendix A of this notice (Evidence and Performance Measures). The Department intends to hold a separate Race to the Top Assessment competition that will fund the development of common, summative assessments tied to common K–12 standards. We therefore believe that funds within this Race to the Top competition would be better spent on other activities. Accordingly, we have added a requirement specifying that no funds awarded under this competition may be used to pay for costs related to statewide summative assessments. Formative and interim assessments (as defined in this notice) may be funded within this competition, and would be funded as part of a State's plan for criterion (B)(3). In addition, for any State receiving funds, the Department will monitor the State's progress in meeting its goals and timelines.

Changes: We have added a program requirement that no funds awarded under this competition may be used to pay for costs related to statewide summative assessments.

Comment: A few commenters suggested that high-quality assessments include grade-by-grade specificity of core subject matter. Others suggested this notice explicitly include the assessment of broad-based humanities centered curricula, including art, science, and social studies.

Discussion: This notice does not limit or require certain grade or content coverage for high-quality assessments.

Changes: None.

Comment: Another commenter suggested that we award additional points to States that commit to developing a common STEM assessment.

Discussion: A State may choose to address competitive preference priority 2, which addresses STEM issues, and, if peer reviewers determine the State has met the priority, would receive extra points in the Race to the Top competition. The third element of this priority (a plan to address the need to prepare more students for advanced study and careers in the sciences, technology, engineering, and mathematics) could be addressed, in part, by a commitment to develop a common STEM assessment. Note, however, that a statewide summative STEM assessment would have to be developed using funds other than those awarded under this competition because, as noted in the previous comment, Race to the Top funds cannot be used to pay for costs related to statewide summative assessments.

Changes: None.

Comments: Some commenters asked that the Department provide incentives for States to develop and implement high-quality assessments beginning at pre-kindergarten.

Discussion: As previously stated, this notice does not limit or require certain grade or content coverage for high-quality assessments. We note, however, that invitational priority 3 invites States to include in their applications practices, strategies, or programs to improve educational outcomes for high-need young children by enhancing the quality of preschool programs. Of particular interest are proposals that support practices that (i) improve school readiness (including social, emotional, and cognitive); and (ii) improve the transition between preschool and kindergarten.

Changes: None.

Comment: One commenter requested that the Department state in the final notice that new assessment systems should be aligned with content standards, and be vertically integrated. Another commenter suggested that the entire K–12 assessment system should be vertically moderated to the anchor assessments so ''proficient'' means ''prepared'' and that students are on-track to meet college and career ready standards by graduation.

Discussion: Under criterion (B)(2) States will be rewarded for the development of assessments aligned with common standards that build toward college and career readiness. The technical aspects of how the assessment system is organized to reflect increasing student competence from grade to grade will be determined by the consortia developing the assessments.

Changes: None.

Comment: One commenter stated that a plan for implementing high-quality assessments must include high-quality alternate assessments.

Discussion: We agree with the commenter; however, we do not believe it is necessary to include additional language to that effect in this notice because section 1111(b)(3)(C)(ix)(II) of the ESEA requires that States include students with disabilities in their assessments. In addition, section 612(a)(16)(C) of the IDEA requires States to provide an alternate assessment to a student with a disability who needs it for any statewide assessment.

Changes: None.

Comment: Several commenters supported the statement in the NPP that, at a later date, we may announce a separate Race to the Top Assessment Competition, for approximately $350 million, to support the development of assessments by consortia of States. Several commenters asked for more explicit guidelines on standards and assessment work for Phases 1 and 2 as described in this notice, as opposed to the work for the separate $350 million fund for the development of assessments.

Discussion: As previously indicated, the Department intends to hold a separate Race to the Top Assessment competition that will fund consortia in developing common, summative assessments tied to common K–12 standards. The Department may provide additional information about this competition in the future, and as noted previously, more requirements may be articulated in that competition's notice.

Changes: None.

Definition of High-Quality Assessment

Comment: Many commenters supported the proposed definition of

high-quality assessment. Several commenters recommended that the definition refer to the use of universal design principles in test development and administration. A few commenters suggested revising the definition to clarify that the use of open-ended items, performance-based tasks, and technology are desirable and necessary only insofar as they are grade-appropriate for the subject matter and consistent with the skills to be measured. Many other commenters recommended revising the definition to include assessments and assessment systems that measure higher order and critical thinking, problem-solving, reasoning, research, writing, scientific investigation, communication, and teamwork skills.

Discussion: We agree with the commenters that the definition of *high-quality assessment* should refer to the use of universal design principles in test design and administration and are making that change. However, we are not revising the definition to include specific skills, such as critical thinking, problem solving, research, or writing skills, mentioned by the commenters because the skills and content included in an assessment will be determined by the content standards on which the assessment is based. Instead, we are revising the definition to state that a *high-quality assessment* is an assessment that is designed to measure a student's ''knowledge, understanding of, and ability to apply, critical concepts,'' rather than an assessment that is designed to measure ''understanding of, and ability to apply, critical concepts.''

We do not believe it is necessary to clarify that open-ended items, performance-based tasks, and technology should be appropriate for the grade and subject to be assessed and consistent with the skills to be measured, as recommended by commenters. We believe this is implicit in the design of any assessment and have included open-ended responses, performance-based tasks, and technology as examples, not as requirements of a high-quality assessment.

Finally, based on the Department's internal review, we are making several changes to the definition. First, in the NPP, we stated that a high-quality assessment uses a ''variety of item types, formats, and administration conditions (*e.g.*, open-ended responses, performance-based tasks, technology).'' We believe that a variety of administration conditions is not necessarily a requirement for an assessment to be of high quality. Therefore, we are revising the definition to clarify that a *high-quality assessment* uses a variety of item types and formats (*e.g.*, open-ended responses, performance-based tasks) and incorporates technology, where appropriate. Second, for consistency with the rest of the notice, we are changing the reference to ''limited English proficient students'' to ''English language learners.'' Next, the proposed definition stated that a *high-quality assessment* be ''of high technical quality (*e.g.*, valid, reliable, and aligned to standards).'' For completeness, we are adding ''fair'' to the examples in the parenthetical. Finally, for clarity, we are changing ''Such assessments are structured to enable measurement of student achievement * * *'' to ''Such assessments should enable measurement of student achievement.''

Changes: With the aforementioned changes, the definition of *high-quality assessment* is as follows: ''*High-quality assessment* means an assessment designed to measure a student's knowledge, understanding of, and ability to apply, critical concepts through the use of a variety of item types and formats (*e.g.*, open-ended responses, performance-based tasks). Such assessments should enable measurement of student achievement (as defined in this notice) and student growth (as defined in this notice); be of high technical quality (*e.g.*, be valid, reliable, fair, and aligned to standards); incorporate technology where appropriate; include the assessment of students with disabilities and English language learners; and to the extent feasible, use universal design principles (as defined in section 3 of the Assistive Technology Act of 1998, as amended, 29 U.S.C. 3002) in development and administration.''

Comment: Several commenters recommended that the Department require that high-quality assessments address the needs of English language learners, students with disabilities, and other learners who need targeted services.

Discussion: As defined in this notice, a *high-quality assessment* includes assessment of students with disabilities and English language learners.

Changes: None.

Selection Criterion (B)(3): Supporting the Transition to Enhanced Standards and High-Quality Assessments (Proposed Selection Criterion (A)(3)):

Comment: Many commenters approved of criterion (B)(3) regarding a State's high-quality plan for supporting a statewide transition to and implementation of enhanced standards and high-quality assessments, but stated that the Department should expand the activities that a transition plan might include. For instance, several commenters suggested that States show that they plan to increase student participation in Advanced Placement and International Baccalaureate courses, as well as dual enrollment in postsecondary credit-bearing courses, while transitioning to common standards and assessments. A few commenters suggested States commit to increasing student participation in pre-Advanced Placement courses for middle school students, and in after-school programs to accelerate achievement for students having difficulty meeting academic targets. One commenter recommended that States provide a roll-out plan for adoption of the common standards and all of their supporting components. Some commenters suggested that adoption of common standards be accompanied by the necessary supporting components, such as curricular frameworks, unit plans, lesson plans, curriculum-embedded formative assessments, anchor assignments, and rubrics. One commenter noted that States should amend course requirements for graduation to ensure that students are guaranteed to receive the content.

However, not all commenters supported additional supports and resources during a State's transition to enhanced standards and high-quality assessments. One commenter questioned whether limited Race to the Top funds should be used by States and LEAs to develop instructional materials. Another commenter was critical of requiring a plan for transition; instead this commenter suggested that a State should be judged on its transition after implementation of common standards and assessments, not before the State has developed best practices.

Discussion: We agree with many of the commenters' suggestions regarding which supporting components should be considered when transitioning to new standards and assessments. We encourage States to create plans that increase student participation in advanced coursework in order to provide for a smooth transition to internationally benchmarked standards aligned with college and career ready expectations. We also agree that a rollout plan and additional supports would aid in the transition to enhanced standards and high-quality standards, and have therefore incorporated these suggestions. We understand the commenter's concern that States may need to amend course requirements for graduation to ensure that students are guaranteed to receive the content. We

believe a statement in criterion (B)(3) addresses this comment—that State or LEA activities might include, ''in cooperation with the State's institutions of higher education, aligning high school exit criteria and college entrance requirements with new standards and assessments.''

We disagree with commenters who questioned whether limited Race to the Top funds should be used by States and LEAs to develop instructional materials. We believe that the transition to enhanced assessments and a common set of K–12 standards will not be successful without support from the States doing this work in collaboration with their participating LEAs.

We have made several edits for clarity in the illustrative list of State and LEA support activities for transition to enhanced standards and high-quality assessments. We deleted the reference to developing curricular frameworks, for example, but added a reference to ''high-quality instructional materials and assessments (including, for example, formative and interim assessments).'' Additionally, we accepted commenters' suggestion to add ''development of a rollout plan for the standards with all supporting components,'' which could include, among other things, development of curricular frameworks and materials.

Changes: We have revised the language in criterion (B)(3) to include many of the commenters' suggestions. The language now reads that State or LEA activities might, for example, include, ''developing a rollout plan for the standards together with all of their supporting components; in cooperation with the State's institutions of higher education, aligning high school exit criteria and college entrance requirements with the new standards and assessments; developing or acquiring, disseminating, and implementing high-quality instructional materials and assessments (including, for example, formative and interim assessments (both as defined in this notice)); developing or acquiring and delivering high-quality professional development to support the transition to new standards and assessments; and engaging in other strategies that translate the standards and information from assessments into classroom practice for all students, including high-need students (as defined in this notice).''

Comment: One commenter suggested including, as an additional activity to support statewide transition to and implementation of enhanced standards and high-quality assessments, building improvements for science labs and technology in the classrooms.

Discussion: Consistent with the Department's May 11, 2009, State Fiscal Stabilization Fund guidance ,[3] the Department also discourages States and LEAs from using Race to the Top funds for new construction because this use may limit the ability of the State and its LEAs to implement the State's core Race to the Top plans. States may propose that certain participating LEAs may use Race to the Top funds for modernization, renovation, or repair projects to the extent that these projects are consistent with the State's Race to the Top plan.

Changes: None.

Comment: Several commenters observed that teachers will be primarily responsible for ensuring successful implementation of new standards and, accordingly, recommended that teachers be involved in a State's transition plan. Commenters stated that a transition plan should include model lesson plans, pre-service teacher education, and in-service professional development to familiarize and train teachers on the content standards and how to use assessment results. One commenter suggested that professional development be focused on middle school and high school teachers.

Discussion: We agree with commenters that a successful transition plan should include high-quality professional development to support the transition to new standards and assessments. The NPP included developing, disseminating and implementing professional development materials as a suggested State or local activity in this criterion. We are strengthening the language about this activity to suggest development or acquisition and delivery of high-quality professional development to support the transition to new standards and assessments. We also agree with the commenter that teachers should be involved in a State's transition plan. Under criterion (B)(3) the Department will evaluate a State application on the extent to which it has a high-quality plan for supporting the transition to and implementation of enhanced standards and high-quality assessments, in collaboration with its participating LEAs. We expect that LEAs will collaborate with teachers on this criterion. In addition, in criterion (A)(2)(ii)(a), a State is judged on the extent to which it has a high-quality overall plan to (among other things) utilize the support it has from a broad group of stakeholders to better implement its plans, as evidenced by the strength of the statements or actions of support from the State's teachers and principals, which include the State's teachers' unions or statewide teacher associations.

We decline to take the commenter's suggestion that a State focus its professional development on middle and high school teachers because we believe all teachers implementing enhanced standards and high-quality assessments would benefit from high-quality professional development.

Changes: We have included language in criterion (B)(3) to clarify that a State or LEA activity might, for example, include ''developing or acquiring and delivering high-quality professional development to support the transition to new standards and assessments.''

Comment: Numerous commenters articulated a need for collaboration, stakeholder engagement, financial support, autonomy, and flexibility during the transition to enhanced standards and assessments. One commenter stated that unless States are committed to the adoption and implementation of the standards, and support LEAs and schools in implementing them, the new standards and assessments will not positively affect teaching or learning. One commenter suggested that the State plans require local school boards to ensure collaboration between school administrators and union leaders to ensure that all educators are part of the alignment of assessments. A few commenters urged the Department to encourage continuity between pre-kindergarten and elementary school as part of the transition process. One commenter supported efforts to promote a seamless articulation of standards and assessments between pre-kindergarten, K–12, and post-secondary education, since any gap leads to critical loss of learning for students.

Discussion: The Department agrees with commenters that collaboration, support, and engagement are critical factors for a successful transition to enhanced standards and high-quality assessments. The criteria in (A) establish State Success Factors, which ask States to articulate their education reform agendas and LEAs' participation in it, and explain their strategies for building strong statewide capacity to implement, scale and sustain proposed plans. Specifically, criterion (A)(2)(ii) provides for evaluation of a State's plan to utilize the support it has from a broad group of stakeholders to better implement its plans, as evidenced by

[3] *Available at: http://www.ed.gov/programs/statestabilization/guidance-mod-05112009.pdf.*

the strength of statements or actions of support from critical stakeholders.

Changes: None.

Comment: One commenter requested clarification about whether all LEAs or only participating LEAs must transition to the enhanced standards and high-quality assessments. Many commenters noted that the adoption of common standards will affect all LEAs, not only those participating in a State's Race to the Top application. Accordingly, commenters suggested that a State include in its plan how it will provide direct financial support for the operational costs incurred by LEAs as they transition to common standards and assessments.

Discussion: The NPP was clear that a State will be judged on the extent to which it has a high-quality plan for supporting a statewide transition to a common set of K–12 standards and high-quality assessments aligned to those standards. We recognize that a statewide system of standards and assessments eventually would be implemented in all LEAs, some of which are not participating in the Race to the Top grant. To address this situation, we are adding a new definition of *involved LEAs.* An involved LEA is an LEA that chooses to work with the State to implement those specific portions of the State's plan that necessitate full or nearly-full statewide implementation, such as transitioning to a common set of K–12 standards. Involved LEAs do not receive a share of the 50 percent of a State's grant award that it must subgrant to LEAs in accordance with section 14006(c) of the ARRA, but States may provide other funding to involved LEAs under the State's Race to the Top grant in a manner that is consistent with the State's application. We expect that participating LEAs will have a greater role than involved LEAs in collaborating with States as States develop their plans, but believe that the specifics of such decisions are best left to local decision makers.

Changes: We have added a new definition of *involved LEAs*, which reads as follows: ''Involved LEAs mean LEAs that choose to work with the State to implement those specific portions of the State's plan that necessitate full or nearly-full statewide implementation, such as transitioning to a common set of K–12 standards (as defined in this notice). Involved LEAs do not receive a share of the 50 percent of a State's grant award that it must subgrant to LEAs in accordance with section 14006(c) of the ARRA, but States may provide other funding to involved LEAs under the State's Race to the Top grant in a manner that is consistent with the State's application.''

Comment: One commenter recommended that States should provide minimum protections for their students during the transition to new standards and assessments, including a period of time to orient students and teachers to new standards and assessments, to ensure instruction time, and to eliminate disparate impact on minority students. One commenter requested that the Department address equity in the adequacy of instructional materials, suggesting that States ensure that every student has access to print or digital instructional materials that are current and aligned to the enhanced standards.

Discussion: We agree with commenters that a State should address supports for high-need students in its plan to transition to enhanced standards and high-quality assessments. We are adding a reference to high-need students in criterion (B)(3) and including a definition of *high-need students* in the Definitions section of this notice. States should have the flexibility to decide on the appropriate supports for their high-need students; therefore, we decline to specify the supports States must provide to students.

Changes: We have added language to criterion (B)(3) indicating that State or LEA activities might include ''engaging in other strategies that translate the standards and information from assessments into classroom practice for all students, including high-need students (as defined in this notice).'' We also have added a definition of high-need students, which reads as follows: ''*High-need students* means students at risk of educational failure or otherwise in need of special assistance and support, such as students who are living in poverty, who attend high-minority schools (as defined in this notice), who are far below grade level, who have left school before receiving a regular high school diploma, who are at risk of not graduating with a diploma on time, who are homeless, who are in foster care, who have been incarcerated, who have disabilities, or who are English language learners.''

Comment: One commenter suggested that a State demonstrate that its public higher education institutions will certify readiness for entry into credit-bearing coursework if students meet the high school common standards through completing a course of study aligned with those standards and score at the defined college-ready level on high school assessments.

Discussion: We do not believe that we should prescribe the exact policy mentioned by the commenter; we believe a State should have the flexibility to determine, in cooperation with its institutions of higher education, the best way to align high school exit criteria and college entrance requirements with the new standards and assessments. However, we believe that some clarification of the language in criterion (B)(3) is necessary and have revised accordingly.

Changes: Criterion (B)(3) has been revised to provide that State or LEA activities might, for example, include, ''in cooperation with the State's institutions of higher education, aligning high school exit criteria and college entrance requirements with the new standards and assessments.''

Comment: A few commenters requested that States provide minimum evidence as to how they are ensuring proper implementation of their current standards, including evidence of actual implementation in classrooms, such as survey results from a representative sample of teachers demonstrating how standards are being disseminated and utilized.

Discussion: For any State receiving funds, the Department will monitor the State's progress in meeting its goals and timelines as established in its plan. Rather than requiring a State to use survey results as minimum evidence for this criterion, as some commenters suggested, we will be gathering this kind of information through evaluations. As stated elsewhere in this notice, IES will be conducting a series of national evaluations of Race to the Top State grantees as part of its evaluation of programs funded under the ARRA. Race to the Top grantee States are not required to conduct independent evaluations, but may propose, within their applications, to use funds from Race to the Top to support independent evaluations. Grantees must make available, through formal or informal mechanisms, the results of any evaluations they conduct of their funded activities. In addition, as described elsewhere in this notice and regardless of the final components of the national evaluation, Race to the Top States, LEAs, and schools are required to make work developed under this grant freely available to others, and should identify and share promising practices and make data available to stakeholders and researchers (in appropriate ways that must comply with FERPA, including 34 CFR Part 99, as well as State and local requirements regarding privacy).

Changes: None.

C. Data Systems To Support Instruction

Definitions: Instructional Improvement System

Comments regarding the preceding definition are addressed, as appropriate, below.

Selection Criterion (C)(1): Fully Implementing a Statewide Longitudinal Data System (Proposed Selection Criterion (B)(1)):

Comment: Many commenters supported criterion (C)(1) that provides for a State to be evaluated based on the extent to which it has a statewide longitudinal data system that includes all of the America COMPETES Act elements. Other commenters suggested that the Department consider using Race to the Top funds for purposes other than data systems, such as providing direct services in schools with demonstrated needs or improving the infrastructure for the delivery of instruction. One commenter suggested using the funds to develop new standards and assessments first, rather than building a longitudinal data system based on current standards and assessment systems. One commenter suggested that rather than having a major focus on State collection and sharing of data, the Department should require States to help schools and LEAs develop longitudinal data collection systems.

Discussion: The Department appreciates the support for the development and implementation of statewide longitudinal data systems. We disagree with commenters who recommend that funds not be used for this purpose. Data is an important tool to identify needs and improve instruction. In addition, section 14006(a)(2) of the ARRA directs the Secretary to make grants to States that have made significant progress in meeting the objectives of paragraphs (2), (3), (4), and (5) of section 14005(d), including the development of statewide longitudinal data systems that include the elements described in section 6401(e)(2)(D) of the America COMPETES Act. While criterion (C)(1) is a measure of the current status of States' implementation of their statewide longitudinal data systems under the America COMPETES Act (as defined in this notice), both criteria (C)(2) and (C)(3) provide for the evaluation of States' plans to enhance their statewide longitudinal data systems and local instructional improvement systems. Funds awarded under the Department's statewide longitudinal data systems grants program may also be used, in coordination with Race to the Top funds, to build out a State's data infrastructure.

Changes: None.

Comment: One commenter indicated that a State should plan for the operational costs of implementing data systems that a Race to the Top grant does not cover. This commenter recommended that the Department require each State to specifically indicate in its application how it plans to technically and financially support LEAs across the State, including developing contracts and systems that can reduce costs by involving multiple LEAs.

Discussion: We agree with commenters that it is important for a State to consider funding issues in its data system implementation plans, as well as its overall plans. Under criterion (A)(2)(i)(e), a State will be evaluated on the extent to which it has a high-quality overall plan to ensure that it has the capacity required to implement its proposed plans by using the fiscal, political, and human capital resources of the State to continue, after the period of funding has ended, those reforms funded under the grant for which there is evidence of success.

Changes: None.

Comment: Many commenters applauded criterion (C)(1), which evaluates the extent to which a State has a statewide longitudinal data system that includes all of the elements specified in section 6401(e)(2)(D) of the America COMPETES Act. Several commenters specifically highlighted the importance of including unique identifiers for students, teachers, and administrators in the list of America COMPETES Act data elements. However, many commenters suggested additional data elements that should be collected and reported through these systems.

Commenters indicated that these data systems should include multiple achievement measures and multiple data sources, such as annual achievement data for all core academic subjects, as defined in the ESEA, valid and reliable local and State assessment results, formative assessment results, performance assessment results, and English language proficiency results. One commenter recommended that the data systems include data that demonstrate a student's ability to apply, analyze, synthesize and evaluate content knowledge. A few commenters recommended collecting data on the rates of students reading at grade-level by grade 3.

Some commenters recommended various ways data should be disaggregated. They suggested that statewide longitudinal data systems be designed to allow for analysis of student achievement by race, ethnicity, socioeconomic status, gender, disability, and English language learner status. One commenter recommended that the Department encourage States to disaggregate data of vulnerable populations such as pregnant and parenting students. One commenter noted that it is critical that the statewide longitudinal data system measure all proficiency levels (*i.e.*, below proficiency, at proficiency, above proficiency, and advanced) instead of just measuring below or above proficiency.

Other commenters recommended non-assessment related data elements to be included in statewide longitudinal data systems, such as college readiness indicators, graduation rates, attendance rates, student enrollment data, course enrollment, student mobility rates, budget information, completion rates, curriculum changes, and instructional time. A few commenters suggested that in order to evaluate the progress of individual students through the K–12 system and into postsecondary education, systems should include information such as the percentage of students from each high school enrolling in institutions of higher education, students taking remedial or developmental coursework in college, or the points at which students exit, transfer in, transfer out, drop out, or complete P–16 education programs. One commenter suggested that the data systems include model lesson plans for teachers.

Some commenters recommended including data related to indicators of school safety, culture and climate. Others suggested including information about student, family and community engagement. A few commenters requested that the data systems include student social service-related data elements and health indicators, such as immunization rates, asthma rates, vision and hearing screening, and obesity rates. Several commenters recommended including measures of students' social and emotional health and character development. Others believed that data systems should provide data regarding the numbers of transfers, dropout rates, chronic absenteeism, suspension rates, truancy, and dropout re-enrollment in order to trigger supports and interventions for students and families.

Commenters also suggested that statewide longitudinal data systems should include data about teaching and learning conditions, such as teacher recruitment and retention, educator turnover, pupil and teacher ratios,

subject area teacher certification, full-time equivalent teacher employment, and the commitment to current educational programs (*i.e.*, whether the curriculum has changed) in order to help schools, districts and States better understand supports and barriers to teacher effectiveness.

One commenter recommended that statewide longitudinal data systems include information about English language learners, such as the type of English language learner instructional program in which a student participates, time in that program, level of English proficiency, and date of reclassification. Some commenters suggested requiring data about student participation in other programs, such as data on students served in gifted and talented education programs, innovative programs, expanded learning programs, or students receiving advanced coursework. One commenter recommended that data on technology use be explicitly included in statewide longitudinal data systems.

Some commenters recommended that statewide longitudinal data systems include linkages with students in adult basic education, workforce and skills training programs and corrections systems, and student information from State employment wage records.

One commenter stated that we did not provide sufficient justification for why all these data elements are essential. Another commenter suggested that the Department give States latitude to define the elements included in their data systems.

Discussion: Some of the data elements suggested by commenters mirror the data elements listed in the America COMPETES Act. Although the Department will not be evaluating whether a State's system has information beyond the 12 elements of the America COMPETES Act, we recognize the varying needs and capabilities of States, and we encourage States to track additional information through their longitudinal data systems or to add additional components to their State plans to the extent the State deems appropriate. However, the Department recognizes the financial burden of collecting data, and we believe that it is sufficient to specifically evaluate States only on the extent to which their statewide longitudinal data systems include the elements in the America COMPETES Act.

As stated in invitational priority 4, the Secretary is particularly interested in applications in which the State plans to expand statewide longitudinal data systems to include or integrate data from special education programs, English language learner programs, early childhood programs, at-risk and drop-out prevention programs, and school climate and culture programs, as well as information on student mobility, human resources (*i.e.* information on teachers, principals, and other staff), finance, student health, postsecondary, and other relevant areas, with the purpose of connecting and coordinating all parts of the system to allow important questions related to policy, practice, or overall effectiveness to be asked and answered, and incorporated into effective continuous improvement practices. While the Secretary is interested in applications that meet this invitational priority, a State meeting the priority would not receive additional points or preference over other applications. A State will be evaluated based on the extent to which it has a statewide longitudinal data system that includes all of the elements specified in section 6401(e)(2)(D) of the America COMPETES Act.

Changes: None.

Early Childhood

Comment: Several commenters supported the fact that a statewide longitudinal data system, as specified by the America COMPETES Act, would include student information beginning at the pre-kindergarten level. Some commenters recommended that the Department require a State to expand its longitudinal data system by linking with available data on young children; their participation in early childhood education programs; and the characteristics, quality, staffing, and funding of those programs in order to increase access, improve quality, identify critical social services and interventions, and align standards, curricula and assessments from pre-kindergarten through grade 3. A few commenters recommended that a data system be designed so that data eventually can be captured at birth and fed into a Quality Rating Improvement System, if a State has such a system.

Discussion: We agree with commenters that data about early childhood education programs are important to help ensure that young children begin school ready to learn. The America COMPETES Act elements specify a pre-kindergarten-16 data system. If it chooses, a State may link its longitudinal data system to available data on young children and their participation in early childhood programs, consistent with FERPA, including 34 CFR Part 99. This notice has several invitational priorities regarding early childhood programs: (a) Invitational priority 3, inviting applications in which the State plans to create practices, strategies, or programs to improve educational outcomes for high-need young children by enhancing the quality of preschool programs; (b) invitational priority 4, which invites applications that propose to expand statewide longitudinal data systems to include or integrate data from early childhood programs, among other programs; and (c) invitational priority 5, inviting applications in which the State plans to address how early childhood programs, K–12 schools, postsecondary institutions, workforce development organizations, and other State agencies and community partners, will coordinate to improve all parts of the education system and create a more seamless pre-kindergarten-20 route for students. While the Secretary is interested in applications that meet these invitational priorities, we decline to require that statewide longitudinal data systems include additional information about early childhood programs because that would go beyond the data elements specified in the America COMPETES Act.

Changes: None.

Timeline

Comment: Many commenters suggested that a State be evaluated based on the degree of progress it has made on developing a system that would comply with the America COMPETES Act rather than on the extent to which a State has completed these efforts. Another commenter suggested a State be judged on a plan to implement any missing elements of its statewide longitudinal data system. Several commenters also stated that it is not feasible for some States to have a completed statewide longitudinal data system to be in place by September 30, 2011, the date specified in the notice of proposed requirements for the State Fiscal Stabilization Fund.

Discussion: The State Reform Conditions Criteria are used to assess a State's past progress and its success in creating conditions for reform in special areas related to the four ARRA education reform areas. A State will be judged on the extent to which it has, already in place, a statewide longitudinal data system that includes the elements in the America COMPETES Act. Some commenters misunderstood criterion (C)(1); this notice does not require the statewide longitudinal data system to be completed by a particular date. Rather, a State will receive points for the elements it has completed at the time it submits its application.

Changes: None.

Development of a Statewide Longitudinal Data System

Comment: Several commenters stressed the importance of stakeholder support and technical expertise in the development and implementation of statewide longitudinal data systems. Some commenters suggested that we provide incentives to encourage States to design data systems using input from professional standards boards. Other commenters recommended seeking feedback from parents, businesses, educators, community-based partners, universities, hospitals, and students on the content and overall effectiveness of the statewide longitudinal data system.

Discussion: We agree with commenters that stakeholder and expert support in developing a longitudinal data system is important. However, we believe that each State is in the best position to determine how best to solicit technical expertise and stakeholder support and from which groups. Accordingly, we do not believe it is necessary to specify the input and support each State should seek.

Changes: None.

Comment: Some commenters suggested particular qualities of strong statewide longitudinal data systems. They argued that data sets must be common across districts, cross-operational, and supportive of developing a robust, accurate, and immediately useful data mine. Commenters emphasized the importance of developing data systems that are comprehensive, systemic, reliable, valid, and designed for long-term use. One commenter suggested that the Department ensure data elements are used to create uniform cohorts.

Discussion: We agree with commenters that these are important characteristics of a statewide longitudinal data system. We believe that the 12 data elements in the America COMPETES Act represent the qualities suggested by the commenters, and therefore, no change is necessary.

Changes: None.

Comment: One commenter recommended that the State data systems should reflect sufficient grade-to-grade alignment in order to ensure that valid grade-level growth determinations can be made in each State. This commenter urged that the Department require that such growth measures be used only with vertically scaled assessments that are appropriate for examining value-added growth. Two commenters recommended emphasizing the importance of States using cohort data in the statewide longitudinal data systems for determining student progress.

Discussion: We agree with commenters who emphasize the importance of data and assessment systems that support the measurement of student growth. In this notice, *student growth* is defined as the change in achievement data for an individual student between two or more points in time. A State may also include other measures that are rigorous and comparable across classrooms. Given this definition, we decline to specify or restrict the structure of statewide longitudinal data or assessment systems but rather allow States the flexibility to develop data and assessment systems, as long as they support a growth measure that is rigorous and comparable across classrooms.

Changes: None.

Comment: Many commenters stressed that it was important for States to develop interoperable data systems that are aligned with existing technology platforms and able to incorporate data from existing data management systems. Commenters also stressed the importance of ensuring that statewide longitudinal data systems can ''communicate'' with each other so that the data in these systems can be used by early childhood centers and institutions of higher education, within and among schools, within and among LEAs, among State and local agencies, across States and with Federal agencies. One commenter requested that the Department provide additional clarification regarding America COMPETES Act element (4), ''the capacity to communicate with higher education data systems'' and whether this capacity includes data integration or two-way communication.

Discussion: The COMPETES Act requires a statewide longitudinal data system to have the capacity to communicate with higher education data systems. Therefore, statewide longitudinal data systems should have the ability to link an individual student record from one system to another, consistent with FERPA, including 34 CFR Part 99. Additionally, these systems should meet interoperability and portability standards, which will ensure that they have timely and reliable opportunities to share data across different sectors within a State and across States. Timely and reliable information from across sectors will facilitate the evaluation of which program or combinations of programs is improving outcomes for students. Note that States must consider how to protect student privacy as data are shared across agencies. Successful applicants that receive Race to the Top grant awards will need to comply with FERPA, including 34 CFR Part 99, as well as State and local requirements regarding privacy.

Changes: None.

Selection Criterion (C)(2) (proposed Selection Criterion (B)(2)): Accessing and using State data:

Uses of Data

Comment: Several commenters expressed support for our proposal to evaluate State Race to the Top applications based on the extent to which the State plans to use this data to inform and engage key stakeholders, such as policymakers, parents, students, and the public, so that they have information about how well students are performing. Many commenters recommended that these data systems should also be used to identify continuous improvement goals, address barriers that compromise student success, and highlight understanding of best practices. Some commenters suggested these data systems be used to improve instructional practice by facilitating the use of differentiated instruction, to make individualized decisions about students' academic and developmental needs, and to design comprehensive interventions to address those needs. A few commenters suggested that States use these data systems to inform professional development and teacher and administrator evaluations, evaluate teacher preparation programs, allow for the monitoring of teacher and principal assignments, and ensure equitable distribution of teachers. One commenter suggested that data be used to address conditions that lead to the racial isolation of low income students. Commenters recommended that data systems be used to inform strategic planning, inform resource allocation decisions, and support decision-makers in overall organizational effectiveness. In order to ensure that all students have equitable access to education, one commenter recommended that data be analyzed to identify and implement an appropriate array of options that use early access to college coursework as a way to promote college readiness for every student.

Discussion: Criterion (C)(2) will be used to evaluate a State on the extent to which it has a high-quality plan to ensure that the data from its statewide longitudinal data system are accessible to, and used to inform and engage decision-makers in the continuous improvement of policy, instruction, operations, management, resource allocation, and overall effectiveness. We

agree with the commenters that data from these systems can be used for many of the purposes indentified by the commenters. However, we believe most of these are covered in the broad categories of instruction, operations management, and resource allocation. We are revising the criterion to specify that such data can also be used in the areas of ''policy'' and ''overall effectiveness.''

Changes: We have revised criterion (C)(2) to include ''policy,'' and ''overall effectiveness'' as areas for which data may be used.

Building Capacity

Comment: Several commenters stated that the Race to the Top funds should be used to build State capacity for data accuracy, analysis, and dissemination. One commenter urged the Department to consider ways to help States expand and use longitudinal data systems. Other commenters recommended that a State be judged on its capacity to use the data contained in these systems or how it has moved from collecting data to transforming the data into actionable information for use.

Discussion: We agree with the commenter that State plans under this criterion should include a proposal for how the State will improve its own capacity to analyze and use data. We believe the criterion makes this clear and that no further changes are needed. In addition, invitational priority 4 indicates that the Secretary is particularly interested in applications in which States propose working together to adapt one State's statewide longitudinal data system so that it may be used, in whole or in part, by other States, rather than having each State build or continue building such systems independently. We will consider the commenter's request for the Department to help States expand their statewide longitudinal data systems as we develop plans to provide technical assistance to grantees.

Changes: None.

Accessibility of Data

Comment: Some commenters recommended adding language to criterion (C)(2) to ensure that data from a State's statewide longitudinal data system are accessible to key stakeholders. For instance, commenters suggested requiring a State to describe how its data are presented in a format and language that key stakeholders can access and understand, and are in a format that is easy to interpret and analyze. One commenter suggested that this notice compel a State to describe the format (*e.g.*, dashboards, reports, data downloads) and timelines in which it plans to provide the appropriate level of data to the different stakeholders, as well as its communication plans to ensure that stakeholders are aware this information is available. Some commenters were especially concerned that the data are accessible to communities and families, and in particular, that these stakeholders be provided support in understanding data and their uses to monitor children's progress and to hold districts and schools accountable.

A few commenters recommended that States and LEAs provide parents and the public with clear and concise annual reports that are useful and relevant to all constituencies. Commenters suggested topics that should be included in these reports, such as an overall assessment of education, reports on school quality, descriptions of progress in the core academic subjects, and indicators of the health and safety of children. One commenter suggested that States include in reports an opportunity-to-learn index to track data about the quality of State and local education systems. Another commenter suggested that reports provide teachers with data on the growth of their students on interim or summative assessments. A few commenters noted the importance of consultation with stakeholders after the data are reported, recommending that States and LEAs address in their application how they plan to disseminate and explain the data to stakeholders and how they will use community input to develop a plan of action to improve schools.

Discussion: We agree with commenters that data should be accessible to key stakeholders and that reports including those data should provide useful information to them. A State's application will be evaluated on the extent to which it has a high-quality plan to make sure its data are accessible to, and used to inform and engage key stakeholders. However, we decline to specify the exact format of the data, what might be included in reports, the specific input or consultation with stakeholders, or the timelines for sharing data given the unique nature of statewide longitudinal data systems and the differing needs of constituencies within States. These are all potential elements that States could include, however, in their Race to the Top plans.

Changes: None.

Comment: Some commenters suggested adding to the list of stakeholders in criterion (C)(2) other groups who should have access to data from statewide longitudinal data systems, such as families (instead of parents), youth-serving community-based organizations and value-added intermediaries, parent teacher associations, nonprofit organizations, workforce investment boards, business leaders, community groups, institutions of higher education involved in the preparation of new teachers, and early childhood program providers.

Discussion: The list of stakeholders in criterion (C)(2) is meant to be illustrative, but not exhaustive. States should make data available, consistent with FERPA, including 34 CFR Part 99, to any relevant stakeholder it deems appropriate. We do not, however, think it is necessary to add more examples of stakeholders to this criterion.

Changes: None.

Comment: Many commenters recommended that the Department require a State to address how public charter schools will have the same access to the information produced by these data systems as traditional public schools. Commenters believed that access to high-quality student-level data is critical to the successful operation of all public schools, including public charter schools, and is a key underpinning of any accountability based system. Another commenter requested that the Department clarify that charter schools must provide data to States.

Discussion: The Department agrees that charter schools should have the same access to the information produced by statewide longitudinal data systems as traditional public schools and States should ensure this access. Nothing in this notice would prohibit equal access to data for public charter schools. Public charter schools must provide States with any data specified by the State on the same basis as other public schools.

Changes: None.

Privacy Issues

Comments: Several commenters recommended that the Department require a State to provide assurances concerning the safeguards it has in place to protect the privacy of students and school employees as data about them are shared.

Discussion: States must consider how to protect student privacy as data are shared. Successful applicants that receive Race to the Top grant awards will need to comply with FERPA, and its implementing regulations 34 CFR Part 99, as well as any applicable State and local requirements. Because a State's compliance with FERPA is a requirement with which all recipients of Department funds must meet, we are removing the reference to compliance

with FERPA from the text of the selection criteria in (C). To remind States of their obligations under FERPA, we are including a footnote with a reference to the statute and implementing regulations in this section.

The Department agrees that teacher and principal privacy also must be protected. However, teacher and principal privacy is governed by State law. States, LEAs, and schools should consider their individual State privacy statutes when addressing these privacy issues in the establishment of a statewide longitudinal data system.

Changes: We moved the references to FERPA from the criteria in (C) to a footnote in that same section.

Comments: Several commenters stated that the Department should harmonize Federal policy to ensure that individual privacy protections are safeguarded in a way that does not interfere with timely and necessary information sharing. Some commenters expressed concern that States may face challenges in fully implementing statewide longitudinal data systems while meeting the requirements of FERPA unless current FERPA regulations regarding data-sharing among State agencies are revised. They recommended that the FERPA regulations be revised to explicitly allow for interagency data exchanges so the Administration's policy goals for Race to the Top can be realized.

Discussion: The Department recognizes that further clarity on FERPA and the America COMPETES Act will facilitate States' ability to develop and implement statewide longitudinal data systems that contain all 12 data elements outlined in the America COMPETES Act. The establishment of a statewide longitudinal data system with the necessary functionality to incorporate all 12 of the COMPETES Act elements, by itself, does not violate FERPA. The actual implementation of such a system (including the disclosure and redisclosure of personally identifiable information from education records) also does not violate FERPA provided that States follow FERPA's specific requirements. For example, the Department's current interpretation of FERPA is not a barrier to importing data into an educational agency from another State agency, since FERPA only applies to the personally identifiable information contained in education records. In the following discussions, in response to specific questions from commenters, we provide greater detail about how a statewide longitudinal data system may be established and implemented in compliance with FERPA. The Department is not aware of any other Federal laws that would prohibit or pose barriers to a State establishing a statewide longitudinal data system. To the extent that State laws present barriers to the development of a statewide longitudinal data system in compliance with the ARRA, the State will likely need to take specific actions to address those barriers. The Department will provide further clarification in this area as warranted.

Changes: None.

Comments: Some commenters asked the Department to clearly explain how post-secondary institutions, K–12, and pre-kindergarten-K education systems can share restricted student information.

Discussion: As stated previously, the establishment of a statewide longitudinal data system with the necessary functionality to incorporate all 12 of the COMPETES Act elements, including the sharing of data between pre-kindergarten-12 and postsecondary data systems, by itself, does not violate FERPA. States also may implement a statewide longitudinal data system that includes the disclosure and redisclosure of personally identifiable information from education records in a manner that complies with FERPA. In addition to complying with FERPA, any sharing of student data must also comply with the requirements of 34 CFR 104.42(b)(4) (the regulations implementing section 504 of the Rehabilitation Act), generally prohibiting postsecondary institutions from making pre-admission inquiries about an applicant's disability status.

We first address the question of the disclosure and redisclosure of personally identifiable information in the pre-kindergarten context. The disclosure of personally identifiable information from pre-kindergarten to LEAs is not affected by FERPA with respect to pre-kindergarten programs that do not receive funding from the Department, as FERPA does not apply to those programs. With respect to pre-kindergarten programs that receive funding from the Department, the non-consensual disclosure of personally identifiable information from the students' pre-kindergarten education records to LEAs is permitted under the enrollment exception in the FERPA regulations, provided that certain notification and access requirements are met. (20 U.S.C. 1232g(b)(1)(B); 34 CFR 99.31(a)(2) and 99.34).

The second issue raised by commenters involved the sharing of information between postsecondary institutions and SEAs. Similar to the pre-kindergarten context, the non-consensual disclosure of personally identifiable information from K–12 education records to a postsecondary institution is permitted under the enrollment exception, provided the notification and access conditions are met. Postsecondary institutions may disclose personally identifiable information to an SEA under the evaluation exception if the SEA has the authority to conduct an audit or evaluation of the postsecondary institution's education programs. (20 U.S.C. 1232g(b)(1)(C), (b)(3), and (b)(5); 34 CFR 99.31(a)(3) and 99.35). States that have not established the requisite authority may do so in a number of ways, such as: (1) Creating an entity in the State to house the statewide longitudinal data system and endowing that entity with the authority to conduct evaluations of elementary, secondary, and postsecondary education programs; or (2) granting authority at the SEA or IHE level to conduct evaluations of elementary, secondary and postsecondary education programs. States may grant authority through various vehicles, including for example, Executive Orders, regulations and legislation. In some States the formation documents for SEAs, IHEs or other educational entities may already grant the necessary authority; however, explicit statutory authority is not required by FERPA.

The Department recognizes that there is considerable variation among States' governance structures and laws, and that using this exception to obtain personally identifiable information from postsecondary institutions may be difficult. The Department is currently reviewing its regulations and policies in this area and will be in close communications with States over the next several months regarding these issues. Of course, the Department also is available, upon request, to provide States with technical assistance on how to implement a statewide longitudinal data system that meets the requirements of FERPA.

Changes: None.

Comment: A few commenters requested that the Department provide specific guidance about the de-identification process that all States must adhere to in order to share potentially identifiable information about students.

Discussion: It is not possible to prescribe or identify a single method to minimize the risk of disclosing personally identifiable information in redacted records or statistical information that will apply in every circumstance, including determining whether defining a minimum cell size is an appropriate means to protect the

confidentiality of aggregated data and, if so, selection of an appropriate number. This is because determining whether a particular set of methods for de-identifying data and limiting disclosure risk is adequate cannot be made without examining the underlying data sets, other data that have been released, publicly available directories, and other data that are linked or can be linked to the information in question. For these reasons, we are unable to provide examples of rules and policies that necessarily meet the de-identification requirements in 34 CFR 99.31(b). The releasing party is responsible for conducting its own analysis and identifying the best methods to protect the confidentiality of information from education records it chooses to release. We recommend that State educational authorities, educational agencies and institutions, and other parties refer to the examples and methods described in the notice of proposed rulemaking to amend its FERPA regulations that the Department published in the **Federal Register** on March 24, 2008 (73 FR 15574, 15584) (FERPA notice of proposed rulemaking) and refer to the Federal Committee on Statistical Methodology's Statistical Policy Working Paper 22, *http://www.fcsm.gov/working-papers/spwp22.html*, for additional guidance.

Further, as noted in the preceding paragraph and in the preamble to the FERPA NPRM, use of minimum cell sizes or data suppression is only one of several ways in which information from education records may be de-identified before release. Statistical Policy Working Paper 22 describes other disclosure limitation methods, such as ''top coding'' and ''data swapping,'' which may be more suitable than simple data suppression for releasing the maximum amount of information to the public without breaching confidentiality requirements. Decisions regarding whether to use data suppression or some other method or combination of methods to avoid disclosing personally identifiable information in statistical information must be made on a case-by-case basis.

With regard to issues with ESEA reporting in particular, determining the minimum cell size to ensure statistical reliability of information is a completely different analysis than that used to determine the appropriate minimum cell size to ensure confidentiality.

Changes: None.

Selection Criterion (C)(3): Using data to improve instruction (proposed Selection Criterion (B)(3)):

Comment: One commenter recommended that a State describe in its plan the State and LEA roles and responsibilities related to using data to improve instruction, including how the plan would ensure that LEAs are primarily responsible for creating instructional improvement systems with assistance and support from the State. One commenter recommended that the Department increase the explicit emphasis on adoption and implementation of local data and instructional improvement systems.

Discussion: Application requirement (e)(4) requires States to describe, for each Reform Plan Criteria that it chooses to address, the parties responsible for implementing the activities. We therefore do not feel it is necessary to specify in the criterion itself that a State should describe its roles and responsibilities and that of its LEAs. However, we agree with the commenters that criterion (C)(3)(i) concerns local instructional improvement systems, and we are revising it to clarify this. We are also clarifying that the plans under this criterion should include efforts to increase the acquisition and adoption of such systems.

Changes: Criterion (C)(3)(i) now begins, ''Increase the acquisition, adoption, and use of local instructional improvement systems.''

Comment: Some commenters suggested that a State be evaluated on the degree to which it can demonstrate collaboration and cooperation with and among LEAs. Several commenters recommended that the Department include an incentive for States and LEAs to learn from outstanding LEAs in data development and reporting in order to improve vertical alignment of the State's education system.

Discussion: As described elsewhere in this notice, States receiving Race to the Top funds, along with their LEAs and schools, are expected to identify and share promising practices, make work freely available to others and make data available in appropriate ways that comply with FERPA to stakeholders and researchers. Specifically, criterion (A)(1)(ii) provides for the evaluation of a State based on the extent to which the participating LEAs are strongly committed to the State's plans and to effective implementation of reform in the four education areas. Criterion (A)(2)(i)(b) asks the State to demonstrate how it will support participating LEAs in successfully implementing the education reform plans the State has proposed, through such activities as identifying promising practices, evaluating these practices' effectiveness, ceasing ineffective practices, widely disseminating and replicating the effective practices statewide, holding participating LEAs accountable for progress and performance, and intervening where necessary. In addition, under criterion (C)(3)(i), a State will be evaluated on the extent to which it, in collaboration with its participating LEAs, has a high-quality plan to increase the LEAs' acquisition, adoption, and use of local instructional improvement systems that provide teachers, principals, and administrators with the information and resources they need to improve their instructional practices, decision-making, and overall effectiveness. This could include facilitating collaboration between LEAs. Given these existing criteria, we do not believe a change is necessary.

Changes: None.

Comment: One commenter suggested that the Department allow States to focus on early childhood care and development data systems exclusively, without penalty for not including K–12 instructional improvement systems.

Discussion: While we believe it is important for instructional improvement systems to include tools for improving early childhood care, we decline to make the commenter's suggested change. Section 14005(c) of the ARRA requires a State, when applying for a Race to the Top grant, to describe the status of the State's progress in each of the four assurance areas in section 14005(d), including improving the collection and use of data. We believe the assurance in the ARRA related to the use of data is intended to cover all levels of the educational system.

Changes: None.

Comment: Several commenters recommended revising criterion (C)(3)(i) to include other stakeholders, in addition to teachers and principals, who can benefit from using data to improve instruction, such as youth development professionals in after-school and summer programs, mentoring and after-school learning organizations, expanded learning time partners, early childhood providers, and program directors.

Discussion: We understand that there are other stakeholders outside of the school who play critical roles in education. Criterion (C)(2) addresses how data from a statewide longitudinal data system can be used by a wide range of stakeholders, whereas criterion (C)(3)(i) is focused on how data are specifically used in instructional improvement systems to improve instructional practices, decision-making, and overall effectiveness during the school day. We believe the list of stakeholders in criterion (C)(3)(i) is appropriate given this focus, therefore, we do not believe it is necessary to

revise this criterion. However, nothing in this notice would prevent a State from specifying in its plan additional stakeholders who may use instructional improvement systems.

Changes: None.

Comment: Some commenters stated that, in addition to making data available, there must also be an equal focus on building the capacity of educators and school leaders to analyze and use this information. They argued that a State should describe how it will support its LEAs in providing effective, collaboratively designed and research-based professional development, including pre-service training to teachers, principals and administrators on how to analyze and use these data. One commenter suggested that professional development opportunities include a focus on using multiple sources of information to assess student academic performance; using a variety of strategies to analyze data; using data to identify barriers for success, design strategies for improvement, and plan daily instruction; benchmarking successful schools with similar demographics to identify strategies for improvement; and, creating a school environment that makes data-driven decisions.

One commenter suggested that a State should articulate the means by which it will require educators seeking certification or re-certification to receive training and show competence in the analysis, interpretation, and use of data. Several commenters suggested that time during the school day should be dedicated to data analysis and action planning for teachers. Another commenter suggested that a State be required to explain how it will promote an environment (*e.g.*, a climate of autonomy) in which teachers, principals, and administrators have the support and conditions to make decisions based on the results of the data analyses.

Discussion: We agree with commenters that States must support their LEAs in providing effective professional development. We are adding a new criterion (C)(3)(ii) to encourage States to support participating LEAs and schools that are using local instructional improvement systems to provide effective professional development to teachers, principals, and administrators on how to use these systems and the resulting data to support continuous instructional improvement. We are also clarifying, in criterion (C)(3)(i), that the purpose of instructional improvement systems is to provide educators with the resources they need, as well as the information they need. In addition, criterion (D)(5) addresses the need for high-quality professional development. The Department also encourages States to utilize current Federal education funding, for example Title II–A Improving Teacher Quality State grants, as a funding mechanism to provide further professional development to teachers in the use of data in the classroom.

We do not believe we should require a State to articulate the means by which it will require educators seeking certification or re-certification to receive training and show competence in the analysis, interpretation, and use of data. A State may address this issue in its plan if it chooses.

Changes: Criterion (C)(3)(ii) has been added to provide that a State will be evaluated based on the extent to which it has a high-quality plan to support LEAs and schools that are using instructional improvement systems (as defined in this notice) in providing effective professional development to teachers, principals, and administrators on how to use these systems and the resulting data to support continuous instructional improvement. As a result of this addition, proposed criterion (C)(3)(ii) has been redesignated (C)(3)(iii). We have also revised criterion (C)(3)(i) to clarify that instructional improvement systems should provide educators with the ''information and resources they need to inform and improve their instructional practices, decision-making, and overall effectiveness.''

Comment: One commenter did not support making data available and accessible to researchers. This commenter stated that large urban districts are deluged with requests for information and access to data, which diverts time and resources from student-centered activities, and that this misconstrues the purpose of Race to the Top to improve student achievement and close achievement gaps. Rather than making data available to researchers for the purposes specified in criterion (C)(3)(iii), this commenter suggested that the data be available instead to evaluation contractors and State and Federal officials.

Discussion: We appreciate the commenter's concern about the resources needed to share data with researchers. However, we believe it is very important that researchers, consistent with FERPA, including 34 CFR Part 99, be able to conduct studies to improve instruction. We therefore decline to make the recommended change to make the data available only to evaluation contractors and State and Federal officials.

Changes: None.

Comment: Many commenters suggested that the Department clarify that instructional improvement systems should identify students who are off-track to graduation or have dropped out of school. These commenters said that early warning indicators can be used by LEAs and States to develop and implement options that will keep students on track, or put them back on track, to graduation.

Discussion: We agree with the commenter that instructional improvement systems should provide early warning indicators about students at risk of educational failure and are revising the definition of *instructional improvement systems* accordingly. We also are revising criterion (C)(3)(iii) to be consistent with criterion (C)(3)(ii) and to clarify that the data from instructional improvement systems, together with statewide longitudinal data system data, should be made available and accessible to researchers.

Changes: We have revised the definition of *instructional improvement systems* to clarify that such systems may also integrate instructional data with other student-level data such as attendance, discipline, grades, credit accumulation, and student survey results to provide early warning indicators of a student's risk of educational failure. We have also revised criterion (C)(3)(iii) to clarify that the data from ''instructional improvement systems,'' together with statewide longitudinal data system data, should be made available and accessible to researchers.

Comment: One commenter recommended that the Department clarify the definition of *instructional improvement systems* to reference use of technology-based tools and other strategies to systemically manage cycles of continuous instructional improvement. A few commenters suggested that instructional improvement systems should be research-based. Some commenters suggested that the definition of this term should state that the purposes of these systems are to: Ensure that every student has access to instructional materials that are current and aligned to these standards; differentiate instruction; provide individualized learning; gather input and feedback from stakeholders; translate data into knowledge; drive innovation; use knowledge to create networks of best practices; and inform decision-making.

Discussion: In response to these comments, we are clarifying the

definition of *instructional improvement systems.* However, we are not specifying additional purposes of instructional improvement systems, as this could inadvertently discourage States and LEAs from developing new and innovative strategies for addressing students' learning needs.

In response to the commenters who indicated that instructional improvement systems should be research-based, we believe that much research has been done on the effectiveness of using data to inform instructional decisions. Instructional improvement systems provide teachers and instructional leaders with the evidence they need to make informed instructional decisions. Therefore, such systems are a critical element of any classroom-based, evidence-driven approach to instruction.

Changes: We have revised the definition of *instructional improvement systems* to reference that such systems are ''technology-based tools and other strategies that provide teachers, principals, and administrators with meaningful support and actionable data to systemically manage continuous instructional improvement * * *.'' In addition, we have included summative assessments as an additional example of information gathering on instructional improvement.

Performance Measures and Minimum Evidence for Selection Criteria (C)(1), (C)(2), and (C)(3)

Comment: Several commenters recommended specific performance measures for criteria (C)(1), (C)(2), and (C)(3). For instance, one commenter recommended that data performance measures include indices or rankings on districts' and schools' actual provision of basic resources and opportunities that the ARRA contemplates. Another commenter encouraged the Department to include a performance measure that States must ensure data are in a format and in a language that families can access and understand, consistent with the myriad roles parents are required to play under the ESEA. Another commenter recommended that performance measures for criterion (C)(2) include the results of surveys of stakeholders. One commenter suggested that performance measures be used to evaluate the extent to which the output from the statewide longitudinal data system is geared to stakeholder needs.

Discussion: A State may propose its own performance measure(s) for the section on Data Systems to Support Instruction. Rather than requiring particular performance measures for this section, we are choosing to give a State the flexibility to define its own measures that are tailored to the context of its statewide longitudinal data system.

Changes: None.

Comment: One commenter suggested that criterion (C)(3)(iii) require minimum evidence to ensure that competing applications are judged in a consistent manner. Another commenter recommended that minimum evidence should include the adoption and publication of procedures for the request and release of longitudinal data for research purposes. In addition, this commenter suggested that evidence include the State's partnerships with national researchers to evaluate the effectiveness of the instructional practices in each participating LEA.

Discussion: We believe that the basic elements of a plan, as specified in Application Requirement (e), should be sufficient to yield consistent judging on this criterion. We therefore decline to require the specific minimum evidence suggested by the commenters.

D. Great Teachers and Leaders

Selection Criterion (D)(1): Providing High-Quality Pathways for Aspiring Teachers and Principals (Proposed Criterion (C)(1)):

Comment: Many commenters recommended changes to the proposed definition of *alternative certification routes.* Two commenters suggested changing the term to ''alternative routes to certification'' to be consistent with the terminology in criterion (D)(1). Some commenters recommended that the definition refer to school districts and nonprofit organizations as providers of programs offering alternative routes to certification. A few commenters sought to ensure that programs offering alternative routes to certification be selective in accepting candidates into their programs. Many commenters objected to defining an alternative route to certification as one that includes clinical or student teaching experience, claiming that such experiences are characteristic of traditional preparation programs, and that other kinds of training, such as intensive mentoring support during the first months of teaching, are more valuable than clinical or student teaching experiences. However, one commenter supported field-based experiences for principals, and other commenters stated that administrators seeking alternative routes to certification should have prior teaching experience.

Commenters also had different views on the level and type of coursework that should be part of alternative routes to certification. One commenter supported alternative routes to certification involving limited amounts of coursework, one commenter disagreed, and a third commenter specifically recommended requiring substantive coursework in reading and math content and teaching methods.

Several commenters recommended that the definition include a requirement that all alternative routes to certification ensure that graduates of such programs have the skills to address the needs of all students. One commenter expressed concern that alternative routes to certification, given their shortened timeframe, are not designed to ensure that teachers develop the skills needed to effectively instruct students with disabilities. The commenter recommended strengthening both traditional and alternative route preparation programs so that all teachers are more skilled in teaching students with disabilities.

Two commenters sought changes aimed at ensuring that graduates of alternative routes to certification receive the same level of certification as teachers and leaders who complete traditional preparation programs. Similarly, a few commenters recommended that the Department require States to verify that teachers certified through alternative routes to certification are treated equally and fairly in hiring under all State regulations and statutes, while another commenter suggested sanctioning States that treat alternative routes to certification as a ''route of last resort.'' On the other hand, one commenter stated that teachers certified through alternative routes generally should not be assigned to high-need schools because of their limited experience.

Discussion: In response to these comments, the Department is making a number of changes to the definition of *alternative certification routes.* First, we agree that the various terms used in the Race to the Top program should be consistent; therefore, we are changing the proposed term ''alternative certification routes'' to ''alternative routes to certification'' in this notice. We also agree that the NPP was unclear regarding providers of alternative routes to certification, and are changing the definition to clarify that qualified providers of States' teacher and administrator preparation programs include both institutions of higher education and other providers that operate independently from institutions of higher education. In addition, we agree that providers of alternative routes to certification, as with all preparation programs, should be selective in enrolling individuals in their programs

and, therefore, are changing the definition to ensure that qualified providers of teacher and principal preparation programs are selective in the candidates they accept.

The Department believes it is important to provide prospective teachers and principals with direct school and classroom experiences as part of their preparation. Because alternative routes to certification are accelerated and vary in delivery models, there are a variety of ways, in addition to clinical or student teaching experiences, to provide this experience, such as through practicum and job embedded experiences, coupled with intensive mentoring or support during the first months of teaching, as suggested by the commenters. We agree with the commenters and are revising the definition to refer to school-based experiences and ongoing support such as effective mentoring and coaching.

As to the extent of the coursework required by programs providing alternative routes to certification, the Department believes that States are in the best position to determine the courses and coursework that could be reduced or limited as a part of any alternative route to certification program, consistent with the needs of local schools, the accelerated nature of alternative routes to certification, and the wide range of previous education and experience that candidates bring to these programs. The Department, therefore, declines to change the definition to specify the amount or type of coursework that must be included in programs providing alternative routes to certification. We are specifying in the final definition, however, that alternative routes to certification should include standard features such as demonstration of subject-matter mastery and high-quality instruction in pedagogy.

We also believe that programs providing alternative route to certification should not award levels of certification that are different from the certifications available from traditional preparation programs, which could limit the opportunities for teachers to teach and leaders to lead; rather, alternative routes to certification programs, whether for teachers or principals, should be considered different pathways to certification with the same rigor as other State-approved routes. The Department's view is that States, LEAs, and schools should treat individuals prepared through State-approved alternative routes to certification in the same manner as those prepared and certified through traditional teacher and principal preparation programs, and we are changing the definition to reflect this view.

The Department agrees that there is a need to strengthen preparation programs to prepare teachers and principals to meet the needs of all students. We are revising the definition of *alternative routes to certification* to clarify that such routes should prepare teachers and principals to address the needs of all students, including English language learners and students with disabilities.

Changes: We have changed the term ''alternative certification routes'' to ''alternative routes to certification.'' We also have made the following changes: (1) Revised clause (a) to clarify that ''other providers'' refers to ''other providers operating independently from institutions of higher education''; (2) added a new clause (b) to clarify that alternative routes to certification programs must be selective in accepting candidates; (3) re-designated proposed clause (b) as new clause (c) and changed ''clinical/student teaching experiences'' to ''supervised, school-based experiences and ongoing support such as effective mentoring and coaching;'' (4) re-designated proposed clause (c) as new clause (d); and (5) re-designated proposed clause (d) as new clause (e) and revised it to clarify that upon completion, programs providing alternative routes to certification must award the same level of certification that traditional preparation programs award upon completion. We have also revised the definition of *alternative routes to certification* to clarify that such routes should include ''standard features such as demonstration of subject-matter mastery, and high-quality instruction in pedagogy and in addressing the needs of all students in the classroom including English language learners and students with disabilities.''

Comment: Many commenters suggested that the Race to the Top competition places too much emphasis on alternative routes to certification and recommended that the Department eliminate the focus on alternative routes and expand the criterion to include multiple routes. Several commenters expressed concern that alternative routes to certification are not as effective as traditional routes. Those commenters argued that alternative routes to certification do not provide the necessary skill sets to impact teaching and learning, and do not attract educators with the necessary background to provide instructional leadership. A few commenters questioned whether criterion (D)(1) is necessary. One commenter recommended that the Department not require States to require alternative routes for principals. A few commenters argued that research shows that alternative routes have not been as effective as traditional programs. One commenter suggested that the Department focus on the quality of pathways to certification rather than the number of those pathways. Multiple commenters suggested that States develop common standards of performance for those entering the profession, regardless of the route taken. One commenter recommended that the Department establish safeguards to ensure that alternative routes successfully prepare candidates to meet a consistent set of standards that govern teacher licensure. A few generally supportive commenters recommended monitoring these routes to ensure quality programs, and requiring States to provide evidence of a quality control process for their certification programs.

Discussion: The Department agrees that we should encourage the creation of high-quality pathways for aspiring teachers and principals through both traditional and alternative routes to certification. We are therefore adding criterion (D)(1)(iii), under which States will be rewarded for having a process for monitoring, evaluating, and identifying areas of teacher and principal shortage and for preparing teachers and principals to fill these areas of shortage.

At the same time, we believe it is important to retain the original substance of proposed criterion (C)(1), regarding alternative routes to certification, for two reasons. First, to increase the supply of high-quality talent entering the field of education we must reduce the barriers to entry into the education profession, especially for high-achieving individuals, such as individuals who have changed careers and recent college graduates who have the potential to be good educators. Alternative routes to certification are typically optimized for such new entrants into the profession. Second, the Secretary believes that competition between traditional and alternative certification providers will help increase the quality of all programs. To provide clarity, and to emphasize the importance of alternative routes actually being in use, we are separating proposed criterion (C)(1) into two criteria, (D)(1)(i) and (D)(1)(ii).

To further support the notion that all teacher and administrator preparation programs must train candidates to become high-performing professionals, we proposed in the NPP and establish in this final notice, criterion (D)(4). This

criterion is intended to shine a light on the quality of all preparation programs in the State by providing both potential candidates and schools recruiting graduates with valuable information about which programs are actually best preparing candidates for success. We are also adding criterion (D)(4)(ii), which encourages States to expand preparation and credentialing options and programs that are successful at producing effective teachers and principals.

Together, we believe that criteria (D)(1) and (D)(4) provide a combination of rewards, incentives, and transparency that could result in significant quality improvements in educator preparation and recruitment.

Finally, we do not believe we should remove principals from this criterion. Well-prepared principals are critical to providing the instructional leadership necessary to support teaching and learning in our schools. We know that chronically underperforming schools too often have poor leadership, and that poor leadership drives away good teachers. The focus on principal preparation is therefore critical.

Changes: Criterion (D)(1) now reads, ''Providing high-quality pathways for aspiring teachers and principals: The extent to which the State has—

(i) Legal, statutory, or regulatory provisions that allow alternative routes to certification (as defined in this notice) for teachers and principals, particularly routes that allow for providers in addition to institutions of higher education;

(ii) Alternative routes to certification (as defined in this notice) that are in use; and

(iii) A process for monitoring, evaluating, and identifying areas of teacher and principal shortage and for preparing teachers and principals to fill these areas of shortage.''

In addition, we have added criterion (D)(4)(ii), which encourages States to ''expand preparation and credentialing options and programs that are successful at producing effective teachers and principals (both as defined in this notice).''

Comment: One commenter recommended including an additional requirement that States demonstrate the extent to which their alternative routes for STEM teachers draw upon nationally recognized models.

Discussion: The Department places great emphasis in Race to the Top on STEM, as evidenced by the fact that we have established a competitive preference priority for STEM proposals in this notice. We also recognize the importance of using models that have shown success in raising student achievement in STEM areas. However, we do not believe it is necessary to require that States demonstrate the extent to which their alternative routes to certification for STEM teachers utilize nationally recognized models. We expect that all alternative routes to certification, including those for STEM teachers, would include standard features such as demonstration of subject-matter mastery, and high-quality instruction in pedagogy and in addressing the needs of all students in the classroom including English language learners and student with disabilities. As previously stated, we are adding language to the definition of *alternative routes to certification* that clarifies this point.

Changes: None.

Comment: Two commenters recommended that a portion of the Race to the Top funds be used to promote new approaches to alternative routes to certification, incentivizing existing programs to adopt research-based and effective strategies.

Discussion: The Department recognizes that there are many research-based, innovative practices that can help teachers, principals, and others improve student achievement. Nothing in this notice prevents States from engaging in or supporting such innovation. The Department notes that it recently announced proposed priorities, requirements, definitions, and selection criteria for the Investing in Innovation Fund. Established under section 14007 of the ARRA, the Investing in Innovation fund will provide competitive grants to expand the implementation of innovative practices that show the promise of significantly improving K–12 student achievement for high-need students, as well as help close the achievement gap, and improve teacher and principal effectiveness. The grants will allow eligible entities to expand their work and serve as models of best practices. LEAs and nonprofit organizations interested in developing new approaches to improve teacher and principal effectiveness in meeting the needs of high-need students and scaling-up such strategies may wish to consider applying for an Investing in Innovation grant.

Changes: None.

Comment: One commenter recommended that, instead of asking States to show the extent to which they encourage alternative routes to certification, States should be required to demonstrate the extent to which teacher preparation programs partner with high-need LEAs and schools to meet the specific personnel needs of those LEAs and schools.

Discussion: The Department agrees that creating partnerships between effective teacher preparation programs and high-need LEAs and schools could be an effective strategy to meet personnel needs. As discussed earlier, we are adding criterion (D)(1)(iii), which is focused on identifying areas of teacher and principal shortage and preparing teachers and principals to fill them. States could address part of this criterion by establishing the partnerships suggested by the commenter.

Changes: None.

Selection Criterion (D)(2): Improving Teacher and Principal Effectiveness Based on Performance (Proposed Criterion (C)(2)):

Comment: Several commenters recommended requiring that teacher and principal evaluations be conducted at the local level and that States only provide support rather than be directly involved in the evaluation process. Many commenters also stated that the consequences of those evaluations (*e.g.*, performance pay) should also be decided at a local level. Those commenters argued that local school systems are better able to identify effective and ineffective educators, allowing for meaningful comparisons and interpretations across schools. Another commenter recommended adding an assurance encouraging States to provide local control to principals over issues such as hiring, leadership team appointments, school-based funding, and scheduling flexibility. Two commenters suggested replacing ''differentiating'' in the title of criterion (D)(2) (proposed criterion (C)(2)) with ''evaluating.'' Other commenters stated that the focus of this criterion should be primarily on improving the performance of teachers and principals in order to improve student achievement.

Discussion: It was the Department's intent that LEAs would be the entities conducting teacher and principal evaluations and making informed decisions, based on the evaluations, regarding teacher and principal development, compensation, promotion, retention, tenure, and removal. We are revising criterion (D)(2) to clarify that participating LEAs (as defined in this notice) should perform these functions and States should have a plan for ensuring that participating LEAs do so.

While differentiating performance is an important component of evaluation systems, we agree that criterion (D)(2) is focused on improving teacher and principal effectiveness, and we are changing the title to make this clear. We

also have made the development of evaluation systems (rather than differentiation) the centerpiece of this criterion by revising (D)(2) to encourage the design and implementation of high-quality evaluation systems, and to promote their use for feedback, professional improvement, and decision-making.

Changes: We have revised criterion (D)(2) to clarify that the State's role is to ''ensure that participating LEAs'' perform the functions described in criterion (D)(2). We have also replaced ''differentiating'' with ''improving'' in the title of criterion (D)(2). We have also reframed this criterion so that it focuses on the creation and use of evaluation systems.

Comment: One commenter recommended changing criterion (D)(2)(i) (proposed criterion (C)(2)(a)) to read ''Establish and provide a clear description of a system to measure impact on student growth (as defined in this notice) that uses a rigorous statistical approach.''

Discussion: We accept the commenter's suggested language, in part. We do not, however, believe it is necessary to include in criterion (D)(2)(i) that the measure of student growth uses a rigorous statistical approach. The definition of *student growth* in this notice already provides that the approaches used to measure growth must be rigorous. We are changing criterion (D)(2)(i) to reflect the first part of the commenter's suggested language. We are also clarifying that growth should be measured for each individual student.

Changes: Criterion (D)(2)(i) has been revised to read, ''Establish clear approaches to measuring student growth (as defined in this notice) and measure it for each individual student.''

Comment: One commenter asked for clarification regarding the word ''overall'' in the proposed definition of an *effective principal.*

Discussion: The word ''overall'' in the definition of *effective principal* refers to the performance of all of the students in the school, taken as a whole. The analogue from the ESEA is the ''all students'' group used in AYP determinations. We are removing the reference to section 1111(b)(2)(C)(v)(II) of the ESEA from the definition of *effective principal* because, as noted elsewhere, a new paragraph (g) in the Application Requirements section of this notice explains that references to ESEA subgroups throughout the notice are the subgroups described in section 1111(b)(2)(C)(v)(II) of the ESEA.

Changes: We have removed the parenthetical ''(described in section 1111(b)(2)(C)(v)(II) of the ESEA)'' from the definition of *effective principal.*

Comment: Many commenters stated that the proposed definition of *effective principal* relies too heavily on standardized test scores as the sole measure of effectiveness. Several commenters recommended that the definition be changed to require States to expand the definition beyond student growth to include multiple measures such as effectiveness as a leader; effective fiscal management; student, community, and parental engagement; effective school safety; evidence of providing a supportive teaching and learning environment; discipline; college matriculation rates; college readiness rates; and data on staff turnover rates and working conditions. One commenter suggested balancing the evaluation of principals by including data from State assessments and other data on student learning in all core academic subjects, so as to avoid ''narrowing the curriculum.'' Other commenters emphasized the principal's role in creating a positive school climate, engaging students, increasing the number of effective teachers, continuous improvement, connecting learning to solving community problems, implementing school-wide practices that drive substantial student achievement gains, and preparing students for success in work and post-secondary education. One commenter suggested supplementing the definition to state that an *effective principal* is one who demonstrates growth in the number and percentage of effective and highly effective teachers within the school through demonstrated success in strategies such as teacher recruitment and selection, retention, high quality data-driven professional development, feedback and coaching to individual teachers, counseling out, and fair dismissals.

Discussion: The Department believes that student growth must be a significant factor in determining principal effectiveness. However, we agree with commenters that data on student growth should not be used as the sole means of evaluating principals and that States, LEAs, and schools should supplement student growth with other measures of effectiveness. Accordingly, we are revising the definition of *effective principal* to require that they do so. While we cannot include in the definition all of the measures recommended by the commenters, we believe it is important to include several examples for illustrative purposes and are adding examples of the following measures in the definition of *effective principal:* high school graduation rates and college enrollment rates, as well as evidence of providing supportive teaching and learning conditions, strong instructional leadership, and positive family and community engagement. We also are making minor changes to the definition for purposes of clarification.

Changes: We have changed the definition of *effective principal* as follows: (a) Replaced ''States may supplement this definition as they see fit'' with ''States, LEAs, or schools must include multiple measures;'' (b) added ''Supplemental measures may include, for example, high school graduation rates and college enrollment rates, as well as evidence of providing supportive teaching and learning conditions, strong instructional leadership, and positive family and community engagement;'' and (c) replaced ''so long as principal effectiveness is judged, in significant measure by student growth'' with ''provided that principal effectiveness is evaluated, in significant part, by student growth.''

Comment: One commenter supported the definition of *effective teacher* and agreed that student growth should be used as a measure of teacher effectiveness along with other supplemental measures. However, many commenters stated that the proposed definition relies too heavily on standardized test scores and recommended requiring supplemental measures. Another commenter recommended giving States the flexibility to define effective teachers using models that make sense in their States. Several commenters suggested that the definition include examples of supplemental measures such as using research-based teaching practices, implementing practices that have been documented in the classrooms of teachers who are driving substantial student achievement gains, and using feedback and student performance data to improve teaching.

Discussion: As noted in our response to commenters' concerns that student growth data should not be used as the sole means to evaluate principals, we agree with commenters that States, LEAs, and schools should include multiple measures in determining teacher effectiveness. We are, therefore, changing the definition to require States, LEAs, or schools to take into account data on student growth as a significant measure of teacher effectiveness, but also to include multiple measures. We also are adding multiple observation-based assessments of teacher performance as an example of

a supplemental measure in the definition of *effective teacher.*

Changes: We have defined *effective teacher* to mean ''a teacher whose students achieve acceptable rates (*e.g.,* at least one grade level in an academic year) of student growth (as defined in this notice). States, LEAs, or schools must include multiple measures, provided that teacher effectiveness is evaluated, in significant part, by student growth (as defined in this notice). Supplemental measures may include, for example, multiple observation-based assessments of teacher performance.''

Comment: One commenter recommended that the definition of *effective teacher* be changed to require student growth to be a ''predominant measure,'' rather than a ''significant measure,'' of teacher effectiveness. The commenter noted that using student growth as a ''significant measure'' for judging teacher effectiveness would allow other factors to outweigh a teacher's impact on student achievement.

Discussion: We believe that having student growth as a significant factor in determining teacher effectiveness is a sufficiently rigorous standard. The revised definition also provides States, LEAs, and schools with more flexibility in determining the appropriate use of supplemental measures without outweighing the importance of teachers' impact on student growth in determining teacher effectiveness.

Changes: None.

Comment: Several commenters suggested that the definition of *effective teacher* acknowledge and address the need to mentor and support new teachers who disproportionately work in struggling schools.

Discussion: We agree that professional development, including mentoring and coaching, are important aspects of teacher effectiveness. For this reason, criterion (D)(2)(iv)(a) focuses on using evaluations to inform decisions regarding developing effective teachers and principals, including by providing relevant coaching, induction support, and/or professional development. Criterion (D)(5) also provides for evaluation of the extent to which a State has a high-quality plan for its participating LEAs to provide effective, data-informed professional development, coaching, induction, and common planning and collaboration time to teachers and principals. We believe these criteria address the need for mentoring and other forms of professional development for teachers and therefore, are not changing the definition of *effective teacher* in the manner recommended by the commenter.

Changes: None.

Comment: One commenter strongly recommended including high school graduation rates as a measure to evaluate teacher effectiveness in order to provide a disincentive to ''creaming'' students and to signal the importance of preventing students from dropping out.

Discussion: We believe it could be misleading to include high school graduation rates as a required or supplemental measure of teacher effectiveness, because, more than other measures, graduation rates typically reflect the work of many teachers and school administrators. Accordingly, we have included graduation rates as an example of a supplemental measure of effectiveness in the definitions of *effective principal* and *highly effective principal.*

Changes: None.

Comment: One commenter recommended that *effective teacher* be defined as a teacher whose students, overall and for each subgroup, demonstrate acceptable rates of student growth. The commenter noted that the definition of *effective principal* refers to ''each subgroup'' and expressed concern that the omission of ''each subgroup'' in the definition of *effective teacher* could be misinterpreted to mean that teachers could be deemed effective (or highly effective) even if their students from different subgroups are not making sufficient learning gains.

Discussion: The Department included the performance of subgroups in the definitions of *effective principal* and *highly effective principal* because there would generally be a sufficiently large number of students in a particular subgroup at the school level to evaluate principal effectiveness. However, it is generally unlikely that a class would have a sufficient number of students in any particular subgroup on which to base an evaluation of a teacher's effectiveness.

Changes: None.

Comment: Some commenters recommended that, instead of defining *effective teacher,* this notice should encourage the use of proven tactics for improving teacher effectiveness (*e.g.*, lowering class sizes or innovative solutions for addressing the challenges teachers face). Other commenters suggested encouraging States to develop and use performance assessments of teachers that reliably and validly assess the use of teaching practices known to be associated with student achievement gains and to experiment with a range of strategies to incorporate evidence of student learning and accomplishment into teacher evaluation tools. One commenter recommended that educators should use research data and scientific recommendation as a basis for instruction and developing appropriate methods.

Discussion: Throughout this final notice, the Department encourages States, LEAs, and schools to use proven strategies for improving teacher effectiveness and addressing other challenges teachers face. For example, Invitational Priority 6—School-Level Conditions for Reform, Innovation, and Learning focuses on providing schools with flexibility and autonomy, such as creating school climates and cultures that remove obstacles to, and actively support, student engagement and achievement, and implementing strategies to effectively engage families and communities in supporting the academic success of their students. Criterion (C)(3) focuses on using data to improve instruction by increasing the acquisition, adoption, and use of local instructional improvement systems that provide teachers and principals with the information they need to inform and improve instructional practices; supporting LEAs and schools that use these systems in providing professional development on how to use these systems to support instructional improvement; and making data available and accessible to researchers so they can evaluate the effectiveness of instructional materials, strategies, and approaches. Criteria (D)(2)(iv)(a) and (D)(5) emphasize that the supports provided to teachers and principals should be ongoing and informed by data and evaluations.

Changes: None.

Comment: One commenter expressed concern that data on student growth are available only for the limited number of subjects included in the annual assessments required under the ESEA. The commenter recommended that we clarify that alternative measures of student performance should be used for teachers teaching subjects that are not tested under the ESEA. Another commenter asked how teacher effectiveness would be determined when there are no data on student growth, such as might be the case for novice teachers and teachers teaching subjects or grades that are not tested under the ESEA.

Discussion: As defined in this notice, the term *student growth* means the change in student achievement (as defined in this notice) for an individual student between two or more points in time. In turn, the definition of *student achievement* includes alternative measures of student performance for

non-tested grades and subjects. As noted elsewhere, we are adding, in the definition of *student achievement*, a number of examples of alternative measures of student performance for both tested and non-tested grades and subjects and clarifying that for tested grades and subjects, student achievement must include a student's score on the State assessments required under the ESEA (which will allow for the determination of student growth) and may include other measures of student learning as well. Therefore, we do not believe that additional language needs to be added to the definition of *effective teacher*.

Changes: None.

Comment: One commenter expressed concern that the definition of *effective teacher* equates effectiveness with advancing students one grade level in an academic year. The commenter stated that this approach ignores the fact that research has not identified a standard for student gains in a given school year in a given subject. Another commenter requested clarification regarding the meaning of ''at least one grade level in an academic year'' as used in the definition of *effective teacher*. Another commenter inquired whether States that use summative tests to measure one or more years of student growth would need to change their assessment system.

Discussion: We included ''at least one grade level in an academic year'' as an example of an acceptable rate of student growth in the definition of *effective teacher* (and *effective principal*). We recognized that this example of an acceptable rate of student growth may not be appropriate for all students and therefore, did not include it as a requirement but rather as an example. We believe States, LEAs, and schools should determine what constitutes an acceptable rate of student growth for purposes of assessing teacher (or principal) effectiveness.

Changes: None.

Comment: As with the definition of *effective principal*, many commenters expressed concern about using student growth as the sole measure for defining a *highly effective principal*. Some commenters stated that a good measure of a *highly effective principal* is success in attracting, developing, and retaining effective teachers. Another commenter, however, stated that significant growth in student achievement would suffice as evidence of a highly effective principal's ability to improve teacher effectiveness.

Discussion: As noted earlier, the Secretary believes that student growth must be included as a significant factor in evaluating principal and teacher effectiveness. However, he understands and appreciates commenters' concerns that student growth should not be used as the sole means to evaluate principals and teachers. Therefore, we are changing the definition of *highly effective principal*, consistent with the changes to the definition of *effective principal*, to require States, LEAs, or schools to take into account multiple measures, in addition to data on student growth, in defining a *highly effective principal*. We agree with commenters that success in attracting, developing, and retaining high numbers of effective teachers would be a good measure of a *highly effective principal* and are adding this to the definition along with other examples of supplemental measures. We also are making minor technical changes for clarity and removing the statutory reference to section 1111(b)(2)(C)(v)(II) of the ESEA, regarding student subgroups. We are removing the statutory reference to the ESEA because, as noted elsewhere, a new paragraph (g) in the Application Requirements section of this notice explains that references to ESEA subgroups throughout the notice are the subgroups described in section 1111(b)(2)(C)(v)(II) of the ESEA.

Changes: We have changed the definition of *highly effective principal* to read as follows: ''*Highly effective principal* means a principal whose students, overall and for each subgroup, achieve high rates (*e.g.*, one and one-half grade levels in an academic year) of student growth (as defined in this notice). States, LEAs, or schools must include multiple measures, provided that principal effectiveness is evaluated, in significant part, by student growth (as defined in this notice). Supplemental measures may include, for example, high school graduation rates; college enrollment rates; evidence of providing supportive teaching and learning conditions, strong instructional leadership, and positive family and community engagement; or evidence of attracting, developing, and retaining high numbers of effective teachers.''

Comment: One commenter noted that the definition of *highly effective principal* refers to ''high rates of student growth'' and recommended modifying the definition of *student growth* accordingly.

Discussion: We believe that States' definition of *highly effective principal* should demonstrate high rates of student growth for their students overall, and for each subgroup. The Department believes that one and one-half grade levels of growth in an academic year is a good example of a high rate of student growth. We recognize, however, that this example of ''high rates of student growth'' may not be appropriate for all students. We included ''one and one-half grade levels in an academic year'' as an example, not a requirement. We believe States, LEAs, and schools should determine what constitutes a high rate of student growth, as the definitions of *highly effective principal* (and *highly effective teacher*) clearly permit. We, therefore, do not believe it is necessary to revise the definition of *student growth*, as requested by the commenter.

Changes: None.

Comment: One commenter suggested that successful completion of a State-approved principal licensure program that builds the knowledge, skills, and attitudes to effectively lead people, lead learning, and manage school operations should be included as a measure of a highly effective principal.

Discussion: States, LEAs, and schools may choose to use successful completion of a State-approved principal licensure program as a supplemental measure of a highly effective principal. However, we decline to include it as an example of a supplemental measure in the definition of a *highly effective principal* because we believe that principal effectiveness is best determined by measuring results and outcomes.

Changes: None.

Comment: Some commenters commended the Department for focusing the definition of teacher effectiveness on student achievement and growth. Other commenters recommended adding language that would allow States and LEAs to supplement student growth with multiple measures determined on the State or local level. Other commenters suggested that States and LEAs be required to supplement their definitions of student growth with multiple measures. Commenters also recommended that such measures include the use of evidence-based practices for improving student achievement, the use of feedback and professional development opportunities, and leadership activities such as mentoring or leading an instructional community.

One commenter did not believe the definition should include a teacher's commitment and ability to use feedback and performance data to improve instructional practices. The commenter reasoned that a teacher who improves student achievement is using (1) practices that are both effective for student learning and healthy for social and emotional development of students and (2) feedback to improve practice. One commenter urged the Department

to have ''an equity focus on those current highly qualified teacher proxies that have some research base grounded in student achievement: Novice and out of field teaching.'' Another commenter suggested that the definition provide individual school districts with the flexibility to establish policies to determine whether a teacher is highly effective in order to ''recognize that a wide range of conditions can vary from district to district that would make a state-wide definition inappropriate for evaluation, promotion, or compensation purposes.''

Discussion: We agree with commenters that States, LEAs, and schools should be required to supplement their definition of a *highly effective teacher* with multiple measures. We are, therefore, revising the definition to require that States, LEAs, or schools include multiple measures. In addition, we are including examples of supplemental measures that States, LEAs, and schools might use, including leadership roles.

Changes: We have revised the definition of *highly effective teacher* to mean a teacher whose students achieve high rates (*e.g.*, one and one-half grade levels in an academic year) of student growth (as defined in this notice). States, LEAs, or schools must include multiple measures, provided that teacher effectiveness is evaluated, in significant part, by student growth (as defined in this notice). Supplemental measures may include, for example, multiple observation-based assessments of teacher performance or evidence of leadership roles (which may include mentoring or leading professional learning communities) that increase the effectiveness of other teachers in the school or LEA.

Comment: One commenter suggested that adopting the definitions of *effective teacher* and *highly effective teacher* in the NPP would be at odds with the value-added system prescribed in the State Fiscal Stabilization Fund.

Discussion: The definitions of *effective teacher* and *highly effective teacher* in this notice are not at odds with the requirements of the State Fiscal Stabilization Fund. The Race to the Top definitions are broad enough to give States, LEAs, and schools sufficient flexibility to determine the approach to measuring growth that works best for them, giving them a variety of ways to comply with the requirements of the State Fiscal Stabilization Fund.

Changes: None.

Comment: One commenter suggested that standardized tests are not created to measure teacher effectiveness and therefore are an invalid measure of effectiveness.

Discussion: We believe students' standardized test scores are one of many measures that can be used to determine student growth. However, we recognize that teacher effectiveness should not be determined solely on the basis of standardized test scores, which is why we are requiring, in this final notice, the use of student growth as a significant factor in teacher evaluations that must include multiple measures.

Changes: None.

Comment: Commenters stressed that it is imperative that there is common ground on how to develop, fairly compensate, and accurately evaluate teachers. A few commenters stated that there should be collaboration between teachers and principals in determining appropriate measures for evaluation.

Discussion: We agree about the importance of involving teachers and principals in the design and development of these evaluation systems, and are adding in this final notice language requiring such systems to be designed and developed with teacher and principal involvement.

Changes: We have revised criterion (D)(2)(ii) to read, ''Design and implement rigorous, transparent, and fair evaluation systems for teachers and principals that (a) differentiate effectiveness using multiple rating categories that take into account data on student growth (as defined in this notice) as a significant factor, and (b) are designed and developed with teacher and principal involvement.''

Comment: One commenter recommended that the Department replace the word ''rating'' with ''personnel evaluation'' to account for a more nuanced approach with multiple measures.

Discussion: We believe that the reference to ''rating categories'' in criterion (D)(2)(ii) is sufficiently clear that the criterion does not need to be revised.

Changes: None.

Comment: A large number of commenters recommended changes to the proposed definition of *student growth*. Some suggested that we include in the definition the use of non-achievement-based measures of student learning, performance-based or portfolio assessments, and interim assessments. Other commenters suggested including in the definition the specific amount of growth required. Some commenters supported the proposed definition's emphasis on individual growth, while others called for comparisons among ''like populations,'' such as students with disabilities or English language learners. One commenter warned that the use of a growth-based model could make teachers unwilling to serve students with disabilities. Some commenters urged the Department to require specific models, such as value-added, while others urged the Department not to require specific models in order to leave States with the flexibility to develop their own measures of student growth. One commenter was concerned that the definition ''amounts to another all or nothing model'' and pointed out that research on student growth cautions against making judgments about student growth using solely two data points, and suggested that we reconsider this approach.

Discussion: Our purpose, in the context of a competitive grant program intended to provide leading-edge States with incentives to develop and test innovative education reform ideas, is to give States freedom to create their own systems for measuring student growth within a few key parameters. We believe that the proposed definition strikes this balance and that, therefore, significant changes are not needed. We acknowledge that LEAs or schools may reasonably want to measure student growth using more than two data points. We are changing the phrase ''two points in time'' to ''two or more points in time'' to permit the use of interim assessments or achievement data collected across multiple years. We are also editing the second sentence for clarity; this includes deleting the phrase ''in order to increase the construct validity and generalizability of the information.''

Changes: We have revised the definition of *student growth* to read as follows: ''*Student growth* means the change in student achievement (as defined in this notice) for an individual student between two or more points in time. A State may also include other measures that are rigorous and comparable across classrooms.''

Comment: Numerous commenters expressed their support for evaluating teachers and principals based on student achievement or growth. One commenter stated that principal evaluations should include an aggregation of data on student growth. Several of these commenters, however, asserted that student growth data have limitations, including a lack of common definitions between States, difficulty in disaggregating a teacher's effect on student achievement from other effects, and the lack of data for all grade levels and subject areas. Additionally, many commenters expressed their disapproval of the proposed criteria regarding using student achievement data or student

growth for the evaluation of teachers and principals. In support of their arguments, those commenters cited factors such as the current limitations of student assessments, and the inadequacy of assessments as an evaluation factor. Several of those commenters claimed that there is a lack of research or evidence demonstrating that the use of such data for teacher and principal evaluations has any positive impact on teacher, principal, or student performance. One commenter disagreed with the Department's statement that ''It is difficult to predict teacher quality based on the qualifications that teachers bring to the job. Indeed measures such as certification, master's degrees, and years of teaching experience have limited predictive power on this point.'' The commenter argued that the research the Department cites (*i.e.*, Kane *et al.*) actually demonstrates that teaching experience and whether a teacher is fully certified does indeed have substantial impact on students' achievement. Other commenters argued that research indicates growth models are unstable and too vulnerable to multiple sources of error and to other student and school factors separate and apart from student achievement. Additionally, many commenters offered reasons for not using student assessments as a factor in teacher and principal evaluations, including the claims that: Using student achievement data to make employment decisions may lead to corruption, students are not held accountable for the results of State assessments, and that such a policy would detract from other priorities, such as equitable distribution of effective teachers. Another commenter argued that measuring teacher effectiveness ignores the organizational context of schools and inappropriately defaults to a single measure of student test scores as the basis to evaluate, compensate, and dismiss teachers.

Discussion: Research shows that teacher quality is a critical contributor to student learning, and that differences between teachers are persistent. Kane *et al.* found in their study that the certification status of teachers (*e.g.*, certified, uncertified, and alternative certified) ''has at most small impacts on student test performance.'' At the same time, they found that, ''among those with the same certification status, there are large and persistent differences in teacher effectiveness.'' They also reported that evidence suggests that teachers' classroom performance during their first two years of teaching is a more reliable indicator of a teacher's future effectiveness than their certification status.[4] Another study used data from Chicago public high schools to estimate the importance of teachers on student achievement in mathematics and found that, ''one semester with a teacher rated two standard deviations higher in quality could add 0.3 to 0.5 grade equivalents, or 25 to 45 percent of an average school year, to a student's math score performance.'' The study further concluded that the resulting teacher quality ratings ''remain relatively stable for an individual instructor over time.''[5] A recent study of New York City public charter schools concluded that charter schools that pay teachers in part based on evaluations of their performance have more positive effects on student achievement.[6] In light of this evidence, the Department believes that the best indicator we have today for teacher (and by extension principal) quality is student academic growth, but that (as noted above) this data must be supplemented with additional measures. At the same time, the Secretary appreciates that growth models are not yet perfect, that there are some challenges to using student growth data, and that there is more work to be done in this area. For this reason, we do not stipulate which approach States, LEAs, or schools should use to measure student growth so long as the approach used is rigorous and comparable across classrooms (*see* the definition of *student growth*). The criteria and definitions in this notice reflect the Department's belief that student growth data should be used as a significant factor in determining teacher and principal effectiveness; that evaluation systems should use multiple measures; that these evaluation systems should be rigorous, transparent, and fair; and that they should be designed and developed with teacher and principal involvement.

We do not agree that using student growth data as a part of a rigorous, transparent, and fair evaluation system that is designed and developed with teacher and principal involvement will lead to corruption or detract from other priorities. We contend that implementing fair and transparent evaluation systems developed with the involvement of both teachers and principals, and that include student growth as a significant factor in evaluations, will lead to greater trust between teachers and principals, enable meaningful decision-making and support, and push educators to remain focused on the ultimate priority — improving student achievement.

Changes: None.

Comment: One commenter recommended that the Department encourage the development of research-based rubrics and/or innovative teacher performance evaluation programs.

Discussion: We encourage LEAs to be innovative and draw on rigorous research in creating evaluation systems; this is an area that has high leverage and is ripe for change. However, in order to avoid creating a one-size-fits-all policy or stifling innovation, we decline to name specific tools that LEAs should use in their evaluation systems.

Changes: None.

Comment: One commenter recommended that the Department consider designating NAEP as the standard test for every State to measure student achievement.

Discussion: Race to the Top will use both the NAEP and the assessments required under the ESEA to measure student achievement. Each test has its benefits and its drawbacks; together, we believe they will offer the Nation an appropriate ''picture'' of how Race to the Top States are performing.

Changes: None.

Comment: One commenter recommended removing the phrase ''targeted professional development'' from criterion (D)(2)(iv)(a) (proposed criterion (C)(2)(d)(i)). The commenter's rationale was that the Department should promote a comprehensive system for managing and developing human capital rather than a one-to-one system based on remediation. In addition, the commenter asserted that the Department should be explicit that professional development must be for the purpose of increasing student achievement.

Discussion: We agree with the commenter that the term ''targeted professional development'' does not connote the appropriately broad range of professional development and support for teachers and principals originally envisioned by the Department. We are therefore changing this criterion to include the phrase ''providing relevant coaching, induction support, and/or professional development.'' We do, however, want to make clear that in the context of criterion (D)(2), we are encouraging LEAs and schools to consider how they will use teachers' and principals'

[4] *See*, Kane, Thomas J., Jonah E. Rockoff, and Douglas O. Staiger (2006), ''What Does Certification Tell Us About Teacher Effectiveness? Evidence from New York City.''

[5] Daniel Aaronson, Lisa Barrow, and William Sander (2003), ''Teacher and Student Achievement in the Chicago Public High Schools,'' Federal Reserve Bank of Chicago Working Paper 2002–28.

[6] Hoxby, Caroline M., Sonali Murarka, and Jenny Kang. ''How New York City's Charter Schools Affect Achievement, August 2009 Report.'' Second report in series. Cambridge, MA: New York City Charter Schools Evaluation Project, September 2009.

evaluations to inform their specific professional development plans. In other criteria, such as (D)(5) and (C)(3)(ii), we encourage a broad range of professional development activities. We also believe that, by specifying that professional development should be responsive to evaluations that use student growth as a significant factor, we make clear in this final notice that professional development should be oriented around supporting teachers and principals in increasing student achievement.

Changes: We have split proposed criterion (C)(2)(d)(i) into two parts. We have combined the first part with proposed criterion (C)(2)(c), resulting in criterion (D)(2)(iii), which reads, ''Conduct annual evaluations of teachers and principals that include timely and constructive feedback; as part of such evaluations, provide teachers and principals with data on student growth for their students, classes, and schools.'' The second part has been designated criterion (D)(2)(iv)(a), which specifies that evaluations should inform decisions regarding ''Developing teachers and principals, including by providing relevant coaching, induction support, and/or professional development.''

Comment: A few commenters recommended that the Department include a clear statement indicating that State reform plans should specify that teachers and principals will be assessed on more than a single year of data.

Discussion: We believe it is important to use accurate data when evaluating teacher and principal performance, and that those evaluations should be done at least annually and should involve timely and constructive feedback. To make it clear, however, that annual evaluations do not have to be conducted based on only one year of information, we have revised the definition of *student growth* to clarify that student growth should be measured using achievement data between ''two or more points in time,'' rather than between only two points in time.

Changes: We have revised the definition of *student growth* so that it means the change in achievement data for an individual student between ''two or more points in time.''

Comment: A number of commenters supported the use of student growth data in determining compensation and promotions. A few commenters stated that the Department needs to specify how to structure performance pay (*e.g.*, how to offer it for teachers of subjects that are not tested). However, many commenters expressed their opposition to pay based on student achievement or growth data. Several commenters stated that there is no evidence suggesting that performance pay linked to achievement data leads to improved educational outcomes. Several commenters asserted that performance pay places an undue emphasis on teachers and principals as individuals as opposed to parts of the education system as a whole. One commenter recommended that Race to the Top funds be used to design tests in pilot districts that could test the effectiveness of alternative compensation programs.

Discussion: The Department believes that we need to do much more to shine a spotlight on and reward excellence in teaching and school leadership, and that one way to do so is through compensation and promotion. At the same time, we recognize that rewarding excellence while fulfilling the demands of fairness and the need to maintain a collaborative school environment is a delicate task that requires cooperation between LEA leadership, principals, and teachers.

We also recognize that pay-for-performance systems in education are controversial and spark much debate. Some States, LEAs, and schools have experimented with such models and shown relative success and promise, while others have experienced less encouraging results. The ARRA also includes funds for the Teacher Incentive Fund, which will award grants to LEAs to develop performance-based compensation models. While research on pay-for-performance plans is limited, there is evidence to suggest that a well-designed performance-based pay system can lead to improved student achievement.[7] Studies indicate that the most effective and successful pay-for-performance systems incorporate factors such as using multiple measures for evaluating performance; making student growth just one measure of performance; having a clearly identified purpose (*e.g.*. improving student achievement, improving recruitment and retention, or attracting teachers to hard-to-staff schools); and creating collaboration among teachers, principals, and other stakeholders. The Department believes that criterion (D)(2) incorporates these factors by specifying that evaluation systems for teacher and principals should use multiple measures, take into account student growth as a significant factor, and be designed and developed with teacher and principal involvement.

We also note that the criterion refers to decisions regarding promotion and retention as well as compensation because we believe that great teaching and school leadership should be recognized and rewarded as much as possible, and that talented educators should have opportunities for increased responsibilities and other retention incentives, where appropriate, as well as for additional compensation.

Changes: We have reorganized criterion (D)(2) to make it clearer that the decisions discussed in criterion (D)(2)(iv) should be based on the evaluation systems discussed in criterion (D)(2)(ii) and the evaluations discussed in criterion (D)(2)(iii). We have also added ''retaining'' to the list of decisions in criterion (D)(2)(iv)(b).

Comment: Numerous commenters argued that performance pay would create perverse incentives for teachers to work only with student groups most likely to demonstrate improvement, thereby marginalizing difficult-to-teach student groups and communities, including low-income communities, English language learners, and students with disabilities.

Discussion: As contemplated in the notice, performance pay would be based on teacher and principal evaluations that, as discussed previously, use student growth—not raw student achievement data or proficiency levels—as a significant factor. Thus, teachers whose pupils start behind their peers or who are working with students with disabilities or English language learners are in no way penalized. This final notice also gives States, LEAs, and/or schools sufficient flexibility to take these concerns of commenters into account when creating systems for evaluation, compensation, and promotion. We also note that the Department is placing an emphasis on attracting teachers to hard-to-staff subjects, specialty areas, and schools in criterion (D)(3).

Changes: None.

Comment: Several commenters recommended including language requiring States to provide additional responsibilities for effective teachers. Many of the commenters included specific examples of professional opportunities States or LEAs should provide to highly effective teachers, such as serving as a community liaison, induction leader, or curriculum developer after earning an endorsement on their teacher's license.

Discussion: The Department believes that it is critical to adequately compensate and promote our best

[7] *See e.g.*, Joshua H. Barnett, Gary W. Ritter, Marcus A. Winters, and Jay P. Greene, ''Evaluation of Year One of the Achievement Challenge Pilot Project in the Little Rock Public School District,'' University of Arkansas, January 2007.

teachers and principals. These professionals are the role models and leaders of our schools and are essential to implementing effective educational reforms and improving student achievement. For these reasons, this notice makes clear that highly effective teachers and principals should have an opportunity to obtain additional compensation and responsibilities for their high performance.

We believe that LEAs and schools, in collaboration with their teachers and principals, are best situated to determine the timing and types of additional responsibilities that should be given to their staff and that it would be inappropriate for the Department to set requirements around this issue.

Changes: None.

Comment: One commenter recommended replacing the word ''tenure'' with ''continuing employment status'' for the sake of clarity.

Discussion: The Department believes the word ''tenure'' is more widely understood and declines to make the suggested change.

Changes: None.

Comment: Several commenters expressed concern that, while proposed criterion (C)(2)(iii) mentions using information to grant tenure and dismiss teachers, it does not focus on the need to retain teachers. One of these commenters stated that dismissals are going to involve a very small percentage of teachers and principals. The commenter further stated that both rural and urban schools may have difficulty attracting and retaining effective teachers. One commenter cited the difficulties in attracting and retaining effective or highly effective teachers in extremely rural areas. The commenter further stated that school districts in rural areas are forced to hire beginning teachers who cannot be considered effective or highly effective as defined in the NPP. A couple of commenters believed that robust, strong, and fair evaluation systems are important for attracting and retaining highly qualified, effective teachers and principals to high-poverty schools.

Discussion: The Department concurs that recruiting and retaining effective and highly effective teachers and principals is critical for States and LEAs to meet their goals for education reform and improve student achievement, particularly in high-poverty and/or high-minority schools. For this reason, criterion (D)(3) discusses the equitable distribution of effective teachers and principals in high-poverty and/or high-minority schools and encourages States and LEAs to provide incentives and strategies to attract and retain effective teachers and principals. Criteria (D)(2)(iv)(a) and (D)(5) also encourage States to support LEAs in providing professional development and undertaking other efforts, especially those informed by data and evaluations, to make their existing teachers more effective. We are also revising criterion (D)(2)(iv)(b) to specifically clarify that teacher and principal evaluations should inform retention decisions.

Changes: We have revised criterion (D)(2)(iv)(b) to read as follows, ''Compensating, promoting, and retaining teachers and principals, including by providing opportunities for highly effective teachers and principals (both as defined in this notice) to obtain additional compensation and be given additional responsibilities.''

Comment: Many commenters supported using evaluations in making employment decisions, such as those regarding teacher and principal tenure, dismissal, displacement, and layoff. Most of these commenters supported using multiple measures in these evaluations and not basing such employment decisions primarily or solely on assessment results.

Discussion: We agree that rigorous, transparent, and fair evaluation systems should be used to inform a variety of decisions, including development, compensation, retention, tenure, certification, and removal. As discussed earlier, we are requiring that evaluation systems include multiple measures and that student growth be a significant factor, and we are revising criterion (D)(2) to make it clearer that the decisions under criterion (D)(2)(iv) should be based on the evaluation systems discussed in criterion (D)(2)(ii) and the evaluations discussed in criterion (d)(2)(iii). For purposes of clarity, we are dividing proposed criterion (C)(2)(d)(iii) into two criteria and adding decisions regarding full certification to one of the criteria.

Changes: Proposed criterion (C)(2)(d)(iii) has been reorganized as criteria (D)(2)(iv)(c) and (D)(2)(iv)(d). Criterion (D)(2)(iv)(c) addresses the use of evaluation systems to inform decisions regarding whether to grant tenure and/or full certification to teachers and principals, and criterion (D)(2)(iv)(d) addresses removing ineffective tenured and untenured teachers and principals after they have had ample opportunities to improve. For both criteria, we have clarified that these decisions should be made using rigorous standards and streamlined, transparent, and fair procedures.

Comment: Some commenters suggested that the Department should clarify the statement that the removal of teachers and principals must only occur after they have received ample support and opportunities to improve their performance yet have failed to do so. A few commenters recommended that we clarify the term ''ample opportunities'' and specify the amount of time that low-performing teachers should have to improve their performance (*e.g.*, as one school year).

Discussion: Providing teachers and principals with the needed support to improve the effectiveness of instruction and student outcomes is a critical element of Race to the Top, and removing ineffective professionals from schools is important as well.

Race to the Top includes a number of criteria, in addition to criterion (D)(2), that are dedicated to teacher and principal professional development and supports; parts of criteria (B)(3) and (C)(3) and all of criterion (D)(5) concern this issue, including discussions of professional collaboration and planning time, individualized development plans, training and support in the analysis and use of data, classroom observations with immediate feedback, and other activities critical to supporting and improving teacher and principal capacity. These supports are paired, in the Race to the Top criteria, with criteria that focus on rigorous, fair and transparent teacher and principal evaluation systems that should include providing feedback on areas where professional improvements are needed.

We decline to specify the amount of time teachers should be given to make improvements in their performance, beyond specifying that they should have ''ample opportunities to improve.'' It is the responsibility of the LEA and school to provide their students with effective teachers and principals, to provide their teachers and principals with effective support, and to take action when appropriate. We have deleted the phrase ''but have not done so'' to reflect this.

Changes: We have removed the phrase ''but have not done so'' from criterion (D)(2)(iv)(d).

Comment: One commenter argued that aspects of criterion (D)(2) (proposed criterion (C)(2)) may contravene the Personnel Evaluation Standards that, according to the commenter, have been federally accredited.

Discussion: The Personnel Evaluation Standards referenced by the commenter are not federally accredited or approved by the Department. They are voluntary guidelines published by a private organization and are in no way binding on the Department or its grantees.

Changes: None.

Comment: A few commenters recommended that States should have a

flexible amount of time to develop evaluation systems that link data on student growth to teachers and principals in order to allow time for the development of advanced assessment systems. Other commenters recommended that this notice reflect an understanding of the timeframe that may be necessary to build a comprehensive and fair teacher and principal evaluation system that takes student growth data into account given the state of the research in this area and the practical considerations in establishing such a system. The commenter stated that the proposed criterion would compel States to rush into imposing current value-added indicators of student learning on current evaluation systems rather than developing new advanced systems.

Discussion: The notice does not state a specific timeframe for States to develop assessment systems and teacher and principal evaluation systems. Through their applications, States must provide, for each Reform Plan Criterion in this notice, a detailed plan for the use of grant funds that includes, among other things, (1) the key activities to be undertaken; (2) the timeline for implementing the activities; and (3) annual targets (where applicable) with respect to performance measures for the four school years beginning with the 2010–2011 school year. (*See* Application Requirements, section (e), for a complete list of requirements). It is through this process that States have the flexibility to define the timeframe for implementing their activities, including systems development. States' applications will be judged, in part, on whether their activities and targets are ambitious yet achievable. As a result, we believe that this final notice appropriately encourages States and LEAs to strike the right balance between speed and thoughtfulness. We emphasize, however, that States should not wait to develop improved evaluation systems until higher-quality assessments are available, as doing so would delay this essential progress by years and, in the process, harm student achievement. We expect that these evaluation systems will improve over time, as LEAs learn from their own experiences and from the experiences of others, and as States develop higher-quality assessments, the results of which will improve the measures of student growth that feed into these evaluation systems.

Changes: None.

Comment: A number of commenters recommended requiring States to include in their plans a commitment to adhere to due process rights and existing State statutes concerning tenure and dismissal. A few commenters recommended requiring States to comply with local collective bargaining agreements or involve employee representatives where there is no collective bargaining agreement. One commenter specifically suggested requiring that collective bargaining be the vehicle for implementing performance pay schemes in local school districts.

Discussion: In order to successfully implement many of the plans under criterion (D)(2), LEAs in collective bargaining States will need to work collaboratively with their local unions. Because this work and collaboration are so important, States will earn points based on the extent to which the local union leadership in their participating LEAs have signed the MOUs between the States and the LEAs indicating their intent to work in partnership with the LEAs in implementing the plans, including by addressing contractual issues such as local bargaining agreements. (*See* criterion (A)(1)). In addition, criterion (D)(2)(ii) creates incentives for LEAs to design and implement rigorous, transparent, and fair evaluation systems with teacher and principal involvement, while criterion (D)(2)(iv)(d) encourages LEAs to make decisions regarding removal using rigorous standards, and streamlined, transparent, and fair procedures.

Changes: None.

Selection Criterion (D)(3): Ensuring Equitable Distribution of Teachers and Principals (Proposed Criterion (C)(3)):

Comment: One commenter recommended adding a definition of *high-minority school* and defining the term as a school in the highest quartile of schools in a State with respect to enrollment of minority students. The commenter also recommended adding a definition of *low-minority school* and defining the term as a school in the lowest quartile of schools in a State with respect to enrollment of minority students. These comments were in the context of a recommendation by the commenter to add to criterion (D)(3) a focus on the equitable distribution of effective teachers with respect to high-minority schools.

Discussion: We agree that it is important to consider the equitable distribution of effective teachers with respect to both high-poverty and high-minority schools, and we are revising criterion (D)(3) accordingly. To give greater clarity to this change, we are adding definitions of *high-minority school* and *low-minority school* to this notice. However, in acknowledgment of the vast demographic differences between States, we have opted to give States greater flexibility in defining these terms than the commenter recommended, and are asking each State to define the terms consistent with its Teacher Equity Plan.

Changes: We have added definitions of *high-minority school* and *low-minority school,* both of which are defined ''by the State in a manner consistent with its Teacher Equity Plan. The State should provide, in its Race to the Top application, the definition used.''

Comment: One commenter recommended defining *low-poverty school* for the purposes of reporting and accountability related to ensuring the equitable distribution of effective teachers and principals under criterion (D)(3) (proposed criterion (C)(3)).

Discussion: The Department agrees that a definition of *low-poverty school,* in conjunction with the definition of *high-poverty school* proposed in the NPP and retained in this notice, would help ensure that States are using the same standards to inform their efforts to ensure that students in high-poverty schools have equitable access to highly effective teachers and principals and are not served by ineffective teachers and principals at higher rates than other students. We are, therefore, adding a definition of *low-poverty school,* adapted from similar language in the ESEA.

Changes: We have included the definition of *low-poverty school* in this notice, defining the term to mean, ''consistent with section 1111(h)(1)(C)(viii) of the ESEA, a school in the lowest quartile of schools in the State with respect to poverty level, using a measure of poverty determined by the State.''

Comment: Multiple commenters suggested that the Department take further steps toward ensuring the equitable distribution of teachers by requiring States to have a plan to ensure that low-income and minority students are not taught by ineffective teachers at higher rates than other students. Other commenters recommended that the Department ask States to document their efforts to address gaps in teacher quality between high-poverty and low-poverty and high-minority and low-minority schools. Another commenter recommended revising the performance measures for this criterion to include the number and percentage of effective teachers and principals in high-poverty, low-poverty, high-minority, and low-minority schools. Along those lines, one commenter stated that evidence of existing progress was more compelling

than reform plans and should therefore be given more weight.

Discussion: The Department believes that great teaching and leadership matter tremendously, and that the inequitable distribution of highly effective teachers and principals is a major cause of the achievement gap. We therefore agree with the commenters that we should take further steps to ensure equitable distribution of effective teachers and principals. To that end, we are revising criterion (D)(3)(i) so that it addresses the equitable distribution of effective teachers and principals with respect to *high-minority schools,* in addition to high-poverty schools. We are also specifying that, in addition to having equitable access to highly effective teachers and principals, students in high-poverty and/or high-minority schools should not be served by ineffective teachers and principals at higher rates than other students. We agree that the performance measures for this criterion should allow for comparisons between high-minority and/or high-poverty schools and low-minority and/or low-poverty schools, and we are revising the evidence and performance measures to reflect this. (*See* Appendix A: Evidence and Performance Measures.)

We appreciate the suggestion from commenters that this criterion should reflect States' past actions, and we are revising this criterion to specify that the plans States submit should be informed by past actions and data. We understand the skepticism expressed by commenters who note that States have had Teacher Equity Plans in place since 2002 and have not made sufficient progress, but we emphasize that Race to the Top will use States' performance targets to create a level of accountability that did not exist for these prior plans.

Furthermore, we believe that judging State progress to date would be difficult given the lack of measures of teacher and principal effectiveness and the imperfections with the existing input-based measures, and we believe that asking States to report on their progress using one type of measure and to craft plans using another type would be confusing. Therefore, we choose not to give more weight to progress to date. At the same time, we encourage States to build on their successes and learn from their experiences in recent years.

We are also clarifying that the State's plan for ensuring equitable distribution of effective teachers and principals should be developed in collaboration with the State's participating LEAs. This revision is necessary to ensure consistency with criteria (D)(2) and (D)(5) and to respond to commenters' general concerns about the roles of States and LEAs.

Changes: We have added the phrase ''in collaboration with its participating LEAs (as defined in this notice)'' to criterion (D)(3). We also have revised criterion (D)(3)(i) to read, ''Ensure the equitable distribution of teachers and principals by developing a plan, informed by reviews of prior actions and data, to ensure that students in high-poverty and/or high-minority schools (both as defined in this notice) have equitable access to highly effective teachers and principals (both as defined in this notice) and are not served by ineffective teachers and principals at higher rates than other students.''

Comment: Some commenters recommended requiring that teachers assigned to high-poverty schools with a significant number of English language learners have dual certification.

Discussion: We believe that the decision regarding dual certification for teachers is best left to the States, who have a better understanding of their own demographics as well as whether this critical training is needed for all teachers in such schools or just certain teachers. For this reason, we have decided not to include this specific requirement. However, as discussed previously, we are revising the definition of *alternative routes to certification* to clarify that these routes should prepare teachers and principals to address the needs of all students, including English language learners.

Changes: None.

Comment: One commenter expressed concern that Race to the Top's criterion for ensuring equitable teacher distribution, though well-intended, would have a generally negative impact on struggling schools.

Discussion: The Department intends for this criterion to improve conditions in struggling schools, and does not agree that filling high-minority or high-poverty schools with highly effective teachers through equitable teacher distribution strategies would have a negative impact on struggling schools.

Changes: None.

Comment: Multiple commenters recommended clarifying that special education is an area of teaching, rather than a subject. One commenter made a similar recommendation regarding English language acquisition.

Discussion: We agree that special education and English language acquisition are areas of teaching, not stand-alone subjects. We are revising criterion (D)(3)(ii) to clarify this. We are also clarifying the criterion to refer to ''language instruction education programs (as defined under Title III of the ESEA)'' instead of ''English language proficiency.''

Changes: The Department has revised criterion (D)(3)(ii) to read, ''Increase the number and percentage of effective teachers (as defined in this notice) teaching hard-to-staff subjects and specialty areas including mathematics, science, and special education; teaching in language instruction educational programs (as defined under Title III of the ESEA); and teaching in other areas as identified by the State or LEA.''

Comment: Several commenters requested an expansion of hard-to-staff subjects to include additional subjects or programs such as career and technical education, computer science, and gifted and talented programs. One commenter recommended the addition of over-age students and under-credited youth to this definition.

Discussion: While there are some nationwide teacher shortages, the list of hard-to-staff subjects varies from region to region. The Department has therefore focused its list on national needs, and is providing States with the flexibility to add other subjects or areas as they see fit. The NPP allowed States or LEAs to identify hard-to-staff subjects other than math and science. In this notice, we are clarifying that they may also identify hard-to-staff specialty areas beyond those listed.

Changes: We have revised criterion (D)(3)(ii) by inserting the phrase ''and teaching in other areas as identified by the State or LEA.''

Comment: Several commenters argued that teachers value working conditions over relocation bonuses. Multiple commenters recommended that we focus on the value of class size reduction, improving school safety, and repairing school facilities in order to improve working conditions and achieve equity in teacher distribution. One commenter stressed that States' Teacher Equity Plans should specifically address the steps States will take to remedy disparities in resources, services, and opportunities. Multiple commenters expressed opposition to plans that would encourage involuntary transfers of faculty and principals to high-poverty schools and arbitrary abolition of seniority in contracts. The same commenters also expressed support for certain incentives for teachers in high-poverty schools, including extended contracts or loan forgiveness programs. Many commenters recommended expanding the criterion to refer to attracting high-quality teachers to all classrooms and subjects, rather than just hard-to-staff ones. Several commenters recommended that the list of incentives

and strategies that States might use to ensure equitable distribution of effective teachers and principals should include professional development and training programs. In fact, multiple commenters noted the value of retaining effective teachers and supporting teachers in high-poverty schools through long-term investments such as preparation programs, mentoring, peer review, and wraparound programs, and argued for their superiority over purely monetary incentives or one-size-fits-all approaches. One commenter suggested supporting teachers in their efforts to receive National Board Certification and placing these nationally certified teachers in high-poverty schools. One commenter suggested that the Department provide direct guidance on recruitment and retention, including incentives to persuade high-quality teachers who have retired from or left high-need urban schools to return.

Discussion: The Department agrees that high-quality working conditions are important for all professionals. In the context of criterion (D)(3), ensuring the equitable distribution of teachers and principals, we agree that strategies to attract teachers to hard-to-staff schools, subjects, and specialty areas may encompass a range of different approaches. Many of the ideas put forth in the comments could form the basis for States' strategies to more equitably allocate their teachers. While we have not included all of the examples in this final notice, we are adding ''teaching and learning environments'' and ''professional development'' as examples of areas in which States could offer incentives and strategies. In creating their plans, States should not feel bound by this illustrative list; rather, they should determine which areas will be most likely to succeed to meet their unique circumstances.

Changes: We have revised criterion (D)(3) to specify that plans submitted under criterion (D)(3)(1) and (ii) may include, but are not limited to the implementation of incentives and strategies in such areas as recruitment, compensation, teaching and learning environments, professional development, and human resources practices and processes.

Comment: Multiple commenters expressed opposition to incentives that provide salary compensation for teachers based on the subject they teach, and one supported the use of an enhanced compensation system available to all employees, which would work in tandem with the traditional bargained single-salary schedule.

Discussion: The Department recognizes that, for a variety of reasons, including outside labor market opportunities, it may be harder to recruit teachers for some subjects and specialty areas than for others. We believe that State policy should be responsive to this reality so that hard-to-staff subjects and specialty areas, like other subjects and areas, are filled with exceptional teachers and leaders. We leave it up to States and LEAs to determine the best methods for achieving this goal, and we have provided some illustrative examples in criterion (D)(3)(ii) that we believe are appropriate responses to this long-standing problem.

Changes: None.

Comment: One commenter suggested that Race to the Top funds could be used to bolster recruitment to the teaching profession by investing in research to determine why many college students choose not to enter the profession of teaching.

Discussion: While the commenter suggests one possible idea for bolstering recruitment, we decline to prescribe methods of improving recruitment, but encourage applicants to suggest approaches that they believe will work in their contexts.

Changes: None.

Comment: One commenter recommended that in light of the historical challenges of improving equitable teacher distribution, we provide additional guidance on how States and districts may demonstrate such progress. Another commenter asserted that the Department's NPP fell short of the kind of clear and decisive guidance needed in this area.

Discussion: The Department believes that this final notice as a whole provides a sufficient framework for States to embark on a path to improving the equitable distribution of their teachers and principals, while leaving States and LEAs with sufficient discretion to prepare and implement plans that make sense in their specific circumstances. The Department looks forward to working with grantee States to provide advice and technical assistance where they need it most, which could include the implementation of equitable distribution plans.

Changes: None.

Comment: One commenter recommended encouraging States to pass legislation requiring districts and unions to discuss the issue of equitable teacher and principal distribution in collective bargaining negotiations.

Discussion: The Department encourages collaboration and partnerships between LEAs and teacher unions to resolve issues that may arise as a result of States' Race to the Top plans, such as the equitable distribution of teachers and principals in high-poverty and/or high-minority schools. We believe that Race to the Top may lead to changes in how LEAs and teachers' unions work together within the framework of collective bargaining to address these issues. However, any changes to laws or policies governing collective bargaining are best determined at the State and/or LEA level.

Changes: None.

Comment: A few commenters recommended including performance measures on the percentage of teachers who have taught a minimum number of years, are non-qualified, or are teaching out-of-subject or out-of-field.

Discussion: The Department believes that the performance measures included in this final notice are designed with an appropriate focus on student outcomes. We do not believe it is necessary to include these additional requirements, but welcome States to propose additional performance measures where appropriate for their plans.

Changes: None.

Comment: One commenter expressed concern that Race to the Top lacks the adequate funding required for the preparation, recruitment, retention, and professional development of teachers that is necessary to successfully create equitable teacher distribution.

Discussion: The ARRA provides $4.3 billion for the Race to the Top Fund. This is the largest-ever single investment in school reform. It is our belief that States that use these funds wisely will be able to make significant inroads in addressing the problems of equitable teacher distribution.

Changes: None.

Selection Criterion (D)(4): Improving the Effectiveness of Teacher and Principal Preparation Programs (Proposed Criterion (C)(4)):

Comment: One commenter encouraged us to specify a link between preparation programs and student growth, not just student achievement, to account for teachers and principals serving in persistently low-performing schools where their effectiveness will be determined solely based on student test scores.

Discussion: We agree with the commenter that teacher and principal effectiveness should be measured by student growth (and student achievement is an input to calculating student growth); therefore both student achievement and student growth data should be linked to students' teachers and principals and, in turn, this data should be linked to the programs from which those teachers and principals

received their education credentials. We are revising the notice to this effect.

Changes: We have revised criterion (D)(4)(i) by adding ''and student growth'' after ''student achievement.''

Comment: Many commenters encouraged the Department to require States to link multiple measures of teacher effectiveness to preparation programs, rather than requiring a link only to student test scores. Some commenters pointed out that just as teachers should be evaluated by multiple measures, the same is true of preparation programs, which contribute to more aspects of a teacher's performance than just their students' test scores. One commenter stated that teacher and principal preparation programs should also be evaluated on their ability to develop the capacity of family, school, and community engagement programs to improve student performance. Another commenter recommended that equal priority be placed on teacher preparation that recognizes the importance of teachers being responsible for the social, creative, and emotional development of the child as well as academic growth. One commenter stressed that effective preparation programs should be evaluated on measures such as the pedagogical training and clinical experiences provided to participants. Other commenters expressed concern that evaluating preparation programs by linking student achievement data alone would lead to a narrowing of the curriculum in preparation programs to focus on student test preparation.

Discussion: We agree that many outcome indicators are important for measuring the effectiveness of teacher and principal preparation programs. However, the Department believes that the most important indicator of the quality of a preparation program is the performance of the students served by the teachers and principals the program prepared. At the same time, we welcome States to supplement this reporting with other indicators that they believe are important. We do not agree with the commenters that focusing on student achievement will lead to preparation programs narrowing their curriculum and focusing on student test preparation. We believe that publicly reporting effectiveness based primarily on student achievement and student growth will result in preparation programs reevaluating their programs to ensure that all teachers and principals completing their programs have the wide range of knowledge and skills necessary to help raise student achievement.

Changes: None.

Comment: One commenter expressed concern that State assessments are not always valid or reliable for English language learners, making their use to evaluate preparation programs for teachers of this population problematic.

Discussion: States are currently required under the ESEA to assess English language learners in a valid and reliable manner and provide reasonable accommodations including, to the extent practicable, assessments in the language and form most likely to yield accurate and reliable information on what they know and can achieve in academic content areas, until such students have achieved English language proficiency. As States currently use these data in setting academic achievement standards under the ESEA and determining targets and educational needs for English language learners in their States, we believe these data are equally appropriate for evaluating preparation programs under Race to the Top.

Changes: None.

Comment: Several commenters asked us to clarify whether the intent of this criterion is to link data only to public institutions within a given State or to link teachers to out-of-State or out-of-country institutions, or private credentialing institutions.

Discussion: The language in criterion (D)(4)(i) specifies that States should report the effectiveness of ''each credentialing program in the State.'' The Department understands the phrase ''each credentialing program'' to include both public and private credentialing institutions. To the extent possible, we encourage inter-State reporting as well.

Changes: We have clarified in criterion (D)(4)(i) that student achievement and student growth data linked to the students' teachers and principals should be linked to ''in-State'' programs where those teacher and principals were prepared for credentialing, and that States only need to publicly report data for those credentialing programs ''in the State.''

Comment: Several commenters expressed concern regarding the provision that States report the data for each credentialing program ''that has twenty or more graduates annually.'' One commenter stated that creating an arbitrary threshold of 20 or more graduates would have the effect of only requiring data for large teacher and principal preparatory programs and recommended that all teacher and principal programs be held accountable. One commenter expressed concern that data on new credentialing programs, such as computer science teacher preparation programs, which are currently small (less than 20 graduates annually), and where student performance data may lag, would not be included in the State's report of the effectiveness of teacher preparation programs. This commenter further stated that institutions of higher education may shy away from starting new programs that are not guaranteed to perform well, given the threshold of 20 graduates annually.

Discussion: We agree that restricting the reporting to those teacher and principal preparation programs that have 20 or more graduates annually will unnecessarily exclude many teacher and principal preparation programs, including those that provide alternative routes to certification. Based on the comments, we also realize that it would be a burden on States to obtain the information on the many preparation programs to determine whether such programs annually graduate at least 20 or more students. We are, therefore, revising criterion (D)(4)(i) by removing the phrase ''that has twenty or more graduates annually.''

Changes: We have removed the phrase in criterion (D)(4)(i) that States report data on each credentialing program ''that has twenty or more graduates annually.''

Comment: One commenter suggested that we change the criterion so that States publicly report ''data'' instead of ''findings'' for each credentialing program, and to clarify that States need only report raw data, not an analysis of that data. Raw data could then be analyzed by both States and outside researchers.

Discussion: We agree that asking States to report the ''data'' and not ''findings'' for each credentialing program clarifies what States should report, and we are making this change.

Changes: We have replaced ''findings'' with ''data'' in criterion (D)(4)(i).

Comment: Several commenters asked us to explicitly state that we are including programs that provide alternative routes to certification in the group of credentialing programs for which States should collect and report data.

Discussion: Teacher and principal credentialing programs that provide alternative routes to certification must be included in the group of credentialing programs on which States must report data. We do not, however, believe it is necessary to explicitly state this in the notice, as criterion (D)(4)(i) is clear that data should be collected for ''each credentialing program'' in the

State where a State's teachers and leaders received their credential.

Changes: None.

Comment: Several commenters suggested additional requirements be applied to teacher preparation programs, such as requiring instruction in certain subjects, or creating data systems to track different aspects of teacher preparation.

Discussion: We decline to specify detailed requirements of preparation programs because we believe these decisions are generally best left to the States. We encourage States to use evidence, including the data States will gather over time from the systems they put into place for criterion (D)(4)(i), to continuously improve the quality of their teacher and principal preparation programs.

Changes: None.

Comment: A few commenters recommended that we require States to report information regarding teacher and principal effectiveness directly to the preparation programs.

Discussion: In order to meet this criterion, States must publicly report the data for each credentialing program. Preparation programs will therefore have access to these public reports.

Changes: None.

Comment: One commenter requested clarification on which institution data would be linked to in the event that a teacher or principal held multiple credentials, each from a different institution.

Discussion: If a teacher or principal holds multiple credentials from different credentialing programs, States need only link their data to the credentialing institutions that issued the credential that the teacher or principal is using for the teacher or principal's current assignment. States also would have the option to link such teachers or principals to each institution from which they received a credential.

Changes: None.

Comment: One commenter expressed concern that it is unrealistic for States to achieve the required data linkages in a reasonable period of time.

Discussion: We recognize that many States may not currently have data systems in place to collect the required data, but we believe that the four-year period in which States may use Race to the Top funds should be sufficient for them to implement their plans in this area. In responding to this criterion, as with others, States should propose plans that build on and are informed by the assets the State currently has.

Changes: None.

Selection Criterion (D)(5): Providing Effective Support to Teachers and Principals (Proposed Criterion (C)(5)):

Comment: A few commenters stressed that LEAs must take the lead in providing effective, high-quality professional development. One commenter stated that this criterion should focus on support for comprehensive professional learning and supports for teachers and principals with the understanding that this must be primarily a local effort with State support.

Discussion: We agree that the role of States under this criterion should be to support LEAs in providing effective professional development to their teachers and principals, and we are revising the criterion to clarify this.

Changes: Criterion (D)(5)(i) has been revised to clarify that the States' plans are for participating LEAs (as defined in this notice) to provide effective, data-informed support to teachers and principals.

Comment: Many commenters applauded the Department's inclusion of this criterion, and some suggested it is one of the most important Race to the Top criteria. One commenter stated that teachers will be more or less effective in meeting the goal of improving student achievement to the degree that they have the necessary supports and resources available to them in their workplace. One commenter suggested that professional development should be utilized not simply to provide new information but to support teachers in becoming more effective. One commenter stated there should be more emphasis on expanding the pool of experienced school leaders and teachers available to lead reform efforts. In that respect, some commenters stated that the States need more guidance in developing comprehensive professional development systems. The commenters argued that while professional development and common planning and collaboration time are helpful, such supports in and of themselves are not likely to be sufficient in bringing about significant changes needed to meet reform goals. Several commenters suggested that in developing professional development systems States should require teachers and administrators to collaborate with each other with the goal of individualizing support tailored to fit specific teacher needs for meeting reform goals. They recommended that such individualized support should be provided for both teachers and principals through implementation of ongoing, job-embedded professional learning opportunities aligned with district improvement plans for increasing student achievement.

Discussion: The Department agrees that supporting teachers and leaders through comprehensive professional development systems is a crucial component of education reform efforts, which is why we included this Reform Plan Criterion in the NPP. We also believe the support and professional opportunities provided to teachers and principals should be relevant to the individual needs of teachers and principals and should be ongoing and job-embedded, not short-term ''one-shot'' efforts that do very little to improve the quality of teaching.

We appreciate the suggestions we received for examples of the types of professional development activities that are most effective, and we have chosen to include several of these in this notice (*see* criterion D(5)). It is the Department's expectation, however, that professional development plans will be developed in response to data and to specific staff needs, rather than around the illustrative examples.

Changes: We have re-organized and revised criterion (D)(5) by inserting a new paragraph (i) and clarifying that the professional development, coaching, induction, and common planning and collaboration time provided to teachers and principals should, where appropriate, be ''ongoing and job-embedded.'' We also have added that such supports might focus, for example, on gathering, analyzing, and using data; designing instructional strategies for improvement; differentiating instruction; creating school environments supportive of data-informed decisions; designing instruction to meet the specific needs of high-need students (as defined in this notice); and aligning systems and removing barriers to effective implementation of practices designed to improve student learning outcomes.

Comment: Several commenters suggested that States should include teacher induction as a part of the high-quality plan they submit under criterion (D)(5). One commenter stated that new teachers require a strong induction program, or at a minimum, support and assistance from accomplished teachers to help them develop the skills needed to construct high-quality assessments and effectively diagnose student responses. Another commenter pointed out that studies show induction programs and other intensive supports for beginning teachers improve teacher retention, increase student achievement, and provide a significant return on investment. One commenter suggested requiring States to include in their plans

measures that take into account the unique professional development needs of new teachers and leaders, especially given the disproportionate number of new teachers and leaders working in high-need schools. Other commenters recommended that new teachers partner with effective and experienced teachers as an effective approach for addressing the unique needs of new teachers. One commenter recommended including structured mentoring from principals and teachers who have demonstrated success in turning around struggling schools.

Discussion: We agree that induction programs and coaching by accomplished teachers and principals can be important and effective strategies for supporting novice teachers and principals upon their entering the profession. We are revising the criterion to clarify that States' plans in response to this criterion should provide for coaching and induction programs as supports for teachers and principals.

Changes: We have revised criterion (D)(5)(i) to clarify that plans should include providing effective, data-informed ''coaching'' and ''induction.''

Comment: A few commenters stated that, in addition to providing positive conditions within which teachers can be successful, there are also barriers to success that should be eliminated. The greatest barrier cited is time—that teachers are not given sufficient time to collaborate, plan, or review data. Some commenters suggested that States should be required to determine whether or not school and classroom climates were conducive to teaching and learning, and thus supportive of teachers' efforts. One commenter contended that student learning is linked to educators' perceptions of the culture and context of their schools and a better understanding by administrators of these perceptions can help administrators address these barriers to success.

Discussion: The Department agrees that supporting teachers and principals includes ensuring that school environments are positive and conducive to teaching and learning, and that barriers to effectiveness are minimized.

Changes: In the list of supports that LEAs might provide to teachers and principals in criterion (D)(5)(i), we have added ''creating school environments supportive of data-informed decisions'' and ''aligning systems and removing barriers to effective implementation of practices designed to improve student learning outcomes.''

Comment: Two commenters insisted that the provision of content-rich professional development for STEM teachers is imperative. One commenter suggested that States provide high-quality teacher education programs, including immersion experiences both in the U.S. and abroad, for foreign language teachers. A few commenters argued for the provision of professional development designed specifically to meet the needs of teachers working with diverse populations, including students with disabilities, gifted and talented students, Native Americans, and English language learners.

Discussion: All teachers, including teachers working with the students in the areas and subjects mentioned by the commenters, should have access to high-quality professional development and support. As LEAs and States collaborate to develop their plans for providing support to teachers and principals, we expect they will identify the various types of professional development and other supports necessary for different teachers and principals. For this reason, we do not believe it is necessary to reference specific subject areas or student populations in criterion (D)(5). In addition, the Department clarified language in the definition of *alternative routes to certification* to note that ''standard features'' of such a program would include ''high-quality instruction in pedagogy and in addressing the needs of all students in the classroom including English language learners and students with disabilities.''

Changes: None.

Comment: Several commenters suggested including opportunities for improving professional learning for support personnel.

Discussion: All adults in a school, including support personnel, play an important role in creating a school culture of high expectations and share responsibility for student success. While the focus of States' plans in response to criterion (D)(5) should be on support for teachers and principals, States may choose to include in their plans professional development opportunities and support for individuals other than teachers and leaders, such as support personnel.

Changes: None.

Comment: One commenter suggested that professional development aimed at improving teacher and principal quality should include investing in technical assistance for implementation of the Positive Behavior Support model.

Discussion: The Department cannot assume all schools need to implement a particular reform model. Inclusion of examples of different types of professional development in this notice, does not, however, preclude States and LEAs from providing more specific supports based on student data and the individual needs of teachers and leaders to improve the effectiveness of instruction for improving student outcomes.

Changes: None.

Comment: One commenter suggested integrating family, school, and community engagement into professional development opportunities. Another commenter suggested that such opportunities should include training parents in partnership with professionals.

Discussion: The Department recognizes the need for family and community engagement in schools. While several examples of professional development opportunities in this area have been included, LEAs and schools are encouraged to utilize data to inform program development to meet local needs. As noted previously, States may choose to include in their plans professional development opportunities and support for individuals other than teachers and leaders, including parents.

Changes: None.

Comment: Several commenters endorsed the Department's goal to provide support for teachers and principals but contended that professional development opportunities and other support services should also be provided for individuals working with students outside of the regular school day. Such individuals might include youth development professionals, expanded learning providers, and those working in schools for over-age and under-credited youth. Commenters pointed out that students should have access to engaging learning opportunities throughout the continuum of their learning day. They argued that individuals from other agencies or sources outside the school working with students in these programs need professional support and training to enable them to align their services with school goals to improve student outcomes.

Discussion: The Department supports the coordination of services and opportunities for high-need students across schools, State agencies, and community partners. For this reason, the Department has included in this notice an invitational priority specifically addressing the coordination of services across various agencies and community partners. (*See* priority 5: Invitational priority—P–20 Coordination, Vertical and Horizontal Alignment). If a State elects to address this invitational priority in its application, it could choose to include

in its plan any professional development or support activities that are needed to align services to improve student outcomes. Again, as stated previously, States may also choose to include in their plans professional development opportunities and support for individuals other than teachers and leaders.

Changes: None.

Comment: Several commenters encouraged the Department to require States to provide guidance to LEAs in developing evaluation plans that are designed to examine the impact of professional development opportunities. One commenter stated that such evaluation plans should be designed to provide data on the impact of professional development on leadership, instruction, and student achievement. One commenter argued that States and LEAs need to engage in inquiry, analysis, and reflection about the results of professional development as a means for improving its quality. The commenter further stated that comprehensive evaluation plans would capture data to inform leadership actions for allocating resources as well as for aligning staff, policies, and structures to improve student learning and teacher effectiveness outcomes.

Discussion: We agree that the supports provided to teachers and principals should be continuously measured to improve the effectiveness of those supports. We also agree that the purpose of this measurement and improvement is to ensure that the supports result in improved student achievement. While that was our intent in the NPP, we believe that we should more clearly state that intent in this notice. Accordingly, we are revising criterion (D)(5)(ii) to that effect. We believe that the resulting language sufficiently addresses the commenters' suggestion about evaluation plans. The Department expects that, through the process of working with LEAs, States will determine what guidance LEAs may need to help them continuously measure and improve the supports they provide to teachers and principals.

Changes: We have reorganized and revised criterion (D)(5) by adding criterion (D)(5)(ii) and clarifying that the measurement, evaluation, and improvement of the effectiveness of the supports provided to teachers and principals is conducted in order to improve student achievement.

Comment: Several commenters expressed concern with using rapid-time student data to inform and guide the support provided to teachers and principals. Many of these commenters recommended removing this language from proposed criterion (C)(5). One commenter noted that while the Department's call for providing effective support for teachers and principals is appreciated, the language in the final notice should place a greater emphasis on vital supports rather than on the utilization of rapid-time data to inform it. A few commenters agreed that student data provide a useful tool for guiding instruction but argued that an undue emphasis on rapid-time student data will have a negative impact on overall data quality for improving outcomes. They stated that student data alone is not sufficient for evaluating and improving teaching effectiveness, and argued that a variety of evaluation techniques are needed to capture the breadth of effective teaching and professional practice. They suggested that teacher support is better informed through the incorporation of portfolio assessments, review of lesson plans, self-assessments, teaching artifacts, classroom observation, and feedback on teaching practice. Another commenter noted that utilization of rapid-time student data is far too limited as a concept and practice, and argued that the emphasis should be on building comprehensive professional learning systems that can be integrated into building the capacity of all schools to serve children well.

Discussion: The Department is persuaded by the concerns expressed by the commenters regarding using rapid-time student data to inform and guide the support provided to teachers and principals. Accordingly, we are removing this language from criterion (D)(5).

Changes: The phrase ''use rapid-time (as defined in this notice) student data to inform and guide the support provided to teachers and principals'' has been removed from criterion (D)(5).

Comment: One commenter suggested revising the notice to provide funds for professional learning to help educators improve the knowledge and skills that will enable them to do their jobs well. Another commenter expressed concern that there are not enough funds to design and implement the professional development required to improve teaching and learning. One commenter recommended specifying that States that have reduced funding for professional development activities should be penalized in their applications. The commenter also recommended that Race to the Top funding should be used to ensure that meaningful standards-based professional development activities are provided.

Discussion: States must include a description of how they will use Race to the Top funds to accomplish their plans and meet their targets. It is up to the States to determine how much funding to designate for providing support to teachers and principals under criterion (D)(5). In response to the recommendation that States be penalized for reducing professional development funding, we note that, under criterion (F)(1), States will be evaluated based on the extent to which they have made education funding a priority. We do not believe it is necessary to include a criterion specific to funding for professional development.

Changes: None.

Comment: None.

Discussion: We are revising some of the evidence and performance measures to be consistent with the changes made to criterion (D) in this notice. In some instances we also are revising the evidence and performance measures to provide greater clarity.

Changes: Appendix A, Evidence and Performance Measures, criterion (D) Great Teachers and Leaders, has been revised to reflect the changes made to criterion (D) and to provide greater clarity.

E. Turning Around the Lowest-Achieving Schools

Definitions: increased learning time, persistently lowest-achieving schools.

Comments regarding the preceding definitions are addressed, as appropriate, below.

Introduction

A central purpose of ARRA funds is to increase the academic achievement of students in struggling schools. As a result, the Notices of Proposed Requirements (NPRs) regarding the State Fiscal Stabilization Fund Phase II and the School Improvement Grants programs, as well as the Race to the Top NPP, each included requirements related to struggling schools. The most explicit requirements were included in the School Improvement Grants NPR that was published in the **Federal Register** on August 26, 2009 (74 FR 43101), in which the Department proposed four rigorous school intervention models—turnaround, restart, school closure, and transformation—that an LEA seeking School Improvement Grant funds would implement in the lowest-achieving Title I schools in improvement, corrective action, or restructuring identified by each State and could also implement in secondary schools that are eligible for, but do not receive, Title I funds. Commenters on each notice recommended that the Department

make the identity of, and requirements for, struggling schools consistent among all three programs. We agree with these comments and, in response, have revised the four school intervention models and are integrating them into the criteria, definitions, and requirements for all three programs. In addition, we have developed a definition of *persistently lowest-achieving schools* to substitute for ''schools in the lowest five percent'' (Stabilization Fund) and *persistently lowest-performing schools* (Race to the Top) for use in all three programs.

Because both the Stabilization Fund and Race to the Top notices of final requirements are being published prior to the final School Improvement Grants notice, we have published the requirements for the four models in the final notice for the Stabilization Fund, are including them in Appendix C to this final notice, and will incorporate them into the final School Improvement Grants notice when it is issued. In order to clarify and fully explain the definition of persistently lowest-achieving schools and the changes that we made to the four models, we also are including in this notice the comments and responses related to the definition and those models from the School Improvement Grants NPR. In the following sections, we first discuss the comments we received on struggling schools in reply to the Race to the Top NPP and our responses. We then discuss the comments we received related to the definition and the four intervention models as proposed in the School Improvement Grants NPR and our responses to those comments.

Selection Criterion (E)(1): Intervening in the Lowest-Achieving Schools and LEAs (Proposed Selection Criterion (D)(1)):

Comment: None.

Discussion: The Department is changing the headings in this section to describe ''lowest-achieving schools'' instead of ''lowest-performing schools'' to be consistent with the revised definition of *persistently lowest-achieving schools,* which is based primarily on achievement scores and not on broader measures of school performance, as suggested by the headings in the NPP. We also are replacing the phrase ''struggling schools'' with ''persistently lowest-achieving schools'' to avoid confusion on this subject.

Changes: The Department has changed the terms ''lowest-performing schools'' and ''struggling schools'' to ''persistently lowest-achieving schools'' throughout this notice.

Comment: Several commenters expressed support for criterion (E)(1) (proposed criterion (D)(1)), which will examine the extent to which a State has the legal, statutory, or regulatory authority to intervene directly in its persistently lowest-achieving schools (as defined in this notice) and in LEAs identified for improvement or corrective action under the ESEA. Two of these commenters proposed that the Department require additional information about a State's authority to intervene, including examples of when and how the authority had been used and any available evaluation of State plans and processes for using the authority. Another commenter recommended that States receive extra points for aggressive use of any authority to intervene in low-performing schools and LEAs.

Discussion: Criterion (E)(1) is intended to reward States based on the extent to which they have the legal authority to intervene directly in their persistently lowest-achieving schools, as well as in LEAs identified for improvement or corrective action. The Department believes that such authority to intervene is important for a State's ability to hold LEAs accountable for turning around their persistently lowest-achieving schools. However, the Department is not seeking to encourage direct State intervention per se; the language of criterion (E)(2) (proposed criterion (D)(3)) makes clear that the primary role of a State with regard to its persistently lowest-achieving schools is to ''identify'' and ''support its LEAs in turning around these schools by implementing one of the four school intervention models.'' For this reason, the Department declines to require States to provide more information about their implementation of this authority or to award ''extra points'' to States that have demonstrated ''aggressive'' use of such authority.

Changes: None.

Comment: Many commenters appeared to misunderstand the impact of criterion (E)(1) that a State's application for a Race to the Top grant describe the extent to which it has the legal, statutory, or regulatory authority to intervene directly in its lowest-performing schools and in LEAs identified for improvement or corrective action. For example, some of these commenters appeared to believe that the criterion itself would provide States the authority to intervene in their lowest-performing schools and LEAs; these commenters objected to such authority on the grounds that school improvement must be locally based and not imposed by the Federal Government. Other commenters expressed concerns about the processes, procedures, and funding for any State intervention in schools and LEAs. Commenters also claimed that State intervention in schools and LEAs would violate State constitutions, that most States did not have the capacity to support effective intervention, and that many such efforts in the past had ended in failure.

Discussion: The purpose of criterion (E)(1) is to reward States for, and encourage them to have, the authority to intervene, if necessary, in their persistently lowest-achieving schools and LEAs that are in improvement or corrective action status. The Department believes that States that have such authority are in a stronger position to hold LEAs and schools accountable for implementing effective school intervention strategies, particularly in cases where LEAs or schools continue to fail their students year after year. Criterion (E)(1) will give States credit only for having the authority to intervene, and not for actual intervention. This criterion is not intended to encourage such interventions by States; rather, it recognizes that, in cases where LEAs are unwilling or unable to successfully implement the school intervention models required by section (E)(2) of this notice, State intervention may be both appropriate and necessary. However, we also believe that as States build State and local capacity to turn around their persistently lowest-achieving schools, they should have fewer and fewer reasons for direct intervention.

Changes: None.

Selection Criterion (E)(2): Turning Around the Lowest-Achieving Schools (Proposed Selection Criterion (D)(3)):

Comment: None.

Discussion: As discussed in the introduction to this section, we are replacing the models described in proposed criterion (D)(3) of the NPP with the four models that have been developed in response to public comments across all three notices. The four school intervention models are (1) a turnaround model, which would involve, among other actions, replacing the principal and rehiring no more than 50 percent of the school's staff, adopting a new governance structure, and implementing a research-based and vertically aligned instructional program; (2) a restart model, in which an LEA would convert a school or close and reopen a school under the management of a charter school operator, a charter management organization (CMO), or an educational management organization (EMO) that has been selected through a rigorous review process; (3) a school

closure model, in which an LEA would close the school and enroll the students who attended the school in other, higher-achieving schools in the LEA; and (4) a transformation model, which would address four specific areas critical to transforming a persistently lowest-achieving school. Each of these models is described in detail in Appendix C of this notice.

Changes: We have removed the description of the school intervention models in criterion (E)(2), which now provides for a State to have a high-quality plan and ambitious yet achievable annual targets for (1) identifying its persistently lowest-achieving schools (as defined in this notice) and, at the State's discretion, any non-Title I eligible secondary schools that would be considered persistently lowest-achieving schools if they were eligible to receive Title I funds, and (2) supporting its LEAs in turning around these schools by implementing one of the four school intervention models adopted from the School Improvement Grants program: a turnaround model, restart model, school closure, or transformation model (provided that an LEA with more than nine persistently lowest-achieving schools may not use the transformation model for more than 50 percent of its schools). These models are described in detail in Appendix C of this notice.

Comment: Several commenters supported the strategies in criterion (E)(2) for turning around the lowest-achieving schools, but many commenters objected to these strategies as too prescriptive, overly focused on governance issues, poorly grounded in research, and not truly innovative. Several commenters, in particular, focused on what they described as the punitive nature of the proposed school intervention models due to the emphasis on leadership and staff replacement, charter school conversions, turning over operations to outside management, and closing schools. Others believed that these strategies would prove ''unrealistic'' in many areas, with one commenter claiming that they ''simply won't work in our rural/frontier State.'' A few commenters observed that limiting school intervention options as proposed in criterion (E)(2) appeared to be contrary to the Secretary's stated commitment to be ''tight on goals and loose on the means.'' In response to such concerns, many of these commenters called for greater flexibility to adopt other school intervention models, including those that they claimed were grounded in research, as well as the option of continuing existing school intervention strategies that were achieving positive results. Several commenters identified other reform strategies that they believe should be included in the school intervention options under (E)(2), including common planning time for teachers, career pathways or career cluster programs, inquiry-based and applied learning strategies, such as service learning, summer camp, character education, magnet schools, improving school library programs, and the use of technology as part of school intervention models. Other recommended strategies included, for example, the involvement of teachers in school-based decision-making, district and union leadership support for school staff, providing additional trained staff to support classroom needs, smaller class sizes, the promotion of a safe and orderly school climate, and a focus on students' social, emotional, and health needs.

Discussion: The Department recognizes that there are other reform models and interventions not identified in the NPP that can be successful in turning around the persistently lowest-achieving schools. We also understand that no single reform model will be effective in every State or every district. However, the school intervention models in criterion (E)(2) focus on dramatic change, including significant changes in leadership and staffing, because they are targeted to the nation's persistently lowest-achieving schools, which in most cases have not responded to multiple earlier school improvement and turnaround efforts. Research indicates that fundamental, comprehensive changes in leadership, staffing, and governance hold the greatest promise for bringing about the improvements in school structure, climate, and culture that are required to break the cycle of chronic educational failure. In addition, the commenters' focus on staffing and governance issues led them to overlook the significant flexibility provided to adopt specific reforms such as teacher involvement in decision-making and smaller class sizes. A key purpose of changes in leadership and governance is to promote greater school-based flexibility over things that matter, such as hiring effective teachers, increasing time for both instruction and staff collaboration, and control over budget decisions. The Department recognizes that implementing these turnaround models will be challenging for LEAs, and expects State plans to include technical assistance and other support, including support for successful turnarounds in rural and other areas that may need to overcome a variety of resource limitations. Further, as noted in Appendix C, if a school identified as persistently lowest-achieving has implemented an intervention or part of an intervention in the last two years that meets the requirements of the turnaround, restart, or transformation models, the school may continue or complete its work.

Changes: Criterion (E)(2) replaces the school intervention models proposed in criterion (D)(3) of the NPP with the four models adopted from the School Improvement Grants program and described in Appendix C of this notice.

The Role of States and LEAs in School Intervention

Comment: One commenter recommended that the Race to the Top application require States to explain how they will meet the existing ESEA requirements regarding schools identified for improvement. Other commenters called for States and LEAs to propose their own intervention plans on the basis of evidence from research and evaluation, including ''charter-like'' options, or to build on current turnaround efforts. Similarly, another commenter recommended requiring States to explain how they will combine governance changes with transformation models to improve teaching and learning. One commenter called for LEAs to propose their own school intervention strategies to their States, which could mandate alternatives if the LEA proposals were not rigorous enough. Two commenters, however, called for States, not LEAs, to mandate required school interventions based on their own analyses of those schools' low performance.

Discussion: States and LEAs have had considerable flexibility in implementing the school improvement provisions under section 1116 of the ESEA; unfortunately there is little evidence of success, as the number of schools in the final stage of improvement—restructuring—has nearly tripled over the past few years, to about 5,000 schools. The emphasis of the ARRA on turning around struggling schools reflects, in part, the response of the Congress to this limited success of ESEA school improvement measures in turning around chronically low-performing schools. States and LEAs are expected to use other ARRA funds, including the State Fiscal Stabilization Fund, Title I Grants to Local Educational Agencies, and Title I School Improvement Grants, to carry out the school improvement requirements of the ESEA. Under the Race to the Top program, the

Department is asking States to raise the bar for school improvement by agreeing to undertake, in addition to existing ESEA school improvement activities, dramatic changes and improvement in their persistently lowest-achieving schools, drawing from a set of models that the Department believes holds the greatest promise for breaking the cycle of chronic educational failure in these schools. States and LEAs are not required to use these models—they are part of the criteria for the Race to the Top competition, not eligibility requirements—but States that agree to support the interventions required by criterion (E)(2) will earn points that will strengthen their overall Race to the Top application and increase their chances of winning a Race to the Top grant. In general, the Department anticipates that LEAs will select the appropriate school intervention models and that States will support LEAs in implementing these models. However, criterion (E)(1), which will assess a State's authority to intervene directly in its persistently lowest-achieving schools and LEAs that are identified for improvement or corrective action under the ESEA, reflects the Department's recognition that some States may wish, or in some States it may be necessary, to take additional actions.

This final notice, like the NPP, does include criteria that allow States to earn points for their own existing or planned efforts to support effective school interventions. Criterion (F)(3) (proposed criterion (E)(1)(iii)) provides that a State will receive points if the State, through law, regulation, or policy, has created other conditions supporting education reform and innovation that are not addressed under other State Reform Conditions Criteria and that have increased student achievement or graduation rates, narrowed achievement gaps or resulted in other important outcomes.

Changes: Criterion (F)(3) has been revised to measure the extent to which a State, in addition to information provided under other State Reform Conditions Criteria, has created, through law, regulation, or policy, other conditions favorable to education reform or innovation that have increased student achievement or graduation rates, narrowed achievement gaps, or resulted in other important outcomes.

LEA Capacity

Comment: Several commenters recommended an increased focus on the LEA role in school interventions. Three commenters observed that States should be required to provide technical assistance to LEAs to increase their capacity to support school-level reform, and four commenters recommended that the final notice require States to specify the LEA role in, and capacity to manage, school interventions that will be required under their Race to the Top plans.

Discussion: We agree that participating LEAs will play a leading role in implementing school intervention models, and that States should help build LEA capacity to fulfill this role effectively. In criterion (A)(2)(i)(b), States will be evaluated based upon their plans to support participating LEAs (as defined in this notice) in successfully implementing the State's Race to the Top plans, through such activities as identifying promising practices, evaluating these practices' effectiveness, ceasing ineffective practices, widely disseminating and replicating the effective practices statewide, holding participating LEAs (as defined in this notice) accountable for progress and performance, and, if necessary, intervening directly to effectively implement school intervention models. The Department declines to specify the LEA role in the school intervention models, as this role will vary based on local capacity and circumstances. We want to give States and LEAs flexibility to define the LEA role both in State reform plans and in the MOUs completed by participating LEAs (as defined in this notice).

Changes: None.

Number of School Interventions

Comment: Several commenters requested that the Department clarify how a State determines the schools that it must target for intervention under section (E)(2). Another commenter expressed concern about the potentially low number of schools that would be subject to school intervention options under the proposed requirements; in particular, this commenter worried that the combination of required Title I status and varying rates of State identification of schools for improvement under section 1116 of the ESEA could significantly limit the application of Race to the Top school intervention requirements, particularly to the lowest-performing high schools. The commenter suggested replacing the proposed ''bottom five percent'' approach with a requirement to turn around the lowest-performing one percent of all schools annually, with the one-percent cap applied separately to elementary/middle schools and high schools. This commenter added that interventions should include schools with generally high performance that serve significant numbers of students who are not performing well. Another commenter stated that linking the number of schools that a State must turn around to the number of schools identified for improvement under the ESEA would penalize States with more ambitious AYP criteria. Finally, one commenter asked how schools would exit the ''bottom five percent status'' described in the NPP.

Discussion: The Department agrees that the language in the NPP, in combination with the proposed definition of *persistently lowest-performing schools*, was unclear and potentially created confusion about how States would identify schools for the interventions described in criterion (E)(2). We also recognize the concerns of commenters that the criteria in the NPP could lead some States to identify too few schools for intervention efforts. In response, the Department has (1) modified the definition of the term *persistently lowest-achieving schools* and (2) modified criterion (E)(2) to give States discretion to identify for intervention any non-Title I eligible public secondary school that would be considered a persistently lowest-achieving school (as defined in this notice) if it were eligible to receive Title I funds. The Department believes that these changes will ensure that States identify a sufficient number of schools to target for intervention efforts and that such efforts are not limited by the Title I status of the State's lowest-achieving schools. As for how schools would exit the persistently lowest-achieving schools (as defined in this notice) category, we note that the purpose of this category, consistent with criterion (E)(2), is to identify schools in which LEAs will implement one of four school intervention models. For this purpose, a school in which one of these models has been implemented would no longer be subject to intervention, but may remain on a State's list of persistently lowest-achieving schools as long as it meets one of the criteria in the definition of persistently lowest-achieving schools.

Changes: We have revised the definition of *persistently lowest-achieving schools* to mean, as determined by the State: (i) Any Title I school in improvement, corrective action, or restructuring that (a) Is among the lowest-achieving five percent of Title I schools in improvement, corrective action, or restructuring or the lowest-achieving five Title I schools in improvement, corrective action, or restructuring in the State, whichever number of schools is greater; or (b) Is a high school that has had a graduation

rate as defined in 34 CFR 200.19(b) that is less than 60 percent over a number of years; and (ii) Any secondary school that is eligible for, but does not receive, Title I funds that (a) Is among the lowest-achieving five percent of secondary schools or the lowest-achieving five secondary schools in the State that are eligible for, but do not receive, Title I funds, whichever number of schools is greater; or (b) Is a high school that has had a graduation rate as defined in 34 CFR 200.19(b) that is less than 60 percent over a number of years.

To identify the lowest-achieving schools, a State must take into account both (i) The academic achievement of the ''all students'' group in a school in terms of proficiency on the assessments under section 1111(b)(3) of the ESEA in reading/language arts and mathematics combined; and (ii) The school's lack of progress on those assessments over a number of years in the ''all students'' group.

Governance Issues

Comment: One commenter did not agree with the perceived emphasis in the NPP on existing school governance as the cause of school failure, or that there is research or other evidence that changing lines of authority or reporting will help turn around a low-performing school. This commenter added that the Secretary has indicated that he supports partnerships between school boards and mayors, as opposed, for example, to a mayor taking direct control of a school district. Another commenter suggested an additional governance-based intervention option, for a school that already has undergone unsuccessful restructuring, involving placement of the school under the direct control of the district's superintendent or establishing a ''professional learning community'' in partnership with another school district.

Discussion: Changing school governance can take a variety of forms, and different solutions may be appropriate to different situations. One possible option consistent with this final notice is conversion to a charter school or management by a CMO or EMO. Another possibility, suggested by one commenter, would be for a superintendent or someone reporting directly to the superintendent to oversee turnaround schools. Alternatively, a mayor might, in consultation with the local school board, create an office charged with supervising turnaround efforts, or a State might directly intervene with a takeover. The Department understands and agrees that none of these governance changes is a ''silver bullet'' for low-achieving schools, but believes each may help to create the conditions of autonomy and flexibility that are associated with successful turnaround efforts.

Changes: None.

Replacing Leadership and Staff

Comment: Many commenters opposed replacing school leadership and staff as part of the school intervention models required by proposed criterion (D)(3) and now described in detail in Appendix C, with some commenters claiming that research shows that staff replacement is an ineffective reform strategy, others stating that such strategies are not really an option in many communities that already face teacher and principal shortages, and a few commenters arguing that fear of what might be perceived as arbitrary dismissals associated with school intervention models could create a disincentive for talented teachers and principals to work in struggling schools. Another commenter, however, generally supported the emphasis on changing leadership, citing research showing that principals are the second most important factor contributing to student achievement, after classroom instruction. A number of other commenters recommended changes to the staff and leadership replacement requirements in these models, including (1) giving the new leadership under the turnaround model greater flexibility to make its own firing and hiring decisions instead of simply requiring the replacement of a ''majority'' of staff; (2) requiring all staff to reapply for their positions as long as the principal has full authority to hire either former staff or staff from outside the school; (3) retaining leadership and staff if they support the rest of the turnaround plan; (4) retaining at least 50 percent of current staff who reapply and meet all of the requirements of the redesigned school; and (5) focusing on staff qualifications and putting in place effective staff rather than on a particular target level of replacements. One commenter requested clarification of the terms ''new leadership'' and ''a majority of new staff.'' A few commenters sought greater flexibility for principals under the school intervention models, including the option of retaining principals who have had a positive impact on student outcomes or were recently hired and giving current principals a minimum of two years to improve before being replaced. Other commenters stated that replacement principals should be required to have a record of significantly increasing student achievement at similar schools, or that new leadership should have a ''documented likelihood'' of successfully raising student achievement. One commenter recommended modifying the first three school intervention models—turnaround, restart, and school closure—to include provisions for consensual placement (*i.e.*, with the agreement of the hiring school) of staff that lose their jobs due to implementation of these options or, in the absence of such consensual placement, release from employment.

Discussion: The Secretary understands that replacing leadership and staff is one of the most difficult aspects of the school intervention models required by criterion (E)(2). However, he also believes that in our lowest-achieving schools, many of which have failed to improve despite repeated earlier interventions, dramatic changes in leadership and staffing can be the key to creating the new climate and culture needed to break the cycle of educational failure. On the other hand, while we believe the required intervention models leave room to accommodate many of the flexibilities requested by these commenters, the four school intervention models adopted from the School Improvement Grants program and described in detail in Appendix C specifically include several of the changes suggested by commenters. For example, we have clarified that by ''new leadership'' under the turnaround model, we mean the principal of the school, and that by requiring ''a majority of new staff'' in a turnaround school we mean that no more than 50 percent of existing staff may be rehired. Also, the turnaround model adopted from the School Improvement Grants program now must include giving the new principal significant operating flexibility in areas such as staffing, school calendar and scheduling, and budgeting. In addition, in determining which staff to rehire, LEAs must use locally adopted competencies to measure the effectiveness of staff who can work within the turnaround environment to meet the needs of students. Also, a principal hired in the past two years as part of a planned intervention would have time to continue or complete the intervention as part of one of the four models. Moreover, there is nothing in the models described in Appendix C to this notice that would prevent a State or LEA from requiring replacement principals or other school leaders to have a record of success in previous assignments. As for consensual placement policies, such issues are best

resolved at the State and local level in the context of existing collective bargaining agreements. Finally, while the implementation or potential implementation of dramatic school intervention models could encourage some effective principals and teachers to leave or not seek employment in the lowest-achieving schools, the Race to the Top and other Federal programs also are creating incentives and providing resources that can be used to reward effective teachers and principals and improve strategies for recruitment, retention, and professional development. Moreover, the flexibilities for improving teaching and learning and the focus on school improvement that are created by the intervention models in criterion (E)(2) are equally likely to draw talented new leaders and staff to schools implementing these models.

Changes: We have replaced the interventions outlined in proposed criterion (D)(3) (new (E)(2)) with the four school intervention models adopted from the School Improvement Grants program and described in detail in Appendix C of this final notice.

Impact of Collective Bargaining Agreements on Intervention Options

Comment: Several commenters stated that because the school intervention models referenced in criterion (E)(2) include provisions that would affect collective bargaining agreements related to staffing, time, evaluation, and compensation, such options would have to be locally negotiated by the collective bargaining representative. One commenter also noted that the hiring and firing of teachers and principals required by the proposed intervention options currently are limited by State law. Another commenter added that interventions should be subject to due process.

Discussion: The Department recognizes that State and local Race to the Top plans, including school intervention models implemented as part of these plans, may have an impact on issues covered by collective bargaining agreements, and agrees that such issues would have to be negotiated within the context of these agreements. The Department urges LEAs to work with teacher unions and teacher membership associations to resolve such issues, as well as other legal and regulatory barriers to successful implementation of school intervention models. To encourage such collaboration and partnership, one measure of an LEA's strong commitment to a State's Race to the Top plan is the signature of the local teachers' union leader on the Memoranda of Understanding or other binding agreements completed by participating LEAs (as defined in this notice) under criterion (A)(1)(ii)(c). In addition, criterion (A)(2)(ii)(a) calls for States to demonstrate support for their Race to the Top plans by obtaining statements or actions of support from, among other stakeholders, State teachers' unions or statewide teacher associations. As stated elsewhere in this notice, the concerns raised by commenters are not insurmountable, and the Secretary believes that LEAs and unions can work together to make the changes required to turn around our persistently lowest-achieving schools.

Changes: None.

The Role of Charter Schools

Comment: Several commenters recommended that State school intervention plans include the use of the charter school model both to improve the persistently lowest-achieving schools (as defined in this notice) and to create a large number of new high-quality charter schools to better serve students currently attending such schools. However, two commenters said that the criteria in proposed section (D) for turning around the persistently lowest-achieving schools (as defined in this notice) relied too heavily on charter schools; one of them noted that charters originally were intended as ''experimental incubators for education change'' and not as the ''parallel educational system'' that they claimed would be promoted by the NPP.

Discussion: We believe strongly that high-performing charter schools can be especially valuable in communities where chronically low-performing traditional public schools have failed to improve after years of conventional efforts to turn them around. In such cases, high-performing charter schools, whether created through the conversion of a traditional public school enrolling the same students or by establishing a new school that provides an alternative to the regular public schools, can offer promising and proven options for breaking the cycle of educational failure. At the same time, we acknowledge that the placement of the proposed charter schools criterion (D)(2) in the struggling schools section in the NPP potentially gave the impression that the NPP was emphasizing charter school expansion as the primary strategy for turning around the nation's lowest-achieving schools. This was not the intention. Proposed criterion (D)(2) was aimed more broadly at measuring the extent to which a State had created the conditions supporting an increase in the number of high-performing charter schools (as defined in this notice). Additionally, restart schools based on the charter school model are only one of the four school intervention models required in section (E)(2) of this notice. We are therefore moving proposed criterion (D)(2) to (F)(2) in this notice to help clarify that a State's support for increasing the number of high-performing charter schools is only part of its overall Race to the Top plan, including its efforts to turn around its lowest-achieving schools. Also, we believe that the new criterion (F)(2) will better communicate the emphasis not just on increasing the number of charter schools, but on increasing the number of high-performing charter schools (as defined in this notice). Finally, new criterion (F)(2)(v) will give States credit for the extent to which they enable LEAs to operate innovative, autonomous public schools other than charter schools.

Changes: Proposed criterion (D)(2), Increasing the Supply of High-Quality Charter Schools, has been renamed Ensuring Successful Conditions for High-Performing Charter Schools and Other Innovative Schools and moved to (F)(2) in this final notice. In addition, new criterion (F)(2)(v) will give States credit for the extent to which they enable LEAs to operate innovative, autonomous public schools other than charter schools. We have added a definition of innovative, autonomous public schools to give greater clarity to new criterion (F)(2)(v).

Charter School Conversions

Comment: Several commenters recommended modifying the proposed charter school restart option to emphasize the need to first close a school and then re-open it as a charter school, rather than directly convert an existing low-performing school into a charter school. Two other commenters urged the Department to require intervention planning to be done while students still attend their current school. These commenters stressed the importance of ensuring that charter schools ''start fresh with the student body and fully implement their own approach.'' One commenter emphasized that the selection of the charter school conversion option should result in ''schools of choice''—schools chosen by both students who enroll and the staff who work there—to create the sense of shared commitment and high expectations that have characterized the most successful existing charter schools.

Discussion: The Department understands that charter school supporters and operators have different ideas about the best way to create high-

performing charter schools. When using a charter school conversion as a restart option, LEAs and charter school operators should endeavor to strike a balance between allowing sufficient time for planning and reconfiguring an existing school and moving quickly enough to minimize disruption to students, parents, teachers, and other staff. One way to do this would be to utilize, wherever possible, charter school operators, CMOs, or EMOs with experience in converting existing schools to new management. In addition, every effort should be made to permit and encourage previously enrolled students to enroll in the new charter school. The primary purpose of turning around the lowest-achieving schools is to give the students in those schools the high-quality education they deserve and need to prepare for further education, college, and careers.

Changes: The restart model, as described in paragraph (b) of Appendix C, specifically allows for an LEA to convert a school or close and reopen a school under a charter school operator, a CMO, or an EMO that has been selected through a rigorous review process.

Education Management Organizations

Comment: A few commenters questioned the proposed role for EMOs in school interventions, raising concerns about the research base underlying the use of EMOs and how they would be held accountable. One commenter recommended that the Secretary consider requiring EMOs to have a demonstrated record of success in managing schools before they are used as part of a school intervention strategy, and also recommended that EMOs be prohibited from refusing to serve certain students based on student needs. One commenter added that charter schools should be required to have a demonstrated track record of success.

Discussion: The Department agrees that LEAs should carefully screen EMOs before using them as part of a school intervention model. The restart model adopted from the School Improvement Grants program, and described in Appendix C to this notice, requires the use of an EMO ''that has been selected through a rigorous review process,'' which may include an examination of an EMO's record of success in managing schools as well as an analysis of the extent to which EMOs have served students with diverse educational needs. Charter school operators and CMOs would be subject to the same review requirement under a restart model.

Changes: The restart model, described in detail in Appendix C, states that the organization chosen to restart the school should be ''selected through a rigorous review process.''

School Closures

Comment: Several commenters objected to closing schools, either as part of a charter conversion or the school closure model under criterion (E)(2), because such actions can displace students and disrupt communities. One commenter added that the impact of closing schools may be particularly severe in minority communities, where there may not be a higher-performing school nearby, while another observed that closing schools is not always possible in rural areas. Other commenters variously recommended that school closing be used as a school intervention option only when a high-performing school is available as an alternative, is in close proximity to the closed school, and has room to accommodate new students. Another commenter recommended that LEAs promote the use of inter-district transfers for students in closed schools. Finally, concerns about the impact of closures led one commenter to recommend that school intervention efforts be targeted on existing schools, as opposed to charter school conversion or school closing.

Discussion: The Department recognizes that school interventions, regardless of the strategy or option selected, may lead to some displacement and disruption for both students and adults. LEAs and schools should work together to facilitate a smooth transition, particularly for students and families, when schools are closed as part of school intervention plans. We agree that inter-district transfers could help to mitigate the impact of school closures, and LEAs are already encouraged to promote such transfer options under section 1116(b)(11) of the ESEA. Also, school closing is just one of four available school intervention options in this final notice; it may not be appropriate or even possible for some LEAs. In particular, the school closure model adopted from the School Improvement Grants program in this notice states that a school to which students from a closed school are transferred must be ''within reasonable proximity'' to the closed school.

Changes: The school closure model adopted from the School Improvement Grants program and described in Appendix C to this final notice states that ''School closure occurs when an LEA closes a school and enrolls the students who attended that school in other schools in the LEA that are within reasonable proximity to the closed school and that are higher-achieving.''

Elevating the School Transformation Model

Comment: Many commenters recommended that the final notice elevate the fourth option, the school transformation model, to the same status as the first three school intervention options, rather than a last resort if the first three are not possible. Some of these commenters also asserted that the transformation model may be among the most promising of school intervention options, particularly when it involves a comprehensive approach to turning around low-performing schools that includes systemic behavioral and learning supports, a safe and orderly climate, promotion of students' social-emotional skills and capacities, and the kind of collaborative working environment where staff are empowered to support students. Two commenters added that the ''additional learning opportunities and supports referenced'' in the transformation model, as described in the NPP, should be required under the other school intervention models as well. Another commenter asserted that there ''is no basis in scholarly research'' for subordinating the transformation model to the other three school intervention options. One commenter urged that the fourth option be elevated and that the first three options be deemphasized. Another commenter recommended that a State first implement the non-staffing requirements of the transformation model—improving strategies for recruitment, retention, and professional development; implementing a comprehensive instructional program; extending learning time and utilizing community-oriented supports; and promoting family and community engagement—for ''a reasonable time'' before undertaking school governance and staffing changes such as those required by the other school intervention models described in criterion (E)(2) (proposed (D)(3)). However, one commenter urged, consistent with the NPP, that the transformation model be a last resort only, such as in a remote rural school district that could find it impossible to replace most of the staff at one of its schools.

Discussion: The Department agrees with commenters who recommended broader latitude for LEAs to use the transformation model to turn around their persistently lowest-achieving schools. Criterion (E)(2) includes a

transformation model as one of the four models adopted from the School Improvement Grants program and described in detail in Appendix C of this notice. The final notice also removes the provision in proposed criterion (D)(3) that the transformation model can be used only if the other strategies are not possible. However, we are also adding language to criterion (E)(2) specifying that an LEA with more than nine persistently lowest-achieving schools may not use the transformation model for more than 50 percent of its schools.

And while the Department does not agree that the elements of the transformation model should be required under the turnaround and restart models, largely because doing so would undermine the flexibility to innovate that is a key benefit of changing governance and leadership or a charter school conversion, the turnaround model described in Appendix C specifically permits the implementation of ''any of the required and permissible activities under the transformation model.'' However, the Department declines the suggestion by one commenter to deemphasize the other options, primarily because we believe that changing governance, leadership, and staff often are essential for turning around the lowest-achieving schools; we also note that such actions (*i.e.*, replacing the principal and removing ineffective staff) are required by the transformation model.

Changes: Criterion (E)(2) (proposed (D)(3)) no longer limits the adoption of the transformation model, as described in Appendix C, as a ''last resort'' when it is not possible for an LEA to implement one of the other school intervention models. Instead, it specifies that an LEA with more than nine persistently lowest-achieving schools may not use the transformation model for more than 50 percent of its schools.

Modifications to School Intervention Options

Comment: Several commenters proposed modifications to the school intervention models set forth in criterion (E)(2) (proposed (D)(3)). For example, one commenter recommended that schools subject to intervention implement either the turnaround model or the transformation model for three years; if these reforms are unsuccessful the schools would then be required to convert to a charter school, accept CMO or EMO management, or close. Another commenter recommended combining the first and fourth models due to their similarity.

Discussion: The Department recognizes that there are other ways to structure school intervention models. However, our goal with respect to criterion (E)(2) is to signal a decisive break with the past, rather than simply to create a new school improvement timeline with a menu of interventions, in order to successfully turn around as many of the nation's lowest-achieving schools as possible. As for combining the first and fourth models, the commenter appears to have overlooked the significant changes in staffing and governance that are central to the turnaround model but not required under the transformation model. For these reasons, and as described elsewhere in this notice, the school intervention models adopted from the School Improvement Grants program and described in Appendix C of this notice generally retain the structure and timeline proposed in the NPP, except that the transformation model no longer is limited to situations where it is not possible for an LEA to implement one of the other three models.

Changes: None.

Continuation of Existing School Intervention Models

Comment: One commenter requested that the final notice clarify whether a school that brought in a CMO or EMO two or three years ago would be required under criterion (E)(2) to start over with a new intervention.

Discussion: Appendix C, which describes the school intervention models that we are adopting from the School Improvement Grants program, includes language stating that if a school identified as a persistently lowest-achieving school has implemented, in whole or in part within the last two years, an intervention that meets the requirements of the turnaround, restart, or transformation models, the school may continue or complete the intervention being implemented.

Changes: We have included the following language at the end of Appendix C: ''If a school identified as a persistently lowest-achieving school has implemented, in whole or in part within the last two years, an intervention that meets the requirements of the turnaround, restart, or transformation models, the school may continue or complete the intervention being implemented.''

Instructional Reform

Comment: Numerous commenters supported comprehensive instructional reform, including differentiated instruction and a standards-based, common curriculum, as a school intervention strategy. One commenter observed that many chronically low-performing schools have been reconstituted or restructured more than once, with multiple leadership and staffing changes, without success. This commenter urged the Secretary to recognize that in many cases LEAs must work to improve the skills of existing staff by establishing a fifth ''Comprehensive Instructional Reform'' option that would emphasize curriculum, new instructional approaches, and supports that promise success. However, another commenter emphasized that ''comprehensive instructional reform'' should not be a single model, as this could create barriers to differentiated instruction.

Discussion: The transformation model provides flexibility for LEAs to implement comprehensive instructional reform without significant staff changes. In addition, the final notice no longer limits the application of this model to situations where the other three intervention models—turnaround, restart, and school closure—are not possible. We also note that the transformation model described in Appendix C requires ongoing, high-quality, job-embedded professional development in areas such as subject-specific pedagogy, instruction that reflects a deeper understanding of the community served by the school, and differentiated instruction.

Changes: None.

Increased Learning Time

Comment: Several commenters supported the inclusion of extended learning time in the turnaround and transformation models, while others recommended that all school intervention models include the provision of extended learning time. A number of other commenters requested that the Department define the term ''extended learning time'' to include before- and after-school programs as well as summer learning programs, while one other commenter requested that the Department define the term but did not advocate for a particular definition. Several of these commenters recommended using the term ''expanded learning time'' instead of ''extended learning time.'' A few other commenters urged the Department to promote additional compensation for teachers who teach during extended school hours, while several others advocated for extended learning time strategies that involve outside community partners. One of these commenters warned that extended learning time should not be ''more of the same.'' Instead, according to this

comment, State Race to the Top plans should describe how States and LEAs will ensure that expanded learning time is used to introduce students to new, more effective methods of instruction. This commenter also recommended that the Department give preference to proposals that increase learning time by 30 to 50 percent, consistent with the amount added by the highest-performing charter schools.

Discussion: The Department agrees that increased learning time (as defined in this notice) can drive significant increases in student achievement. Though we know that community-based organizations can play a key role in providing these services in some places, we decline to give preference to such efforts in this competition. States and participating LEAs may choose to engage community-based organizations in efforts to increase learning time as described in the State's plan. We appreciate the commenter's suggestion to give preference to proposals that increase learning time by 30 to 50 percent, but decline to unnecessarily limit SEA and LEA flexibility by specifying the exact threshold that such efforts must meet to be considered as having increased learning time (as defined in this notice). To avoid confusion with other initiatives, we have replaced extended learning time with *increased learning time* and defined the term to mean using a longer school day, week, or year. Lastly, we chose not to require that States provide additional compensation for teachers in extending the school day; we expect that States will establish appropriate policies as part of the development of their State plans in consultation with key stakeholders.

Changes: We have replaced the term ''extended learning time'' with ''increased learning time'' and defined *increased learning time* to mean using a longer school day, week, or year schedule to significantly increase the total number of school hours to include additional time for (a) instruction in core academic subjects, including English; reading or language arts; mathematics; science; foreign languages; civics and government, economics; arts; history; and geography; (b) instruction in other subjects and enrichment activities that contribute to a well-rounded education, including, for example, physical education, service learning, and experiential and work-based learning opportunities that are provided by partnering, as appropriate, with other organizations; and (c) teachers to collaborate, plan, and engage in professional development within and across grades and subjects.

School and Community Partnerships

Comment: One commenter recommended requiring school and community partnerships under all four school intervention options, in particular to help transform schools into centers of their communities and to support expanded learning time, and to provide comprehensive learning supports, more time for enrichment activities, and ongoing mechanisms for family engagement and community support.

Discussion: The transformation model adopted from the School Improvement Grants program and described in Appendix C of this notice includes as a major strategy for increasing learning time and creating community-oriented schools, as well as a specific requirement to provide ''ongoing mechanisms for family and community engagement.'' In addition, the turnaround model, which also is described in detail in Appendix C, requires ''schedules and strategies that provide increased learning time'' and ''community-oriented services and supports for students,'' while also permitting the adoption of family- and community-based strategies identified in the transformation model. However, the Department declines to add this requirement to the other school intervention models, which are focused in large part on governance changes that emphasize autonomy and flexibility for a school to pursue its own priorities and activities.

Changes: None.

Dropout Re-Engagement and Recovery

Comment: Several commenters advocated the inclusion of programs for re-enrolling or re-engaging high school dropouts to the school intervention models in criterion (E)(2) (proposed (D)(3)), such as ''data-driven dropout re-engagement'' and the addition of dropout recovery models as an element of the transformation model. Another commenter called for multiple pathways—including school-work partnerships, diploma-plus programs, and dual enrollment programs—and credit based on student performance rather than instructional time as successful models for educating struggling students as well as dropouts. Three other commenters advocated credit recovery programs, and one commenter recommended the inclusion of small schools that draw on the best practices from research on re-enrolling high school dropouts.

Discussion: The Department agrees that school intervention models should include an emphasis on keeping struggling students in school and re-engaging youth who have dropped out of high school. For example, the transformation model adopted from the School Improvement Grants program provides that LEAs may implement the following activities aimed at increasing graduation rates: Credit-recovery programs, re-engagement strategies, smaller learning communities, competency-based instruction and performance-based assessments, and acceleration of basic reading and math skills. In addition, the transformation model also provides that LEAs may implement other comprehensive instructional reform strategies, such as improving the transition from middle to high school through summer transition programs or freshman academies, and increasing rigor by offering opportunities to enroll in advanced coursework, early-college high schools, dual-enrollment programs, or thematic learning academies that prepare students for college and careers, including supports to help low-achieving students take advantage of these programs.

Changes: We have adopted a transformation model from the School Improvement Grants program that includes, as permissible activities under the comprehensive instructional reform strategies component, (1) increasing rigor by offering opportunities for students to enroll in advanced coursework (such as Advanced Placement or International Baccalaureate programs; or science, technology, engineering, and mathematics courses, especially those that incorporate rigorous and relevant project-, inquiry-, or design-based contextual learning opportunities), early-college high schools, dual enrollment programs, or thematic learning academies that prepare students for college and careers, including by providing appropriate supports designed to ensure that low-achieving students can take advantage of these programs and coursework; (2) improving student transition from middle to high school through summer transition programs or freshman academies; and (3) increasing graduation rates through, for example, credit-recovery programs, re-engagement strategies, smaller learning communities, competency-based instruction and performance-based assessments, and acceleration of basic reading and mathematics skills.

Additions to Performance Measures

Comment: Several commenters proposed additions to the performance measures for criterion (E)(2). Three

commenters recommended the inclusion of indicators of the effectiveness of school intervention models, not just the number of schools adopting each strategy, and one commenter suggested collecting student proficiency data for schools implementing one of the intervention models. Another commenter recommended the addition of indicators of school climate, such as the number of suspensions and ratings of school safety. One commenter recommended adding the increase in the number of alternative schools for re-engaging students who have dropped out or the increase in the number of students served by such schools. One commenter also recommended changing the performance measure for criterion (E)(2) to focus on the percentage of the lowest-performing schools, rather than the number of such schools, in which the first three school intervention options will be implemented. Finally, one commenter recommended that the performance measures include assurances of a whole-school goal-setting process and the guaranteed use of interim or formative assessments.

Discussion: The Department agrees that there is a wide range of potentially useful performance data that could be collected about State and local efforts to turn around their persistently lowest-achieving schools, and we will be collecting such data through other grants and data collections. In addition, we note that, under the ESEA, States are already required to publicly report student proficiency data by school. The primary purpose of the proposed performance measure for criterion (E)(2) is for States to set goals for themselves. At the time it applies for a Race to the Top grant, a State may not have determined the specific schools in which its LEAs will intervene; therefore, the most appropriate goal for a State to set is the number of schools in which it will support interventions each year.

Changes: None.

Attention to Student Subgroups

Comment: A few commenters recommended that the final notice require all four school intervention models to include plans for meeting the educational needs of students with disabilities, English language learners, and other subgroups.

Discussion: The Department has addressed this issue through criterion (A)(1)(iii), which will measure the extent to which a State's Race to the Top plan will translate into broad statewide impact, allowing the State to reach its ambitious yet achievable goals, overall and by student subgroup, for increasing student achievement in (at a minimum) reading/language arts and mathematics, as reported by the NAEP and the assessments required under the ESEA, decreasing achievement gaps between subgroups, increasing high school graduation rates (as defined in this notice), and increasing college enrollment and credit attainment. States will not be able to reach these goals unless their State and local plans address the needs of the student subgroups cited by the commenters. Consequently, there is no need to include new requirements regarding student subgroups in the school intervention models described in detail in Appendix C to this notice.

Changes: None.

Comments and Responses on the SIG NPR

As noted earlier, the following discussion summarizes the comments we received, and our responses, on the ''Tier I'' and ''Tier II'' schools proposed in the SIG NPR that are now included in the definition of *persistently lowest-achieving schools.* The discussion also summarizes the comments and our responses on the four school intervention models proposed in the SIG NPR.

Definition of Persistently Lowest-Achieving Schools

Comment: A number of commenters recommended alternatives to the process proposed in the SIG NPR for determining the lowest-achieving five percent of all Title I schools in improvement, corrective action, or restructuring in the State—that is, ''Tier I'' schools. As proposed in the SIG NPR, a Tier I school is a school in the lowest-achieving five percent of all Title I schools in improvement, corrective action, or restructuring in the State, or one of the five lowest-achieving Title I schools in improvement, corrective action, or restructuring in the State, whichever number of schools is greater. Under the SIG NPR, to determine this ''bottom five percent,'' a State would have had to consider both the absolute performance of a school on the State's assessments in reading/language arts and mathematics and whether its gains on those assessments for the ''all students'' group over a number of years were less than the average gains of schools in the State for the ''all students'' group.

Several commenters said this proposed process was too prescriptive and recommended that States have more flexibility in determining the lowest-achieving five percent. The commenters specifically suggested permitting States to restrict Tier I schools to schools in restructuring if this group constitutes more than five percent of a State's identified schools; to apply a State's growth model; or to consider such other factors as measures of individual student growth, writing samples, grades, and portfolios. One commenter suggested that the Department determine the lowest-achieving five percent of schools in the Nation rather than have each State determine its own lowest-achieving five percent. Other commenters recommended changes that include taking into account the length of time a school has been designated for restructuring, measuring gains related to English language proficiency, and including newly designated Title I schools (especially secondary schools) that do not yet have an improvement status.

Several commenters also suggested changing the method for determining ''lack of progress,'' including using subgroups rather than the ''all students'' group, measuring progress in meeting adequate yearly progress targets, and narrowing achievement gaps. Another commenter recommended clarifying that, even if a school shows gains greater than the State average, it should not be considered to be making progress if those gains are not greater than zero.

Finally, several commenters suggested that graduation rates be taken into account in determining the lowest-achieving Title I high schools. One of these commenters suggested including in Tier I all Title I high schools in improvement, corrective action, or restructuring with a graduation rate below 60 percent as well as their feeder middle and junior high schools.

Discussion: In developing our proposed definition of the lowest-achieving five percent of schools for each State as defined in the SIG NPR, we considered several alternatives, including the use of the existing ESEA improvement categories and the possibility of using a measure that would identify the lowest-achieving five percent of schools in the Nation rather than on a State-by-State basis. The goal was to identify a uniform measure that could be applied easily by all States using existing assessment data. We started with Title I schools in improvement, corrective action, or restructuring as the initial universe from which to select the lowest-achieving schools because those are the schools eligible to receive SIG funds. ESEA improvement categories were deemed too dependent on variations in individual subgroup performance, rather than the overall performance of an entire school, to reliably identify our

worst schools. A nationwide measure, although appealing from the perspective of national education policy, would likely have identified many schools in a handful of States and few or none in the majority of States, making it an inappropriate guide for the most effective use of State formula grant funds.

In general, we believe that the changes and alternatives suggested by commenters would add complexity to the method for determining the lowest-achieving five percent of schools without meaningfully improving the outcome. With the changes noted subsequently, we believe the definition proposed in the SIG NPR is straightforward, can be easily applied using data available in all States, and can produce easily understood results in the form of a list of State's lowest-achieving schools that have not improved in a number of years.

Regarding the determination of whether a school is making progress in improving its scores on State assessments, the commenters highlighted the complexity and potential unreliability of measuring year-to-year gains on such assessments. In response, we are simplifying this aspect of the definition to give SEAs greater flexibility in determining a school's lack of progress on State assessments over a number of years.

We also agree that it is important to include Title I high schools in improvement, corrective action, or restructuring that have low graduation rates in the definition. The Secretary has made addressing our Nation's unacceptably high drop-out rates—an estimated 1 million students leave school annually, many never to return—a national priority. In recognition of this priority, and in response to recommendations from commenters, we are including in the definition any Title I high school in improvement, corrective action, or restructuring that has had a graduation rate that is less than 60 percent over a number of years.

Accordingly, we have made these changes and incorporated the process for determining the lowest-achieving five percent of Title I schools in improvement, corrective action, or restructuring—also known as Tier I schools for purposes of SIG funds—into a new definition of *persistently lowest-achieving schools* in this notice.

Changes: The Department has added a definition of *persistently lowest-achieving schools* to this notice that incorporates the process described in the SIG NPR for determining the lowest-achieving five percent of Title I schools in improvement, corrective action, or restructuring (or the lowest-achieving five such schools, whichever number of schools is greater) (''Tier I'' schools for purposes of SIG). This new definition also includes any Title I high school in improvement, corrective action, or restructuring that has had a graduation rate of less than 60 percent over a number of years (as will the ''Tier I'' definition for SIG purposes). We have removed language in proposed section I.A.1.a(ii) of the SIG NPR defining ''a school that has not made progress.''

Comment: Numerous commenters expressed support for including chronically low-achieving secondary schools that are eligible for, but not receiving Title I funds as Tier II schools, as proposed in section I.A.1.b in the SIG NPR, including one commenter who suggested that LEAs be required to fund Tier II schools. Other commenters, however, opposed the use of Title I funds in non-Title I schools and recommended that other funding be identified to serve those schools or stated that the inclusion of those schools is more appropriately addressed in the Title I reauthorization. One commenter suggested that it would not be appropriate to provide Title I funds to such schools when the SIG NPR would restrict the number of Title I schools that can be served in Tier I.

Discussion: We believe that low-achieving secondary schools often present unique resource, logistical, and pedagogical challenges that require rigorous interventions to address. Yet, many such schools that are eligible to receive Title I funds are not served because of competing needs for Title I funds within an LEA. The large amounts of ARRA funds—available through Stabilization, Race to the Top, and SIG—present an opportunity to address the needs of these low-achieving secondary schools. Accordingly, we have continued in this notice to include secondary schools that are eligible for, but do not receive, Title I funds in the definition of the persistently lowest-achieving schools in a State.

As proposed in the SIG NPR, such secondary schools would have been eligible if they were equally as low-achieving as a Tier I school. We realized that this standard was too vague, particularly in light of the rigorous interventions that would be required if an SEA identified, and an LEA decided to serve, such a school. As a result, we have changed the definition to include secondary schools that are eligible for, but do not receive, Title I funds and that are among the lowest-achieving five percent of such schools in a State (or the lowest five such schools, whichever number of schools is greater). An SEA must identify these schools using the same criteria as it uses to identify the lowest-achieving Title I schools in improvement, corrective action, and restructuring.

For the reasons noted earlier in this notice, we have also included in the definition any high school that is eligible for, but does not receive, Title I funds and that has had a graduation rate that is less than 60 percent over a number of years.

Changes: The Department has added a definition of *persistently lowest-achieving schools* to this notice that incorporates the lowest-achieving five percent of secondary schools in a State that are eligible for, but do not receive, Title I funds (or the lowest-achieving five such schools, whichever number of schools is greater) (''Tier II'' schools for purposes of SIG). This new definition also includes any high school that is eligible for, but does not receive, Title I funds that has had a graduation rate of less than 60 percent over a number of years (as will the ''Tier II'' definition for SIG purposes). We have removed language in proposed section I.A.1.b of the SIG NPR that required a comparison of the achievement of secondary schools to Tier I schools.

General Comments on the Four Intervention Models

Comment: One commenter supported the Secretary's intent in proposing the four interventions in the SIG NPR. The commenter noted that the majority of SIG funds are intended to target the very lowest-achieving schools in the Nation—schools that have not just missed their accountability targets by narrow margins or in a single subgroup. Rather, they are schools that have ''profoundly fail[ed]'' their students ''for some time.'' Accordingly, the commenter acknowledged that the four interventions are appropriately designed to engage these schools in bold, dramatic changes or else to close their doors.

Conversely, several commenters suggested that the four interventions are too prescriptive and do not leave room for State innovation and discretion to fashion similarly rigorous interventions that may be more workable in a particular State. The commenters noted that for some school districts, particularly the most rural districts, none of the interventions may be feasible solutions. In addition, several commenters rejected the idea that there should be any Federal requirements governing struggling schools. The commenters suggested that schools in need of improvement be permitted to engage in self-improvement strategies

tailored to each individual school's needs as determined at the local level based on local data, rather than being mandated to adopt specific models by the Federal Government.

Discussion: We disagree that the four models limit State innovation. Each model provides flexibility and permits LEAs to develop approaches that are tailored to the needs of their schools within the broad context created by each model's requirements. We do not believe that any one model is appropriate for all schools; rather, it is the Department's intention that LEAs select the model that is appropriate for each particular school.

Changes: None.

Comment: Several commenters suggested adding a fifth intervention option. One commenter, for example, suggested permitting States to propose an alternative, but rigorous, intervention model for approval through a peer review process. The commenter noted that whatever accountability measure is adopted in the SIG notice of final requirements should serve to ensure that the model is held accountable for results. Another commenter suggested a ''scale up'' model, in which an LEA could use SIG funds to expand interventions with documented success in producing rapid improvement in student achievement within that LEA or in another LEA with similar demographics and challenges. Yet another commenter suggested adding a ''supported transformation'' model to accommodate, in particular, the needs of children in low-achieving schools in small, rural communities that lack the capacity to transform their schools. The commenter identified the need for an SEA to build the capacity of struggling LEAs by working to develop models for intervention, to identify specific evidence-based intervention strategies, and to provide ongoing, intensive technical, pedagogical, and practical assistance so as to increase LEAs' capacity to assist their low-achieving schools.

Discussion: We included the four school intervention models in the SIG NPR after an extensive examination of available research and literature on school turnaround strategies and after outreach to practitioners. Our goal, which we believe was achieved, was to identify fundamental, disruptive changes that LEAs could make in order to finally break the long cycle of educational failure—including the failure of previous reforms—in the Nation's persistently lowest-achieving schools. We also believe that these models, despite their limited number, potentially encompass a wide range of specific reform approaches, thus negating the need for a ''fifth model.'' We understand, for example, that school closure may not work in some LEAs, but that leaves the turnaround, restart, or transformation models as possible options for them. We also know that not all States have a charter school law, limiting the restart options available to LEAs in such States. However, even where charter schools are not an option, an LEA could work with an Education Management Organization (EMO) to restart a failed school or could pursue one of the other three intervention models. And we understand that some rural areas may face unique challenges in turning around low-achieving schools, but note that the significant amount of funding available to implement the four models will help to overcome the many resource limitations that previously have hindered successful rural school reform in many areas.

The four school intervention models described in the SIG NPR also are internally flexible, permitting LEAs to develop their own approaches in the broad context created by the models' requirements. For example, the turnaround and restart models focus on governance and leadership changes, leaving substantial flexibility and autonomy for new leadership teams to develop and implement their own comprehensive improvement plans. Even the transformation model includes a wide variety of permissible activities from which LEAs may choose to supplement required elements, which are primarily focused on creating the conditions to support effective school turnarounds rather than the specific methods and activities targeting the academic needs of the students in the school.

We also note that over the course of the past eight years, States and LEAs have had considerable time, and have been able to tap new resources, to identify and implement effective school turnaround strategies. Yet they have demonstrated little success in doing so, particularly in the Nation's persistently lowest-achieving schools, including an estimated 2,000 ''dropout factories.'' Under the ESEA, States have been required to set up statewide systems of support for LEA and school improvement; to identify low-achieving schools for a range of improvement, corrective action, and restructuring activities; and to use the school improvement reservation under section 1003(a) of the ESEA to fund such improvement activities. However, the overall number of schools identified for improvement, corrective action, and restructuring continues to grow; in particular, the number of chronically low-achieving Title I schools identified for restructuring has roughly tripled over the past three years to more than 5,000 schools. SEAs have thus far helped no more than a handful of these schools to successfully restructure and exit improvement status, in large part, we believe, because of an unwillingness to undertake the kind of radical, fundamental reforms necessary to improve the persistently lowest-achieving schools.

Finally, although we believe this recent history of failed school improvement efforts justifies using ARRA SIG funds to leverage the adoption of the more far-reaching reforms required by the four school intervention models, we note that Part A of Title I of the ESEA continues to make available nearly $15 billion annually, as well as an additional $10 billion in fiscal year 2009 through the ARRA, that SEAs and LEAs may use to develop and implement virtually any reform strategy that they believe will significantly improve student achievement and other important educational outcomes in Title I schools. In particular, we would applaud State and local efforts to use existing Title I funds to scale up successful interventions or to build State and local capacity to develop and implement other promising school intervention models. For all of these reasons, we decline to add a fifth school intervention model to this notice.

Changes: None.

Turnaround Model

Principal and Staff Replacement

Comment: Many commenters opposed replacing principals and staff as part of the turnaround model. Although several commenters acknowledged that poor leadership and ineffective staff contribute to a school's low performance, a majority claimed that staff replacement has not been established as an effective reform strategy, others stated that such a strategy is not a realistic option in many communities that already face teacher and principal shortages, and one commenter suggested that replacement requirements associated with turnaround plans would discourage teachers and principals from working in struggling schools.

In addition, many commenters opposed sanctioning principals and staff, partly because, as one commenter claimed, the turnaround model assumes that most problems in a school are attributable to these individuals. One

stated that principals face ''trying'' circumstances and another stated that the proposed requirements ignore the ''vital role'' that principals play in high-need schools. These commenters stated that other factors—such as poverty, lack of proper support, and tenure and collective bargaining laws—should be addressed before decisions are made to replace principals and staff. One commenter claimed that principals and teachers in low-achieving schools could perform their jobs if they are given adequate training and support and working conditions are improved. Another opposed the replacement requirement because the commenter believed a stable and consistent staff is a key factor in school improvement.

Discussion: We understand that replacing leadership and staff is one of the most difficult aspects of the four models; however, we also know that many of our lowest-achieving schools have failed to improve despite the repeated use of many of the strategies suggested by the commenters. The emphasis of the ARRA on turning around struggling schools also reflects, in part, an acknowledgement by the Congress that past efforts have had limited or no success in breaking the cycle of chronic educational failure in the Nation's persistently lowest-achieving schools.

Accordingly, the Department believes that dramatic and wholesale changes in leadership, staffing, and governance—such as those required by the turnaround model—are an appropriate intervention option for creating an entirely new school culture that breaks a system of institutionalized failure. Although we acknowledge the possibility that the turnaround model could discourage some principals and teachers from working in the lowest-achieving schools, others will likely be attracted by the opportunity to participate in a school turnaround with other committed staff. In addition, other Federal programs, such as the Teacher Incentive Fund and Race to the Top programs, are helping to create incentives and provide resources that can be used to attract and reward effective teachers and principals and improve strategies for recruitment, retention, and professional development.

Changes: None.

Comment: A number of commenters recommended changes to the principal and staff replacement requirements. One commenter proposed a detailed ''fifth model'' that focused upon providing additional support to teachers by improving working conditions, such as reducing class size and providing professional development opportunities. Others recommended (1) providing a principal with the autonomy to make his or her own firing and hiring decisions instead of requiring the replacement of 50 percent of the staff; (2) allowing staff to reapply for their positions; (3) retaining principals who were recently hired; (4) providing principals with a ''window'' of opportunity to improve their schools before being replaced; (5) suggesting that the replacement requirement extend to superintendents and boards of education; (6) retaining at least 50 percent of current staff who reapply and meet all of the requirements of the redesigned school; and (7) focusing on staff qualifications and putting in place effective staff rather than on a particular target level of replacements.

Discussion: We agree with some of the changes to the turnaround model suggested by commenters. For example, new language in paragraph (a)(1)(i) of the turnaround model recognizes the vital role played by the principal and acknowledges that new principals need authority to make key changes required to turn around a failing school. Under this new language, the new principal of a turnaround school would have ''sufficient operational flexibility (including in staffing, calendars/time, and budgeting) to implement fully a comprehensive approach to substantially improve student achievement outcomes and increase high school graduation rates.''

We also recognize that the staff selected for a turnaround school must have the skill and expertise to be effective in this context. We are adding language clarifying that all personnel must be screened and selected based on locally adopted competencies to measure their effectiveness in a turnaround environment.

In addition, while the SIG NPR would have required an LEA to replace at least 50 percent of the staff of a turnaround school, new paragraph (a)(1)(ii)(A) of the turnaround model requires an LEA, after screening all staff using locally adopted competencies, to rehire no more than 50 percent of the school's staff. Further, some commenters appear to have overlooked proposed section I.B.1 in the SIG NPR, which would give LEAs flexibility to continue implementing interventions begun within the last two years that meet, in whole or in part, the requirements of the turnaround, restart, or transformation models and, thus, would in many cases allow an LEA to retain a recently hired principal in a turnaround school. We are retaining this flexibility provision in this notice.

Finally, the turnaround model includes significant provisions aimed at supporting teachers. For example, the SIG NPR called for ''ongoing, high-quality, job-embedded professional development to staff,'' as well as increased time for collaboration and professional development for staff. These supports for teachers and other staff are retained in this final notice.

Changes: We have modified the provisions in the turnaround model in paragraph (a)(1)(i) to give the new principal of a turnaround school ''sufficient operational flexibility (including in staffing, calendars/time, and budgeting) to implement fully a comprehensive approach in order to substantially improve student achievement outcomes and increase high school graduation rates.'' As described earlier, we have also revised paragraph (a)(1)(ii) to require that an LEA use locally adopted competencies to measure the effectiveness of staff who can work within the turnaround environment to meet the needs of students. In addition, instead of the requirement that an LEA replace ''at least 50 percent of the staff'' in a turnaround school, paragraph (a)(1)(ii)(A) of the definition requires an LEA to screen and rehire ''no more than 50 percent'' of the existing staff.

Comment: Numerous commenters expressed concerns that a national shortage of principals and teachers would prevent successful implementation of the turnaround model. Two commenters stated that, in order to replace half of the staff as required by the turnaround model, an LEA would likely be forced to hire less experienced teachers and rely on emergency credentials or licensure to fully staff a turnaround school. One commenter claimed that research shows that large pools of available applicants are essential for successful replacement of principals and teachers. Another commenter stated that there is a ''national shortage of transformational leaders'' who can lead turnaround schools. Further, many commenters claimed that replacing half of a school's staff would be difficult or even impossible in rural schools and small communities. One commenter asserted that the shortage of teachers in rural areas would disqualify these LEAs from applying for school improvement funds. Another stated that even with recruitment incentives it would be difficult to fill staff vacancies. One commenter urged the Secretary to take such shortages into account before requiring ''blanket firings'' of teachers. In addition, several commenters observed that chronically low-

performing schools already suffer from a number of vacancies due to high staff turnover rates. In fact, one commenter believed replacing 50 percent of the staff was not a ''tough'' consequence because these schools already experience high turnover.

These concerns led several commenters to recommend flexibility regarding the staff replacement requirement of the turnaround model, including the opportunity to request a waiver if an LEA could demonstrate an inability to fill vacancies, and a required evaluation before principals and staff can be replaced. Other commenters opposed the replacement of principals without consideration of such factors as years of experience and district-level support, recommended a three-year window in which to make replacement decisions based upon multiple measures, and suggested the provision of high-quality professional development before replacing any staff.

Discussion: We recognize that the replacement requirement will present challenges for LEAs, particularly in rural areas, where highly effective principals and teachers capable of leading educational transformation may be in short supply; however, the difficulty of identifying new qualified teachers and school leaders for a turnaround school must be measured against the enormous human and economic cost of accepting the status quo for the Nation's persistently lowest-achieving schools. We simply cannot afford to continue graduating hundreds of thousands of students annually who are unprepared for either further education or the workforce, or to permit roughly one million students to drop out of high school each year, many of them never to return to school. Instead, States and LEAs must work together to recruit, place, and retain the effective principals and staff needed to implement the turnaround model. The Department is supporting these efforts through Federal grant programs that can provide resources for improving strategies used to recruit effective principals and teachers, such as the Teacher Incentive Fund program, which helps increase the number of effective teachers teaching poor, minority, and disadvantaged students in hard-to-staff subjects and schools.

Finally, we wish to clarify that the requirements for the turnaround model do not require ''blanket firings'' of staff. The Department agrees that staff should be carefully evaluated before any replacement decisions are made and has added new language requiring LEAs to use ''locally adopted competencies to measure the effectiveness of staff who can work within the turnaround environment to meet the needs of students.'' If required by State laws or union contracts, principals and staff may have to be reassigned to other schools as necessary.

Changes: As described earlier, we have revised paragraph (a)(1)(ii) to require that an LEA use locally adopted competencies to measure the effectiveness of staff who can work within the turnaround environment to meet the needs of students. The LEA must then screen all existing staff before rehiring no more than 50 percent of them.

Comment: Numerous commenters claimed that there is little research supporting the replacement of leadership and staff in school turnaround efforts. One commenter cited a 2008 Institute of Education Sciences (IES) report, ''Turning Around Chronically Low-Performing Schools,'' that, according to the commenter, recommends that decisions to remove staff should be made on an individual basis. Several others also asserted that the proposed requirement to replace at least 50 percent of staff was arbitrary, with two commenters recommending instead that the Department ''empower the turnaround principal with the autonomy to hire, based on merit, for every position in the school.''

Discussion: We are not claiming that merely replacing a principal and 50 percent of a school's staff is sufficient to turn around a low-achieving school. Although principal and staff replacement are key features of the turnaround model proposed in the SIG NPR, they are not the only features. The strength of the turnaround model lies in its comprehensive combination of significant staffing and governance changes, an improved instructional program, ongoing high-quality professional development, the use of data to drive continuous improvement, increased time for learning and for staff collaboration, and appropriate supports for students. The staffing and governance changes are intended primarily to create the conditions within a school, including school climate and culture, that will permit effective implementation of the other elements of the turnaround model. Dramatic changes in leadership, staff, and governance structure help lay the groundwork to create the conditions for autonomy and flexibility that are associated with successful turnaround efforts. Accordingly, we decline to remove the requirement for replacing staff in a turnaround model.

Changes: None.

Comment: Many commenters claimed that teacher tenure, State collective bargaining laws, and union contracts prevent school administrators from replacing staff as required by the turnaround model. Several commenters stated that union contracts would force school administrators to reassign dismissed teaching staff to other schools, and the turnaround model would not solve the problem of removing ineffective teachers from the classroom. One commenter asked if an LEA would have to negotiate staff replacement with the union or if the Federal grant requirements supersede State due process laws. One commenter noted that the Department would have to provide ''involuntary transfer authority'' to LEAs in order for them to implement the turnaround model in collective bargaining States.

Several commenters called for the Department to foster collaboration with teacher unions as well as the larger community. One of these commenters claimed that collaboration ''increases leadership and builds professionalism'' and recommended that evidence of collaboration be documented. Another asserted the involvement of school-based personnel in decision-making is key to the successful implementation of school interventions. Another recommended that an LEA seek ''feedback'' from all stakeholders, including students, parents, and unions, as to whether an intervention is ''feasible or warranted.''

Discussion: We recognize that collective bargaining agreements and union contracts may present barriers to implementation of the turnaround model; however, we do not believe these barriers are insurmountable. In particular, drawing upon pockets of success in cities and States across the country, the Secretary believes LEAs and unions can work together to bring about dramatic, positive changes in our persistently lowest-achieving schools. Accordingly, the Department encourages collaborations and partnerships between LEAs and teacher unions and teacher membership associations to resolve issues created by school intervention models in the context of existing collective bargaining agreements. We also encourage LEAs to collaborate with stakeholders in schools and in the larger community as they implement school interventions.

Changes: None.

Comment: Many commenters stated that the term ''staff'' was not clearly defined. One commenter presumed it excluded maintenance, food services, and other support staff. Another stated that the Department should allow LEAs

to develop their own definition of ''staff,'' and permit LEAs to determine whether non-instructional staff should be included in the replacement calculus. Two commenters also requested greater clarity regarding the meaning of ''new governance.''

Discussion: We believe that, in high-achieving schools facing the most challenging of circumstances, every adult in the school contributes to the school's success, including the principal, teachers, non-certificated staff, custodians, security guards, food service staff, and others working in the school. Conversely, in a persistently lowest-achieving school, we believe that no single group of adults in the school is responsible for a culture of persistent failure. For this reason, our general guidance is that an LEA should define ''staff'' broadly in developing and implementing a turnaround model. The Department declines to define the term ''staff'' in this notice, but plans to issue guidance that will clarify this and other issues related to the turnaround model. As for the term ''governance,'' the language in paragraph (a)(1)(v) suggests a number of possible governance alternatives that may be adopted in the context of a turnaround model. The Department declines to provide a more specific definition in order to permit LEAs the flexibility needed to adopt a turnaround governance structure that meets their local needs and circumstances.

Changes: None.

Comment: Several commenters asked that the Department consider the possible negative consequences of replacing staff on a school and community, with one commenter suggesting that replacing half of the staff could result in more damage ''to a fragile school than no change at all.'' Another commenter stated that maintaining a consistent staff is a key to school success.

Discussion: The Secretary disagrees that implementing a turnaround model would be worse than ''no change at all.'' The schools that would implement a turnaround model have, by definition, persistently failed our children for years, and dramatic and fundamental change is warranted. In addition, as stated elsewhere in this notice, the commenters overlook the fact that the other options—the transformation, school closure, and restart models—do not require replacement of 50 percent of a school's staff. If an LEA believes that it cannot successfully meet the requirements of the turnaround model, we recommend that it consider one of the other three options.

Changes: None.

Comment: Numerous commenters stated that decisions regarding school restructuring are best decided on the local, rather than the Federal, level. One commenter opposed the requirements for the turnaround model as being too prescriptive, and another recommended that the local school board be provided with the discretion to determine how best to implement the turnaround model. One commenter agreed that ''ineffective staff and leadership should be replaced in order for school improvement to work,'' but stated that the turnaround model's ''one-size-fits-all formula may not be the best approach for all schools.'' Two commenters specifically stated that the decision to remove a principal and staff should be determined by a local school board. Similarly, another commenter noted that decisions to replace a principal and staff should be based upon ''local data'' rather than Federal requirements that are not tailored to an individual school's needs. One of these commenters stated that local decision-making is particularly important if a school has been underperforming for a period longer than the ''principal's tenure or if the principal has begun a transformative process that could be harmed by a leadership change.''

Discussion: An LEA is free to exercise local control and use local data and leadership to determine which of the four school intervention models to follow in turning around a persistently lowest-achieving school. However, after nearly a decade of broad State and local discretion in implementing, with little success, the school improvement provisions of the ESEA, the Department believes, for the purpose of this program, it is appropriate and necessary to limit that discretion and require the use of a carefully developed set of school intervention models in the Nation's lowest-achieving schools. In particular, the turnaround and transformation models include a combination of staffing, governance, and structural changes with specific comprehensive instructional reforms that the Department believes hold great promise for effective investment of the $3 billion provided for the SIG program by the ARRA.

Changes: None.

Relationship Between Turnaround and Transformation Models

Comment: Several commenters believed the turnaround model lacked sufficient detail and did not provide adequate direction to LEAs attempting to implement the model. In contrast, several commenters appreciated the level of detail contained in the transformation model and suggested that the turnaround model provide a similar level of detail. Some of these commenters recommended that the turnaround model incorporate some of the specific provisions contained in the transformation model. For example, one commenter suggested that the turnaround model include the transformation model's provisions regarding implementation of instructional changes. Another commenter specifically recommended that the turnaround model incorporate the transformation model's criteria for teacher effectiveness.

Discussion: We agree that the turnaround model in the SIG NPR lacked clarity and potentially created confusion about whether applicants could draw upon permissible activities described in the transformation model. The Department did not intend to limit LEA discretion in adapting elements of the transformation model to the turnaround model. Accordingly, we are adding new language in paragraph (a)(2)(i) to clarify that an LEA implementing the turnaround model may implement any of the required and permissible activities under the transformation model.

Changes: We have clarified in paragraph (a)(2)(i) that an LEA implementing a turnaround model may also implement other strategies such as ''[a]ny of the required and permissible activities under the transformation model.'' In addition, we have made changes in the turnaround model that correspond to changes we made in response to comments on the transformation model. The specific changes are noted subsequently in this notice in our discussion of comments on the transformation model.

Restart Model

Comment: Many commenters opposed the restart model described in the SIG NPR because, they claimed, charter schools generally do not perform better than regular public schools. In particular, these commenters cited recent research from the Center for Research on Education Outcomes (CREDO) at Stanford University showing that fewer than one-fifth of charter schools demonstrated gains in student achievement that exceeded those of traditional public schools. One commenter also mentioned a RAND study highlighting the low performance of charter schools in Texas and a study by researchers at Johns Hopkins University showing that most EMO-operated schools were outperformed by traditional public schools. Most of these commenters proposed broadening or

strengthening the restart option, but one commenter recommended removing it from the list of permitted school intervention models. One commenter claimed that, where charter schools had raised student achievement, in most cases it was attributable to high student attrition rates brought about by demanding school schedules and behavioral rules that did not work for all students. A few commenters noted either that some States do not allow charter schools or that the restart model would be unlikely to work in rural areas. Several commenters also opposed the restart model because it might displace students and disrupt existing efforts to build community schools; another commenter recommended that any planning and reorganization for a restart model take place during the school year, while students remain in the school, so that there would be no disruption in services if the school were closed and then reopened as a restart school.

Discussion: We acknowledge that the available research on the effectiveness of charter schools in raising student achievement is mixed, that some State laws significantly limit the creation or expansion of charter schools, and that smaller communities, particularly in rural areas, may not have sufficient access to providers or teachers to support the creation of charter schools. However, there are many examples of high-quality charter schools, and the Secretary believes very strongly that high-achieving charter schools can be a significant educational resource in communities with chronically low-achieving regular public schools that have failed to improve after years of conventional turnaround efforts. Although they are not a ''silver bullet'' for failing schools or communities, a more balanced view of the results produced by charter schools suggests that they offer promising and proven options for breaking the cycle of educational failure and fully merit inclusion in the restart model.

The Department also recognizes the concerns expressed by commenters about the potential disruption to students, parents, and communities that may be connected with a restart plan that involves closing and then reopening a school. To help address this concern, we are adding language to this notice allowing a school conversion—and not just closing and reopening a school—to qualify as an acceptable restart model.

At the same time, the Department emphasizes that just as the restart model is one of four school intervention models supported by this notice, charter schools are just one option under the restart model. Contracting with an EMO is another restart option that may provide sufficient flexibility in States without charter school laws or in rural areas where few charter schools operate. An EMO also may be able to develop and implement a plan that permits students to stay in their school while undergoing a restart. For example, some EMOs hired to turn around a low-achieving school may begin planning for the turnaround in late winter or early spring, hire and train staff in late spring and early summer, reconfigure and re-equip the school—including the acquisition of curricular materials and technology—during the summer, and then reopen promptly in the fall, resulting in minimal, if any, disruption to students and parents.

Changes: We have changed the language in paragraph (b) to define a restart model as one in which an LEA converts a school or closes and reopens a school under a charter school operator, a charter management organization (CMO), or an EMO that has been selected through a rigorous review process.

Defining Rigorous Review

Comment: Several commenters supported the requirement in the SIG NPR that LEAs select a charter school operator, a CMO, or an EMO through a ''rigorous review process.'' In general, these commenters viewed this requirement as essential to ensuring the quality of a restart model. Commenters also asked for clarification of how such a review would be conducted, including guidance for SEAs and LEAs and opportunities for parent and community involvement in reviewing and selecting a restart school operator. One commenter raised a concern about how it would be possible to review rigorously a new charter school operator, CMO, or EMO.

Discussion: We believe that SEAs and LEAs should have flexibility to develop their own review processes for charter school operators, CMOs, and EMOs, based both on local circumstances and on their experiences in authorizing charter schools. We will provide guidance and technical assistance in this area, but will leave final decisions on review requirements to SEAs and LEAs. We believe flexibility in defining ''rigorous review'' is warranted because of the wide variation in local need and community context as well as in the size, structure, and experience of charter school operators, CMOs, and EMOs.

Changes: None.

Clarifying Restart Operator Definitions

Comment: One commenter recommended that the Department provide a definition of CMO and EMO, while other commenters suggested changes or requested clarification of the definitions of CMO and EMO provided in the SIG NPR. One commenter recommended defining a CMO as an organization that ''operates or manages a school or schools'' rather than, as in the SIG NPR, ''operates charter schools.'' This commenter also urged the Department to define ''whole school operations'' as applied to the definition of EMO. Another commenter recommended that the Department include charter schools operated or managed by an LEA in the definition of CMO. One commenter also urged the Department to establish reporting requirements for CMOs and EMOs, including data on student achievement, the impact of reforms on student achievement, information on how CMOs and EMOs serve students with disabilities, and other accountability data. Finally, two commenters also suggested that the Department award funding directly to CMOs and EMOs to pay for planning, outreach, and training staff for a restart effort.

Discussion: We included definitions of CMO and EMO in the preamble of the SIG NPR and are adding these definitions in the definition of *restart model* for clarification purposes. We agree that the definition of CMO should include organizations that operate or manage charter schools and have made this change to the CMO definition in this notice accordingly. Although a charter school may exist as part of an LEA, it is unlikely that the LEA would be responsible for operating or managing the charter school. Therefore, we have not expressly included LEAs in the definition of CMO. We are retaining the EMO definition from the SIG NPR, and believe the emphasis on ''whole-school operation'' is sufficient to distinguish EMOs from other providers that may help with certain specific aspects of school operation and management, but that do not assume full responsibility for the entire school, as is required by the restart model.

The Department does not believe it is necessary to add new or additional reporting requirements for EMOs and CMOs, as their performance will be captured by the reporting metrics established in the final SIG notice. More specifically, SEAs and LEAs already must report on the intervention model used for each persistently lowest-achieving school, as well as outcome data for those schools, including

outcome data disaggregated by student subgroups. As for providing SIG funding directly to CMOs and EMOs, the SIG program is a State formula grant program, and the Department must allocate funds to States in accordance with the requirements of section 1003(g) of the ESEA. Moreover, the only eligible SIG subgrantees are LEAs.

Changes: We have included the definitions of CMO and EMO in the definition of *restart model.* We have also modified the definition of CMO slightly to reflect the fact that a CMO may either operate or manage charter schools.

Flexibility Under the Restart Model

Comment: Several commenters recommended greater flexibility for LEAs implementing the restart model, including options to create magnet schools or ''themed'' schools. Another commenter, claiming that few charter school operators, CMOs, or EMOs have experience in ''whole school takeover,'' recommended permitting a phase-in approach to charter schools that would allow a charter school operator to start with two or three early grades and gradually ''take over'' an entire school.

Discussion: We believe that considerable flexibility regarding the type of school program offered is inherent in the restart model, which focuses on management and not on academic or curricular requirements. For example, restart operators would be free to create ''themed'' schools, so long as those schools permit enrollment, within the grades they serve, of any former student who wishes to attend. Additionally, LEAs have the flexibility to work with providers to develop the appropriate sequence and timetable for a restart partnership. Whether through ''phase-in'' models or complete conversions, the Department encourages SEAs and LEAs to take into account local context and need in making these decisions.

Changes: None.

Comment: Many commenters asked for clarification regarding various aspects of the restart model, including whether it includes conversion of existing schools, who would have authority over the operator of restart schools (*e.g.,* LEA, SEA, independent governing board, or a State or local authorizer), and whether a group of individuals (*e.g.,* teachers) could manage a restart school.

Discussion: We have changed the definition of restart model to clarify that it includes conversion of an existing school and not just strategies involving closing and reopening a school. In particular, we believe that conversion approaches may permit implementation of a restart model with minimal disruption for students, parents, and communities. In general, an LEA would be responsible for authorizing or contracting with charter school operators, CMOs, or EMOs for implementation of a restart model. The precise form of this contract or agreement would be up to State or local authorities and could include each of the alternatives mentioned by the commenters. However, regardless of the lines of authority, autonomy and freedom to operate independently from the State or LEA are essential elements of the restart model. A group of individuals, including teachers, would be eligible to manage a restart school so long as they met the local requirements of the rigorous review process included in the restart model.

Changes: We have revised the first sentence of the definition of restart model to read as follows: ''A restart model is one in which an LEA converts a school or closes and reopens a school under a charter school operator, a charter management organization (CMO), or an education management organization (EMO) that has been selected through a rigorous review process.''

Comment: Several commenters recommended that the Department include specific elements of the turnaround and transformation models in the restart model, including improved curricula and instruction, student supports, extended learning time, community involvement, and partnering with community-based organizations. Similarly, one commenter noted that a restart model might permit a school to reopen as a charter school while changing little inside the school and urged the Department to require restart schools to use a model of reform that has been proven effective or that includes evidence-based strategies. Another commenter urged the Department to encourage use of the restart model to better serve high-risk students and help dropouts reconnect to school.

Discussion: We note that restart models could include nearly all of the specific reform elements identified under the turnaround and transformation models, but decline to require the use of any particular element or strategy. The restart model is specifically intended to give operators flexibility and freedom to implement their own reform plans and strategies. The required rigorous review process permits an LEA to examine those plans and strategies—and helps prevent an operator from assuming control of a school without a meaningful plan for turning it around—but should not involve mandating or otherwise requiring specific reform activities. However, the review process may require operators to demonstrate that their strategies are informed by research and other evidence of past success.

Changes: None.

Comment: One commenter recommended requiring the review process for CMOs and EMOs to include curriculum and staffing plans for meeting the needs of subgroups of students, including students with disabilities and limited English proficient students. Another commenter suggested that the review process include examining the extent to which a restart operator sought to ensure that restart schools would serve all former students by requiring States to collect data on the number of students from low-income families, students with disabilities, and limited English proficient students served by a restart school compared with the number of those students served by the school it replaced.

Discussion: Restart operators, by definition, have almost complete freedom to develop and implement their own curricula and staffing plans, and the Department declines to place limits in this area in recognition of the core emphasis of the restart model on outcomes rather than inputs. The requirement to enroll any former student who wishes to attend the school will help to ensure that charter school operators, CMOs, and EMOs include serving all existing groups of students in their restart plans. Moreover, the effectiveness of these curricula and staff changes in meeting the needs of subgroups of students, including students with disabilities and limited English proficient students, will be measured by the metrics in the final SIG notice, which will include disaggregated achievement data by student subgroup. We encourage SEAs and LEAs to analyze these data to ensure that subgroups of students are properly included in restart schools and that their needs are addressed.

Changes: None.

Comment: A few commenters expressed concern that charter schools are not subject to the same oversight, regulation, or accountability as are regular public schools. Other commenters emphasized the importance, particularly in the case of charter school conversions, of ensuring autonomy, flexibility, and freedom from district rules and collective bargaining agreements, so that charter schools can

implement their own cultures and practices.

Discussion: The restart model is specifically intended to give providers freedom from the rules and regulations governing regular public schools, in recognition of the fact that, while such rules and regulations may be effective in requiring certain kinds of inputs, such as teacher qualification requirements or a uniform length of the school day or year, they have not been demonstrated to have a significant impact on educational outcomes. Moreover, many successful charter schools have achieved outstanding results by changing these inputs, such as by hiring non-traditional but skilled teachers and by extending the length of the school day. The Department believes that the outcome metrics established in the final SIG notice will ensure accountability for the performance of restart schools.

Changes: None.

Comment: One commenter expressed concern that LEAs could use the restart model to close an existing charter school that, while successful in raising student achievement, remained in school improvement status under section 1116 of the ESEA.

Discussion: An existing charter school that is raising student achievement would be unlikely, under the requirements for identifying a State's persistently lowest-achieving schools, to be identified for school intervention, because those requirements include not only low levels of achievement, but also making little or no progress on improving those low levels of achievement in recent years. Moreover, this notice, as did the SIG NPR, provides flexibility for a school, such as a recently converted charter school that meets the requirements of the restart model, to use SIG funds to continue or complete reforms it began within the prior two years. On the other hand, it is possible, and in some cases appropriate, for an LEA to close a charter school that is not serving its students well and implement a new intervention model in the school.

Changes: None.

School Closure

Comment: A number of commenters expressed their general views regarding whether closing schools is an appropriate intervention for raising student achievement. Although no commenter advocated extensive use of this intervention, several acknowledged that school closure is sometimes necessary, particularly for schools with a long history of very low achievement, and noted that some States and LEAs have used this strategy successfully. Other commenters, however, expressed a number of logistical concerns with this intervention. Some noted that closing schools is often not feasible in rural areas in which the distance between schools is too great to make practical enrolling students from a closed school in higher-achieving schools. Others noted that many LEAs do not have multiple schools at the same grade level in which to enroll students from a closed school. Still others noted capacity issues that would prevent schools from accommodating additional students or the lack of high-achieving schools in which to enroll students from a closed school. One commenter noted that this intervention would not be feasible on a large scale in large, urban LEAs with limited resources and substantial numbers of low-achieving students. Another commenter recommended that this intervention be limited to those LEAs with the capacity to enroll affected students in other, higher-achieving schools.

Discussion: School closure is just one of four school intervention models from which an LEA may choose to turn around or close its persistently lowest-achieving schools, and the Department recognizes that it may not be appropriate or workable in all circumstances. To clarify this, we have revised the definition of *school closure* in this notice to clarify that this option is viable when there are re-enrollment options in higher-achieving schools in the LEA that are within reasonable proximity to the closed school that can accommodate the students from the closed school. To make this option more viable, we have changed ''high-achieving schools'' to ''higher-achieving schools.''

Changes: We have included the following clarifying language in the definition of *school closure:* ''School closure occurs when an LEA closes a school and enrolls the students who attended that school in other schools in the LEA that are higher achieving. These other schools should be within reasonable proximity to the closed school and may include, but are not limited to, charter schools or new schools for which achievement data are not yet available.''

Comment: A number of commenters expressed the opinion that a school should never be closed if that option displaces students and disrupts communities. The commenters noted the importance of having a neighborhood school that serves as the cornerstone of a community. One commenter noted that, when students are moved to a school in a new neighborhood, parents often find it more difficult to feel a sense of belonging at the school or ownership of their child's education. Another commenter noted that school closings often anger parents, exacerbate overcrowding, increase safety and security concerns in neighboring schools, and place students who need specific supports in schools that may not be able to provide those supports. One commenter expressed concern that closing a school may not address the educational needs of specific students, which may be masked within a higher-achieving school. Another commenter suggested the need for an ''educational impact statement'' before a school is closed, and one suggested that an LEA have a detailed plan demonstrating how support would be provided to students and their families transitioning to different schools. Several commenters suggested that the final requirements provide for parent and community input before a school is closed.

Discussion: The Department recognizes and understands that school closures, by definition, displace students and disrupt communities and are among the most difficult decisions faced by local authorities. However, each of the four school intervention models is predicated on the potentially positive impact of ''disruptive change'' on student educational opportunities, achievement, and other related outcomes. Schools targeted for closure under this notice will likely have served their communities poorly for many years, if not decades, as measured by such factors as student achievement, graduation rates, and college enrollment rates. Moreover, such schools also will likely have proven impervious to positive change despite years of identification for improvement, corrective action, or restructuring under the ESEA as well as other previous reform efforts. The Department believes that, when such schools prove unwilling or unable to change, closure must be considered. Many communities have experience in closing, consolidating, or otherwise changing the structure of their existing schools and have their own processes and procedures for obtaining public input and approval for such changes, including assessment of the impact on students, families, neighborhoods, other schools, and transportation requirements, as well as for developing plans to facilitate smooth transitions for everyone involved. Although the Department encourages LEAs and SEAs to involve students, parents, educators, the community, and other stakeholders

in the process, we decline to add any additional requirements in this area of appropriate local discretion.

To address the disruptiveness school closure may cause to a community, we have modified the definition of *school closure*, as noted in response to the prior comment, to clarify that closure should entail re-enrolling students from the closed school in other schools in the LEA that are within reasonable proximity to the closed school. Finally, we note that school closure is just one of the four school intervention models available under the terms of this notice. LEAs and communities that wish to preserve a neighborhood school may do so by implementing a turnaround, restart, or transformation model.

Changes: None.

Comment: Several commenters recommended that a school not be closed unless an LEA opens a new school in its place. One commenter specifically suggested closing a school in phases and reopening it as a new school. Under this concept, an LEA would permit both students and staff who choose to do so to remain in the school but the school would enroll no new students. At the same time, according to the commenter, other schools would be better prepared to absorb students who wish to transfer, logistical and facility issues would be minimized, and the new school would have adequate time to recruit and train high-quality staff and develop its instructional program.

Discussion: The Department has revised the language in the definition of *school closure* to recognize the need to have available options for accommodating the educational needs of the students in a closed school, but does not believe it is necessary to require an LEA to open a new school in place of the closed school. Many LEAs participating in the SIG program have under-utilized or under-enrolled schools that may readily accommodate students from a closed school; requiring such LEAs to open new schools simply does not make sense. However, an LEA that chooses to reopen a new school would be free to do so, either on its own or as part of a turnaround or restart model.

Changes: None.

Comment: One commenter suggested that the Department provide incentives for the development of successful charter schools in the areas in which schools are closed. Specifically, the commenter recommended that the Department require that an LEA that partners with a CMO in order to serve the area in which the LEA is closing schools receive a priority for SIG funds.

Discussion: SIG funds are intended to provide support to LEAs for school improvement efforts targeted primarily at the persistently lowest-achieving schools in a State, and not at providing incentives for the creation of new schools, charter or otherwise, that serve the same general attendance area. However, the restart model (as defined in this notice) may be used by LEAs in situations where the goal is to replace a persistently lowest-achieving school with a charter school.

Changes: None.

Comment: One commenter suggested that, in highlighting which schools may be available to enroll students from a closed school, the Department specifically mention magnet schools along with charter schools.

Discussion: Decisions about the schools to which students from closed schools may transfer are best left to the LEAs selecting the school closure option. The language in the definition of *school closure*, as in the SIG NPR, specifically mentions charter schools only because not all available charter schools might be operated by the LEA that is closing a neighborhood public school and, thus, might not be initially included in an LEA's plan for transferring students from the closed school. This is not a concern for magnet schools and, thus, the Department declines to make the requested change.

Changes: None.

Comment: One commenter recommended that the Department require that, before an LEA may enroll students from a closed school in another school, the LEA require a prospective receiving school, including a charter school, to demonstrate a record of effectiveness in educating its existing students and the capacity to integrate and educate new students from closed schools. The commenter emphasized the importance of this latter point, noting that merely because a school is high-achieving does not mean that it is equipped to help additional students from the lowest-achieving schools succeed while maintaining the quality of its current educational program.

Discussion: The Department believes that the requirement to enroll students from a closed school in a higher-achieving school responds to the concerns of this commenter. The Department believes that such higher-achieving schools are likely in nearly all circumstances, to provide a better education for any new students than was available in the closed school.

Changes: We have added language to the definition of *school closure* clarifying that school closure entails re-enrolling students from the closed school in other schools in the LEA that are higher achieving. We have also added clarifying language that such schools may be new schools for which achievement data are not available.

Comment: Several commenters questioned how SIG funds may be used in closing a school. One commenter noted the importance of gaining community input and that the costs for closing a school may include costs associated with conducting parent and community meetings. Another commenter recommended that allowable costs include academic supports for struggling students who are enrolled in new schools.

Discussion: LEAs may use SIG funds to pay reasonable and necessary costs related to closing a persistently lowest-achieving school, including the costs associated with parent and community outreach. However, SIG funds may not be used to serve students, struggling or otherwise, in the schools to which they transfer, unless those schools are Title I schools. The Department will include additional examples of permissible uses of SIG funds in closing a school in guidance accompanying the application package for SIG funds.

Changes: None.

Transformation Model

General Comments

Comment: Many commenters expressed strong support for the transformation model. One commenter, for example, described it as ''a balanced, comprehensive approach,'' and another described it as ''a supportive and constructive approach.'' Still another commenter stated that it ''provides the greatest hope for promoting genuine school improvement.'' Several commenters noted that the transformation model would be, in reality, the only choice among the four proposed interventions, especially for many rural school districts.

A few commenters responded that the transformation model would still not enable some communities, particularly those with difficult demographics, to make adequate yearly progress. Other commenters worried that, if not monitored carefully, the transformation model would become like the ''other'' restructuring option under section 1116(b)(8)(B)(v) of the ESEA, perceived as the easiest (but least meaningful) way to intervene in a struggling school. One of these commenters recommended adding strong language to make clear that the transformation model is not an incremental approach and that, except in the area of changing staff, the model is as rigorous as the turnaround model.

Discussion: We appreciate the commenters' support. We believe the transformation model holds tremendous promise for reforming persistently lowest-achieving schools by developing and increasing teacher and school leader effectiveness, implementing comprehensive instructional reform strategies, increasing learning time and creating community-oriented schools, and providing operating flexibility and sustained support. Assuming the activities that support these components are implemented with fidelity, the transformation model represents a rigorous and wholesale approach to reforming a struggling school, unlike the manner in which the ''other'' restructuring option in section 1116 of the ESEA has often been implemented.

Changes: To strengthen the transformation model, we have made a number of changes that we discuss in the following paragraphs in our responses to specific comments.

Comment: One commenter recommended affording greater flexibility to LEAs in implementing the transformation model by allowing them to choose which activities are ''required'' and which are ''permissible'' within the four components. The commenter noted that LEAs with persistently lowest-achieving schools may not have the teacher or leader capacity or system to support, monitor, and sustain reforms across all of their schools. The commenter advocated for creating systems at the district level that enable LEAs to provide support at each school.

Discussion: We decline to make the requested changes. We have carefully reviewed the required activities within the four components of the transformation model and have concluded that each is necessary to ensure the rigor and effectiveness of the model; therefore, we continue to require each one. An LEA, of course, may implement any or all of the permissible activities as well as other activities not described in this notice.

In anticipation of receiving unprecedented amounts of SIG funds, SEAs and LEAs should begin now to plan for how they can use those funds most effectively by putting in place the systems and conditions necessary to support reform in their persistently lowest-achieving schools. Despite the best preparation, however, we know that not every LEA with persistently lowest-achieving schools has the capacity to implement one of the four interventions in this notice in each such school. As indicated in the SIG NPR, therefore, an LEA that lacks the capacity to implement an intervention in each persistently lowest-achieving school may apply to the SEA to implement an intervention in just some of those schools.

Changes: None.

Comment: One commenter recommended adding ''graduation rates,'' rated equally with test scores, to assess student achievement in evaluating staff, ensuring that a school's curriculum is implemented with fidelity, and providing operating flexibility. The commenter also recommended making increasing graduation rates a required activity.

Discussion: We agree with the commenter that increasing high-school graduation rates is vital to improving student achievement, particularly in our Nation's ''dropout factories.'' We are, accordingly, adding increasing high school graduation rates in three provisions of the transformation model to make clear that it is also a goal of the interventions in this notice. We are also making a corresponding change in the turnaround model. In addition, we are defining ''persistently lowest-achieving schools'' to include high schools that have had a graduation rate below 60 percent over a number of years. Through these changes, we hope to identify high schools with low graduation rates that would implement one of the interventions in this notice.

Changes: We have added increasing high school graduation rates in three provisions of the transformation model: Paragraphs (d)(1)(i)(B)(*1*); (d)(1)(i)(C); and (d)(4)(i)(A). We also made a corresponding change to the turnaround model in paragraph (a)(1)(i). In addition, we have included high schools that have had a graduation rate below 60 percent over a number of years in the definition of *persistently lowest-achieving schools*.

Comment: One commenter recommended that the Department require an LEA to set up an organizational entity within the LEA to be responsible and held accountable for rapid improvement in student achievement in schools implementing the transformation model in order to ''expedite the clearing of bureaucratic underbrush'' that can impede the model's effectiveness.

Discussion: Although nothing in this notice would preclude an LEA from establishing an organizational entity responsible for ensuring rapid improvement in student achievement in schools implementing the transformation model, we decline to require the establishment of such an entity. Evidence of an LEA's commitment to support its schools in carrying out the required elements of the transformation model is a factor that an SEA must consider in evaluating the LEA's application for SIG funds.

Changes: None.

Developing and Increasing Teacher and School Leader Effectiveness

Comment: A number of commenters supported the emphasis in the transformation model on strong principals and teachers, noting that they are critical to transforming a low-achieving school. Commenters cited specific provisions that they supported, such as ongoing, high-quality job-embedded professional development; strategies to recruit, place, and retain effective staff; increasing rigor through, for example, early-college high schools; extending learning time; emphasizing community-oriented schools; increased operating flexibility; and sustained support from the LEA and SEA.

Discussion: The Secretary appreciates the commenters' support.

Changes: None.

Comment: One commenter suggested adding the word ''ensuring'' in the heading of the component of the transformation model that requires developing teacher and school leader effectiveness. Another suggested changing the heading to ''providing teachers and school leaders with the resources and tools needed to be effective.''

Discussion: We decline to make these changes. First, we do not believe that a school can ensure teacher and school leader effectiveness. We do believe, however, that a school can take steps to improve teacher and leader effectiveness. Second, we note that eligible schools in LEAs that receive SIG funds—all of which are among the lowest-achieving schools in a State—will have very large amounts of resources to implement the transformation model or one of the other school intervention models. Accordingly, we do not believe lack of resources will be a barrier for reforming the persistently lowest-achieving schools in a State. Moreover, there is a significant requirement that an LEA provide ongoing, high-quality, job-embedded professional development for all staff in a school implementing the transformation model. Principals, teachers, and school leaders, therefore, should have sufficient support to do their jobs.

Changes: We have revised the heading in paragraph (d)(1) to read: ''Developing and improving teacher and school leader effectiveness.''

Comment: Many commenters, many of whom were principals or represented principals, opposed the requirement to

replace the principal. A number of commenters commented that such a decision should be made locally, based on local data and circumstances in individual schools, rather than being mandated by the Federal Government. One commenter, although acknowledging the importance of effective school leadership, asserted that a school's underperformance should not necessarily be blamed on the principal. The commenter cited other salient factors, such as whether the principal has the authority needed to turn a school around or whether the principal is laying a foundation for improvements not yet reflected in test scores. One commenter suggested that a principal not be removed until the principal's performance has been reviewed. Others suggested that, rather than replacing the principal immediately, the requirements permit an LEA to offer comprehensive support and leadership training for school leaders and other staff to assist them in making the significant changes needed to transform a school. Several commenters suggested removing the principal unless the person commits to and is held accountable for a turnaround plan that requires, for example, working with a partner management organization or other entity skilled in turning around struggling schools. Another commenter suggested permitting flexibility with respect to removing the principal in cases warranted by, for example, the size and geography of a school or LEA, the cause of the academic failure, the specific solutions being sought, or other barriers to removal.

Discussion: We refer readers to the earlier section of these comments and responses titled ''Principal and Staff Replacement'' in which we respond to similar public comments about the principal replacement requirement under the turnaround model.

Changes: None.

Comment: One commenter recommended a three-pronged approach to defining principal effectiveness: evidence of improved student achievement; changes in the number and percentage of teachers rated as effective and highly effective; and assessment of a principal's highest priority actions and practices.

Discussion: Generally, the Department agrees that multiple measures, including the use of student achievement data, should be used to evaluate principal effectiveness. Accordingly, we have revised proposed section I.A.2.d.i.A.*1* in the SIG NPR (new paragraph (d)(1)(i)(B)(*1*) to allow an LEA to use, in addition to data on student growth, observation-based assessments and ongoing collections of professional practice that reflect student achievement and increased high-school graduation rates to evaluate principal effectiveness.

Changes: We have modified paragraph (d)(1)(i)(B)(*1*) regarding evaluation systems for teachers and principals to require that those systems take into account student growth data as a significant factor as well as other factors ''such as multiple observation-based assessments of performance and ongoing collections of professional practice reflective of student achievement and increased high-school graduation rates.''

Comment: Several commenters cited the shortage of principals, particularly in rural areas, as a reason to eliminate the requirement to remove the principal in a school using the transformation model. One commenter suggested hiring a ''turnaround leader'' or contracting with an external lead partner instead of replacing the principal.

Discussion: We refer readers to the earlier section of these comments and responses titled ''Principal and Staff Replacement'' where we respond to public comments about the principal replacement requirement under the turnaround model.

Changes: None.

Comment: A number of commenters suggested that a principal who has been recently hired to turn around a school should not be removed.

Discussion: The commenters might have overlooked the fact that proposed section I.B.1 in the SIG NPR allowed schools that have ''implemented, in whole or in part within the last two years, an intervention that meets the requirements of the turnaround, restart, or transformation models'' to ''continue or complete the intervention being implemented.'' Thus, a recently hired principal who was hired to implement a school intervention model that meets some or all of the elements of one of the interventions in this notice would not have to be replaced for purposes of a transformation model. We have retained this flexibility in this notice.

Changes: None.

Comment: Many commenters reacted to the requirement in the SIG NPR to use evaluations that are based in significant measure on student growth to improve teachers' and school leaders' performance. A few commenters supported the requirement; most opposed it for a number of reasons. Many commenters objected specifically to assessing teacher effectiveness using testing instruments not designed for that purpose. One commenter noted that standardized assessments are designed to measure students' ready retrieval of knowledge and do not accurately attribute student learning to particular lessons, pedagogical strategies, or individual teachers. In addition, the commenter noted that such assessments do not measure qualities like student motivation, intellectual readiness, persistence, creativity, or the ability to apply knowledge and work productively with others. One commenter asserted that State assessments are generally of low quality and measure a narrow range of student learning. The commenter also noted that assessments do not acknowledge the contributions (or lack thereof) of others, such as prior teachers, towards student achievement. Two commenters argued that State assessments do not provide information about the conditions in which learning occurs and over which a teacher has no control, such as class size, student demographics, or instructional resources. One commenter asserted that State assessments fail to capture academic growth with respect to students with disabilities. A number of commenters proposed other academic and nonacademic measures for evaluating teachers and school leaders, such as standards-based evaluations of practice that include such criteria as observations of lesson preparation, content, and delivery; innovation in teaching practices; analyses of student work and other measures of student learning, such as writing samples, grades, goals in individualized education programs for students with disabilities, and ''capstone'' projects such as end-of-course research papers; assessment of commitment and ability to use feedback and data to learn and improve practices; one-on-one teaching; staff leadership and mentoring skills; conflict resolution skills; crisis management experience; extra-curricular roles and contributions to a school; and relationships with parents and the community.

Discussion: We respect and agree with the commenters' concerns that student achievement data alone should not be used as the sole means to evaluate teachers and principals. We must develop and support better measures that take into account student achievement and more accurately measure teacher and principal performance. Accordingly, we have revised the transformation model's evaluation systems provision to require that these systems take into account student growth data as a significant factor, but also include other factors ''such as multiple observation-based assessments of performance and

ongoing collections of professional practice reflective of student achievement and increased high-school graduation rates.'' We have also clarified that those systems must be rigorous, transparent, and equitable and that they must be designed and developed with teacher and principal involvement.

Nonetheless, it is important to note that the Secretary believes that student achievement data must be included as a significant factor in evaluations of teacher and principal effectiveness. We are confident that the legitimate concerns of the commenters regarding use of student data can be addressed.

Changes: We have modified paragraph (d)(1)(i)(B) regarding evaluation systems for teachers and principals in several respects. First, we modified paragraph (d)(1)(i)(B) to require that evaluation systems be rigorous, transparent, and equitable. Second, we modified paragraph (d)(1)(i)(B)(*1*) to require that those systems take into account student growth data as a significant factor but also include other factors ''such as multiple observation-based assessments of performance and ongoing collections of professional practice reflective of student achievement and increased high school graduation rates.'' Third, we added paragraph (d)(1)(i)(B)(*2*) to require that evaluation systems be designed and developed with teacher and principal involvement.

Comment: A number of commenters raised issues related to collective bargaining and the transformation model. Several commenters objected to the perceived requirement to establish a performance pay plan based on student outcomes, noting that collective bargaining agreements and, in some cases, State laws often prohibit such a plan. Two others noted that, because union contracts limit a principal's control over staffing, principals should not be held accountable for school performance results. At least one commenter expressed concern that these collective bargaining barriers could preclude implementation of the transformation model.

Discussion: In general, we refer readers to the earlier section of these comments and responses titled ''Principal and Staff Replacement'' where we respond to similar public comments regarding collective bargaining as it relates to the turnaround model. In addition, we note that the transformation model does not require that an LEA establish a performance pay plan for teachers or principals. Rather, an LEA must identify and reward school leaders, teachers, and other staff who, in implementing the transformation model, have increased student achievement and graduation rates. One way of meeting this requirement would be through performance pay. An LEA has the flexibility to devise other means that meet this requirement.

Changes: None.

Comment: One commenter, responding to the proposed requirement to remove staff who fail to contribute to raising student achievement, recommended that this provision be deleted. The commenter noted that this provision would make it very difficult to attract the most highly qualified teachers and principals to the persistently lowest-achieving schools. The commenter suggested that extensive professional development, rather than removal, be required for staff in schools in which achievement does not improve.

Discussion: In general, we refer readers to the section of these comments and responses titled ''Principal and Staff Replacement'' where we respond to similar comments regarding removal of the staff replacement requirement under the turnaround model.

Changes: We have modified paragraph (d)(1)(i)(C) regarding removing staff who, in implementing a transformation model, have not contributed to increased student achievement and high school graduation rates to make clear that removal should only occur after an individual has had multiple opportunities to improve his or her professional practice and has still not contributed to increased student achievement and increased high school graduation rates.

Comment: Several commenters objected to the Secretary's proposal to require an LEA to make ''high-stakes'' tenure and compensation decisions through which the LEA would ''identify and reward school leaders, teachers, and other staff who improve student achievement outcomes and identify and remove those who do not.'' The commenters thought this standard was too imprecise. They noted that teacher compensation, tenure, and dismissal are, for the most part, governed by State laws and/or collective bargaining agreements that cannot be simply overturned by a Federal grant program. One of the commenters suggested that this provision be modified by adding, at the end, the phrase ''in full accordance with local and State laws, including collective bargaining agreements.''

Discussion: In general, we refer readers to the section of these comments and responses titled ''Principal and Staff Replacement'' where we respond to similar comments regarding collective bargaining issues as they relate to the turnaround model. In addition, we note that no LEA is required to apply for a School Improvement Grant. Those that do will receive significant resources to support their efforts to reform their most struggling schools, but they also must have the ability to implement the required components of whichever intervention they choose. Accordingly, we decline to make the recommended changes.

Changes: None.

Comment: A number of commenters provided additional examples of what professional development of staff under the transformation model should entail, such as: addressing the needs of students with disabilities and limited English proficient students; creating professional learning communities within a school; providing mentoring; involving parents in their child's education, especially parents of limited English proficient students and immigrant children; understanding and using data and assessments to improve and personalize classroom practice; and implementing adolescent literacy and mathematics initiatives.

Discussion: We appreciate the many excellent suggestions for additional areas on which professional development should focus. With one exception, we decline to add examples. We could never list all relevant topics for strong professional development, which must be tailored to the needs of staff in particular schools, and we would not want to suggest that topics not listed were, thus, less worthy of addressing.

Changes: We have added a permissible activity in paragraph (d)(2)(ii)(C) under ''comprehensive instructional reform strategies'' to highlight the need for additional supports and professional development for teachers and principals in implementing effective strategies to educate students with disabilities in the least restrictive environment and to ensure that limited English proficient students acquire language skills necessary to master academic content.

Comment: One commenter noted that the requirement to provide staff with ongoing, high-quality, job-embedded professional development was silent with respect to the impact of professional development on instruction. The commenter pointed to an apparent inconsistency with the emphasis in the permissible activity that suggested that LEAs be required to institute a system for measuring changes in instructional practices resulting from professional development. Because the commenter values professional development designed to improve

instruction, the commenter recommended that the Secretary require a school to have a system for measuring changes in instructional practices resulting from professional development in order to evaluate its efficacy.

Discussion: We believe that the requirement to provide ongoing, high-quality, job-embedded professional development to staff in a school is clearly tied to improving instruction in multiple ways. First, the requirement that professional development be ''job-embedded'' connotes a direct connection between a teacher's work in the classroom and the professional development the teacher receives. Second, the examples of topics for professional development, such as subject-specific pedagogy and differentiated instruction, are directly related to improving the instruction a teacher provides. Third, professional development must be aligned with the school's comprehensive instructional program. Finally, the articulated purpose of professional development in paragraph (d)(1)(i)(D) of the transformation model is to ensure that a teacher is ''equipped to facilitate effective teaching and learning'' and has the ''capacity to successfully implement school reform strategies.'' Although we believe that instituting a system for measuring changes in instructional practices resulting from professional development can be valuable, we decline to require it as part of this program. We believe that the specificity in the nature of the professional development required for a transformation model is sufficient to ensure that it, in fact, results in improved instruction.

Changes: None.

Comment: One commenter recommended that the Department add a requirement that professional development be designed to ensure that staff of a school using the transformation model can work effectively with families and community partners. The commenter reasoned that, given the emphasis on working with families and community partners to improve the academic achievement of students in a school, staff must know how to work with them.

Discussion: We decline to make the suggested change. We agree with the commenter that family and community involvement in a school is critical to the school's ultimate success and have included, as both required and permissible activities, a variety of provisions to address this important need. We would expect professional development to include appropriate training to ensure, as the commenter suggests, that staff are well equipped to facilitate family and community involvement. We do not believe, however, that we should try to expressly highlight each and every appropriate topic of high-quality professional development in this notice.

Changes: None.

Comment: One commenter suggested that financial incentives are not necessarily the most motivating factor in retaining high-quality staff. Rather, the commenter stated that the culture of a school—*i.e.,* quality relationships with other teachers, the school climate, the leadership of the principal, and the potential for professional growth—is often a greater motivator.

Discussion: We agree that financial incentives are not the only motivating factor in attracting staff to a school or retaining them in the school. We hope that changes in the culture of a school that result from implementing the interventions established in this notice play a large role in attracting, placing, and retaining high-quality staff. As a result, in both the transformation and turnaround models, we have provided examples of several strategies to recruit, place, and retain high-quality staff.

Changes: We have added examples of strategies designed to recruit, place, and retain staff, including ''financial incentives, increased opportunities for promotion and career growth, and more flexible work conditions'' in paragraphs (d)(1)(i)(E), with respect to the transformation model, and (a)(1)(iii), with respect to the turnaround model. We have also made clear that those strategies must be designed to recruit, place, and retain staff who have the skills necessary to meet the needs of the students in the schools implementing a transformation or turnaround model, respectively.

Comment: Several commenters supported the concept of ''mutual consent''—that is, ensuring that a school is not required to accept a teacher without the mutual consent of the teacher and the principal, regardless of the teacher's seniority. One commenter recommended making ''mutual consent'' a required component of both the turnaround model and the transformation model. Other commenters, however, opposed any mention of ''mutual consent,'' even as a permissible activity. One asserted that the concept conflicts with the provision in section 1116(d) of the ESEA that precludes interventions in Title I schools from affecting the rights, remedies, and procedures afforded school employees under Federal, State, or local laws or under the terms of collective bargaining agreements, memoranda of understanding, or other agreements between employees and their employers.

Discussion: Like several commenters, the Secretary supports and encourages the use of mutual consent. The Secretary considers mutual consent to be a positive example of LEAs partnering with unions to bring change to the Nation's persistently lowest-achieving schools. That said, we decline to require mutual consent as a part of the transformation model because mutual consent policies and other similar agreements are best resolved at the State and local levels in the context of existing collective bargaining agreements.

Changes: None.

Comment: One commenter recommended that the Secretary add a requirement that, in the event budget cuts occur, a principal be allowed to lay off teachers on the basis of performance rather than seniority. The commenter noted that this provision could be an important lever for obtaining positive changes to collective bargaining agreements that would help low-achieving schools attract and retain effective staff.

Discussion: We decline to make the suggested change. Although we support the need to modify collective bargaining agreements if they impede efforts to attract and retain qualified staff in the persistently lowest-achieving schools, we do not believe we can or should prescribe the specific terms of those agreements.

Changes: None.

Comprehensive Instructional Reform Strategies

Comment: Several commenters suggested that the Department revise the comprehensive instructional reform component of the transformation model by modifying or expanding the provision requiring the use of individualized student data to inform and differentiate instruction. One commenter suggested clarifying that individualized student data are to be used to meet students' academic needs while another commenter suggested clarifying that the data should be used to address the needs of ''individual'' students. Other commenters suggested expanding this provision to include non-academic data such as chronic absenteeism, truancy, health (vision, hearing, dental, and access to primary care), safety, family engagement and well-being, and housing. The commenter suggested that these data be used, in partnership with parents and other community partners, to address other student needs.

Discussion: The purpose of this section of the transformation model is to improve instruction, and we agree that adding the word ''academic'' is a helpful clarification. Although we also agree that non-academic data can play an important role in identifying other student needs that can affect learning, local school administrators, working with parents and community partners, are in the best position to determine how to address those needs. Therefore, we decline to add a requirement that a school examine non-academic data.

Changes: We have added the word ''academic'' in paragraph (d)(2)(i)(B) to clarify that the continuous use of student data to inform and differentiate instruction must be promoted to meet the academic needs of individual students. We made a corresponding change in paragraph (a)(1)(vii) regarding the turnaround model.

Comment: One commenter noted that requiring instructional programs to be ''evidence-based'' instead of ''research-based'' would enable the use of programs for which there is accumulated evidence that does not meet the current ESEA definition of ''scientifically based research.''

Discussion: We agree with the commenter that an LEA should only implement instructional programs for which there is a sufficient body of evidence supporting improved student achievement. We do not believe a change is necessary, however, because we do not use the term ''scientifically based research'' and, therefore, do not invoke the stringent requirements in section 9101(37) of the ESEA.

Changes: None.

Comment: One commenter recommended that the Department add a provision that would require a school to identify ''off-track and out-of-school youth, through analysis and segmentation of student data,'' and develop and implement education options to put them back on track to graduate. The commenter stated that, once students are off track to graduating on time, their likelihood of graduating is often as low as 20 percent. Moreover, in the 2,000 high schools in the Nation with four-year graduation rates of 60 percent or less, up to 80 percent of ninth graders are significantly behind in skills or credits. Several other commenters suggested including stronger support for re-enrolling youth who have left high school as a critical part of increasing graduation rates.

Discussion: We agree that programs and strategies designed to re-engage youth who have dropped out of high school without receiving a diploma are necessary in increasing graduation rates. Accordingly, we are modifying the notice to address this need. We also hope that an LEA's extension or restructuring of the school day to add time for strategies such as advisory periods to build relationships between students, faculty, and other staff will help to identify students who are struggling and to secure for them the necessary supports sufficiently early to prevent their dropping out of school. Finally, as noted earlier, we have added references to increased high school graduation rates in four provisions to make clear that implementation of the models in high schools must focus on increasing graduation rates as well as improved student achievement.

Changes: We have modified paragraph (d)(2)(ii)(E)(*3*) to add re-engagement strategies as an example of a way to increase high school graduation rates. We have also added paragraph (d)(2)(ii)(E)(*4*) suggesting that permissible comprehensive instructional reform strategies may include establishing early-warning systems to identify students who may be at risk of failing to achieve to high standards or graduate.

Comment: A number of commenters suggested that the Department include additional required or permissible activities for carrying out comprehensive instructional reform strategies. Specifically, two commenters recommended that the Department require schools to conduct periodic reviews so as to ensure that the curriculum is being implemented with fidelity (rather than merely permitting this activity) and improve school library programs. Other commenters suggested expanding the permissible activities in secondary schools to include learning opportunities that reflect the context of the community in which the school is located, such as service learning, place-based education, and civic and environmental education. The commenters also recommended clarifying that improving students' transition from middle to high schools should include family outreach and parent education. Another commenter suggested that the Department expand the list of permissible activities in elementary schools to include providing opportunities for students to attend foreign language immersion programs.

Discussion: The Secretary agrees that there are any number of important activities that would be appropriate to address in a transformation model. As described in this notice, the transformation model, by necessity, focuses on several broad strategies. However, nothing precludes local school leaders from expanding the model as necessary to address other factors needed to respond to the specific needs of students in the school.

Changes: We have included in this notice a definition of *increased learning time* that would permit many, if not all, of the commenters' suggestions. For example, that definition makes clear that a school may increase time to teach core academic subjects, including, for example, civics and foreign languages, and to provide enrichment activities such as service learning and experiential and work-based learning opportunities.

Comment: One commenter recommended that the Department add the implementation of technology-based solutions to the list of permissible activities, while another commenter recommended that the Department add online instructional services offered by a for-profit or non-profit entity as an example of a comprehensive, research-based instructional program.

Discussion: The Secretary agrees that technology can be an important tool for supporting instruction, and we are adding as a permissible activity the suggestion to use and integrate technology-based supports and interventions as part of a school's instructional program. Although online instructional programs might be part of a school's system of technology-based supports, we decline to mention it specifically. Online instructional programs, if research-based, are one of many ways to meet the needs of students in struggling schools, particularly to provide courses or programs that schools in rural or remote areas cannot otherwise provide. We cannot mention in this notice, however, each and every type of instructional program.

Changes: We have added as a permissible activity in paragraph (d)(2)(ii)(D) using and integrating technology-based supports and interventions as part of a school's instructional program.

Comment: One commenter recommended that the Department add to the transformation model the strategy to reorganize the school with a new purpose and structure it as a magnet school, a thematic school, or a school-community partnership.

Discussion: We decline to include this change in the transformation model, a model that uses the existing staff in a school and who would likely not have the expertise to implement an instructional program with a whole new purpose.

Changes: None. However, we have clarified in paragraph (a)(2)(ii) that a turnaround model may include a new

school model (*e.g.,* themed, dual language academy).

Increasing Learning Time and Creating Community-Oriented Schools

Comment: Several commenters expressed support overall and for various activities of the ''Increasing learning time and creating community-oriented schools'' component of the transformation model, including the references to school climate, internships, and community service.

Discussion: We appreciate the commenters' support. We are including some of these activities in the definition of *increased learning time* that also applies to the Stabilization Phase II and Race to the Top programs, rather than listing them as specific elements of the ''increasing learning time and creating community-oriented schools'' component. They have no less importance, however.

Changes: We have included in the notice a definition of *increased learning time* that includes opportunities for enrichment activities for students, such as service learning and community service.

Comment: Several commenters suggested that the Department highlight the importance of certain activities by revising the heading of this component. For example, one commenter suggesting revising the heading to emphasize family involvement while another commenter suggested revising it to specifically reference students' social and emotional needs. A third commenter suggested expanding the title to include ''using research-based methods to deliver comprehensive services to students.''

Discussion: We decline to make these changes. Although we embrace the need to address not just the academic needs of students but also how their social and emotional needs affect their learning and to emphasize the importance of family involvement, we believe it is preferable to keep the heading for this component more general. The headings for each of the components in the transformation model are deliberately broad so as to cover a number of important activities, and the fact that a specific activity is not in a heading is not a reflection of that activity's importance. We believe the list of permissible activities illustrates various ways in which a school can address students' social and emotional needs and involve families in their child's education.

Changes: None.

Comment: Several commenters suggested that the Department highlight the importance of certain activities by making them required. For example, some commenters recommended expanding the required activities to include a comprehensive guidance curriculum delivered by a school counselor who is certified by the State department of education; partnering with parents, faith-based and community-based organizations, and others to provide comprehensive student services; more time for social and emotional learning; and improving school climate. Another commenter recommended requiring that the transformation model include the components of the Comprehensive School Reform Demonstration program.

Other commenters suggested adding references to high school study-abroad programs as an example of a student enrichment activity and activities designed to reduce out-of-school suspensions and expulsions as a strategy for addressing school climate.

Discussion: As we noted earlier, we agree that there are any number of important activities that would be appropriate to address in a transformation model. As described in this notice, the transformation model, by necessity, focuses on several broad strategies. However, there is nothing to prevent local school leaders from expanding the model as necessary to address other factors needed to respond to the specific needs of students in the school.

Changes: None.

Comment: One commenter suggested that the Department define ''community-oriented schools'' as schools that partner with community-based organizations to provide necessary services to students and families using research-based methods, which might include: a school-based, on-site coordinator; comprehensive school- and student-level needs assessments; community-assets assessments and identification of potential partners; annual plans for school-level prevention and individual intervention strategies; delivery of an appropriate mix of prevention and intervention services; data collection and evaluation over time, with on-going modifications of services; and/or other research-based components. Another commenter suggested removing the word ''oriented'' and using the term ''community-schools,'' which the commenter indicated is more commonly known.

Discussion: Although we appreciate the commenters' interest in ensuring greater clarity on the concept of ''community-oriented schools,'' we decline to make the suggested changes. The components of ''community-oriented schools'' will vary school by school depending on student and community needs and resources. There is nothing in the notice that would prevent local school leaders from undertaking any of the strategies in the definition the commenters proposed if necessary to respond to the specific needs of students in the school.

Changes: None.

Comment: Some commenters suggested that the Department add ''community-based organization'' and ''workforce systems, specifically nonprofit and community-based organizations providing employment, training, and education services to youth'' to the list of entities with which an LEA or school may choose to partner in providing enrichment activities during extended learning time.

Discussion: In the SIG NPR, we listed universities, businesses, and museums as examples of entities with which a school could partner in providing enrichment activities during extended learning time. In this final notice, we are instead including a definition of *increased learning time* that applies to the Stabilization Phase II, Race to the Top, and SIG programs. That definition no longer includes examples of appropriate partnership entities, because there may be any number of organizations or entities in a particular community that might be appropriate partners.

Changes: In the definition of *increased learning time,* we have included the following: ''(b) instruction in other subjects and enrichment activities that contribute to a well-rounded education, including, for example, physical education, service learning, and experiential and work-based learning opportunities that are provided by partnering, as appropriate, with other organizations.''

Comment: One commenter suggested that the reference to ''parents,'' in the list of entities with which schools might partner to create safe school environments that meet students' social, emotional, and health needs, should include ''parent organizations.''

Discussion: We agree with this suggestion and are adding a reference to parent organizations.

Changes: We have revised the permissible activity in paragraph (d)(3)(ii)(A) regarding creating safe school environments to include a reference to partnering with parents and ''parent organizations,'' along with faith- and community-based organizations, health clinics, other State and local agencies, and others.

Comment: One commenter recommended that the Department

define ''family engagement'' and requiring the use of certain family-engagement mechanisms, including family-engagement coordinators at school sites, home visitation programs, family literacy programs, and parent leadership programs. Another commenter recommended defining ''community engagement'' as systemic efforts to involve parents, community residents, members of school communities, community partners, and other stakeholders in exploring student and school needs and, working together, developing a plan to address those needs.

Discussion: We agree that there are any number of important activities that could support increased family and community engagement. The reference to family and community engagement in this notice is deliberately broad so as to provide maximum flexibility in determining how best to address local needs. However, there is nothing to prevent local school leaders from incorporating any of the strategies mentioned or other strategies that will lead to effective family and community engagement.

Changes: None.

Comment: One commenter recommended that the Department include language to make clear that extending learning time can be accomplished by adding a preschool program prior to school entry.

Discussion: The Secretary agrees that preschool education is very important in ensuring that children enter kindergarten with the skills necessary to succeed in school. He also agrees that preschool education is an effective way to increase learning time.

Changes: We have added, as a permissible activity in paragraph (d)(3)(ii)(D), expanding the school program to offer full-day kindergarten or pre-kindergarten.

Comment: Several commenters suggested that the Department clarify that increased learning time includes summer school, after-school programs, and other instruction during non-school hours. Several other commenters suggested increasing instructional time during the school day and the need to make existing time more effective, including through the use of technology. Another commenter suggested clarifying that extended learning time should be beyond the current State-mandated instructional time.

Discussion: We have added in this notice a definition of *increased learning time* that applies to the Stabilization Phase II, Race to the Top, and SIG programs. Under that definition, *increased learning time* means using a longer school day, week, or year schedule to significantly increase the total number of school hours to include additional time for instruction in core academic subjects; time for instruction in other subjects and enrichment activities that contribute to a well-rounded education; and time for teachers to collaborate, plan, and engage in professional development within and across grades and subjects.

Changes: We have revised the notice to define *increased learning time.* The full definition is as follows:

Increased learning time means using a longer school day, week, or year schedule to significantly increase the total number of school hours to include additional time for (a) instruction in core academic subjects including English; reading or language arts; mathematics; science; foreign languages; civics and government; economics; arts; history; and geography; (b) instruction in other subjects and enrichment activities that contribute to a well-rounded education, including, for example, physical education, service learning, and experiential and work-based learning opportunities that are provided by partnering, as appropriate, with other organizations; and (c) teachers to collaborate, plan, and engage in professional development within and across grades and subjects.[8]

Providing Operating Flexibility and Sustained Support

Comment: One commenter suggested that the Department add a requirement that a school implementing the transformation model be required to present a plan for how the various elements of the model are aligned and coordinated to improve student achievement and other indicators of student growth (such as health and civic competencies).

Discussion: We decline to make the suggested change. We are confident that a school implementing the transformation model would have a plan without the need for the Department to require it.

Changes: None.

Comment: One commenter recommended that the list of potential technical assistance providers in proposed section I.A.d.iv.A.2 of the SIG NPR be expanded to include ''professional organizations that have a track record of turning around low-performing schools.''

Discussion: This provision is intended to ensure that schools implementing the transformation model receive coordinated ongoing technical assistance and reflects the belief that an SEA, LEA, or external lead partner organization would be in the best position to integrate services at the school level. This notice does not preclude the involvement of entities other than those mentioned so long as they fulfill the role of a lead partner in integrating services and supports for the school.

Changes: None.

Comment: One commenter cautioned about the use of ''weighted per-pupil school-based budgeting,'' noting that early research indicates this practice undermines cross-school cooperation by promoting competition among schools for students and the resources or liabilities they may represent.

Discussion: We note that implementing a per-pupil school-based budget formula that is weighted based on student needs is listed as a permissible, not required, activity to give schools operational flexibility. We believe allocating funds based on student characteristics and then giving schools broad flexibility to use those funds to meet their respective needs is one way to provide incentives for schools to use their cumulative resources in innovative ways to meet the needs of their student population. If an LEA determines such budgeting is not appropriate in the context of its schools, it need not implement this activity.

Changes: None.

F. General Selection Criteria

Comment: None.

Discussion: As part of an overall effort to reorganize and clarify the State Reform Conditions Criteria and State Reform Plan Criteria in this notice, the Department is creating a new section (F), which includes both new criteria and criteria that were included in the NPP under other sections. These changes are described in greater detail below.

[8] Research supports the effectiveness of well-designed programs that expand learning time by a minimum of 300 hours per school year. (See Frazier, Julie A.; Morrison, Frederick J. ''The Influence of Extended-year Schooling on Growth of Achievement and Perceived Competence in Early Elementary School.'' Child Development. Vol. 69 (2), April 1998, pp. 495–497 and research done by Mass2020.) Extending learning into before- and after-school hours can be difficult to implement effectively, but is permissible under this definition with encouragement to closely integrate and coordinate academic work between in-school and out-of school. (See James-Burdumy, Susanne; Dynarski, Mark; Deke, John. ''When Elementary Schools Stay Open Late: Results from The National Evaluation of the 21st Century Community Learning Centers Program.'' *http://www.mathematica-mpr.com/publications/redirect_PubsDB.asp?strSite=http://epa.sagepub.com/cgi/content/abstract/29/4/296.* Educational Evaluation and Policy Analysis, Vol. 29 (4), December 2007, Document No. PP07–121.)

Changes: Criterion (F)(1)(i) incorporated proposed criterion (E)(2) on making education funding a priority. New criterion (F)(1)(ii) examines the extent to which a State's policies lead to equitable funding (a) between high-need LEAs (as defined in this notice) and other LEAs, and (b) within LEAs, between high-poverty schools (as defined in this notice) and other schools. Criterion (F)(2)(i) through (iv) incorporate the criteria regarding charter schools from proposed criterion (D)(2). Criterion (F)(2)(v) is a new criterion that will examine the extent to which a State enables LEAs to operate innovative, autonomous public schools other than charter schools. Criterion (F)(3) incorporates a revised version of proposed criterion (E)(1)(iii).

Selection Criterion (F)(1): Making education funding a priority (Proposed Selection Criterion (E)(2)) Funding and Facilities:

Comment: Many commenters objected to criterion (F)(1)(i) (proposed (E)(2)), which will measure the extent to which the percentage of total State revenues used to support education in FY 2009 was greater than or equal to the percentage in FY 2008. A number of commenters stated that this one-year snapshot of education financing would examine too narrow a period of time, thereby favoring wealthy States. Some commenters, therefore, recommended looking at a minimum of five years of financial data. Similarly, some commenters argued that criterion (F)(1)(i) should be consistent with the ''maintenance of effort'' (MOE) requirement in section 14005(d)(1)(A) of the ARRA, which requires States to assure in their State Fiscal Stabilization Fund applications that they will spend at least as much on K–12 public education in fiscal years 2009, 2010, and 2011 as they did in fiscal year 2006. One commenter recommended that the minimum proposed evidence for criterion (F)(1)(i) include the extent to which State-level K–12 education capital financing as a percentage of total State capital financing has increased, decreased, or remained the same in the last five fiscal years. One commenter sought clarification that criterion (F)(1)(i) is not intended to prejudice States that used State Fiscal Stabilization Funds to fill budget shortfalls. Other commenters stated that this criterion did not go far enough, because if total State revenues fell, a State could earn points even if it was cutting funding for education.

Discussion: The Department believes that States that have protected education funding from disproportionate cuts over the past two years deserve recognition of this fact in their Race to the Top applications. We also believe that recent evidence of a State's commitment to adequately fund education is more important for evaluating its Race to the Top application than data from four or five years ago.

Section 14005(d)(1)(A) of the ARRA sets forth a condition for receiving a formula award from the State Fiscal Stabilization Fund; this requirement does not apply to section 14006 of the ARRA, which authorizes the Race to the Top program. Instead, criterion (F)(1)(i) is consistent with the waiver for the State Fiscal Stabilization Fund MOE requirement, which the Secretary has already granted to a number of States. The two-year comparison used in criterion (F)(1)(i) reflects the Department's understanding of the difficult choices that many States have been forced to make in the recent economic recession, while at the same time recognizing that States that have made education funding a priority in such difficult budgetary times are better positioned to successfully implement their Race to the Top plans.

Changes: None.

Comment: Some commenters suggested that the Department allow States to explain their education expenditures in the context of their overall economic situation. One commenter requested clarification as to what financial data the Department will look at when examining State support for education funding.

Discussion: We believe that States' responses to criterion (F)(1)(i) will be judged most accurately and reliably if, per the language in this notice, States describe changes in education spending in relation to changes in revenues available to the State. This creates more comparability between States than would be achieved by allowing States to explain their economic situations.

Changes: None.

Comment: Many commenters asserted that it was important to consider whether States were meeting obligations to fund education adequately and equitably. Two commenters emphasized the importance of funding equity for schools implementing a school intervention model, recommending that State plans include information on the extent to which their lowest-performing schools receive equitable funding for operations and facilities as compared to their highest-performing schools. Another commenter stated that funding adequacy and equity are especially critical for high-need LEAs serving concentrations of poor and minority students. Finally, one commenter added that States should provide additional resources, such as technical assistance and funding, to allow struggling schools to implement school intervention models.

Discussion: We agree with the principle that all students should benefit from at least similar levels of education resources regardless of where they live or attend school. We are adding criterion (F)(1)(ii), which will examine the extent to which a State's policies lead to equitable funding (a) between high-need LEAs and other LEAs, and (b) within LEAs, between high-poverty schools and other schools. Closer attention by States to funding equity will help ensure that high-need LEAs and high-poverty schools, which are a particular focus of Race to the Top plans, are receiving sufficient State and local educational resources to serve their students. Also, developing and funding budgets that are sufficient in size and scope to successfully implement school intervention models in the persistently lowest-achieving schools, including high-poverty and high-minority schools, will be a critical element of State Race to the top plans, in accordance with the statewide capacity building criteria in section (A)(2) of this notice. Successful State applicants and their participating LEAs (as defined in this notice) will be able to use State Fiscal Stabilization Fund Phase Two, Race to the Top, and School Improvement Grant funding to ensure that all targeted schools have sufficient resources to effectively implement selected school intervention models.

Changes: We have added criterion (F)(1)(ii) to the final notice to consider the extent to which a State's policies lead to equitable funding between high-need LEAs and other LEAs and, within LEAs, between high-poverty schools and other schools.

Comment: None.

Discussion: As stated earlier, in order to reduce redundancy and the burden on States, we are combining proposed criteria (E)(1)(i) and (E)(1)(ii) into one criterion and designating it as criterion (A)(3)(i).

Changes: Criterion (A)(3)(i) provides for an examination of the extent to which a State has made progress over the past several years in each of the four education reform areas, and used its ARRA and other Federal and State funding to pursue such reforms.

Selection Criterion (F)(2): Ensuring successful conditions for high-performing charter schools and other innovative schools (Proposed Selection Criterion (D)(2)):

Definitions: Comments regarding the definitions of *high-performing charter*

school and *innovative, autonomous public schools* are addressed, as appropriate, below.

Overall Charter School Comments

Comment: Many commenters supported criterion (F)(2) (proposed criterion (D)(2)), which is intended to increase the supply of high-performing charter schools, including provisions to remove limits on the numbers or enrollment of public charter schools in a State, efforts to strengthen the charter school authorizing process, and ensuring equitable funding both for the regular operations of public charter schools and for charter school facilities. Two commenters urged the Department to ensure that the definition of charter schools in (F)(2) include virtual charter schools. There was, however, some confusion about the potential impact of these criteria, with one commenter asserting that States that do not meet the criteria should be ineligible for Race to the Top grants and another urging the Department to clarify that removing ''caps'' on charter schools is not a pre-requisite for Race to the Top participation. Other commenters expressed concern that not meeting criterion (F)(2) would penalize the students and schools in their States by making them ineligible for a Race to the Top grant. Many other commenters objected to the emphasis on charter schools because of extensive research suggesting that many charter schools perform no better than regular public schools in raising student achievement. Other commenters objected to charter schools because, they said, most charter schools ''merely serve to drain the most motivated parents and students from the existing district public schools'' and give the appearance of an effort to ''privatize'' public education. Several commenters argued that the emphasis on charter schools failed to respect State authority in this area, noting that 11 States do not have charter school laws, citing one example where voters had rejected charter schools in multiple ballot initiatives, and suggesting that resource limitations in rural States can make the creation of charter schools difficult, if not impossible. One of these commenters also suggested that States without charter school laws receive credit for laws allowing similarly innovative ''charter-like'' schools, including virtual schools. Several commenters urged the Department, in examining State charter school laws under criterion (F)(2), to ''benchmark'' those laws against the model State charter school law developed by the National Alliance for Public Charter Schools. Two commenters asked the Department to include a definition of ''high-quality charter schools'' in the final notice, with one stating that increasing the number of charter schools makes sense only if charter schools are held to a standard at least as high, if not higher, than that of traditional public schools.

Similarly, one commenter also asserted that many regular public schools demonstrate the creativity, innovation, and continuous improvement claimed by the proponents of charter schools.

Discussion: The Department appreciates the many comments in support of the goal of increasing the number of high-performing charter schools, both as a strategy to help turn around the persistently lowest-achieving schools and to increase the educational options for students attending such schools. It is important to clarify, however, that criterion (F)(2) was never intended to determine eligibility for Race to the Top grants; rather, this provision represented one criterion by which a State that had taken certain steps to increase the supply of high-performing charter schools could earn points in the Race to the Top competition. The Secretary recognizes that the available research on the effectiveness of charter schools in raising student achievement is mixed, that some State laws significantly limit the creation or expansion of charter schools, that charter schools compete with the regular public schools for resources and teaching talent, and that smaller communities, particularly in rural areas, may not have sufficient resources and talent to support the creation of charter schools. However, the Secretary also believes that high-performing charter schools can be an educational lifeline in communities with chronically low-achieving regular public schools. In such cases, charter schools, whether created through the conversion of a regular public school enrolling the same students or by establishing a new school that provides an alternative to the regular public schools, offer one of the most promising and proven options for breaking the cycle of educational failure. The provisions in criterion (F)(2), taken as whole, are intended to reward States that have taken steps not just to facilitate the opening of new charter schools (which may include virtual charter schools), but to set high standards for charter school operators, provide them with an equitable share of public funding for operations and facilities, and hold them accountable for their performance. To support this emphasis on high standards for charter schools and charter school operators, we are revising criterion (F)(2)(i) to refer to ''high-performing charter schools'' rather than charter schools. We also are adding a definition of *high-performing charter school* using language adapted from the Department's Public Charter School Program. At the same time, the Department believes that States should have flexibility in establishing charter school laws, and that, for the purposes of the Race to the Top competition, such laws should be judged on the extent to which they satisfy the criteria in this final notice, and not in relation to any particular model for such laws.

Finally, we acknowledge that charter school operators do not have a monopoly on educational innovation (*i.e.,* that charter schools are not a ''silver bullet'' for school interventions), and that many States, LEAs, and schools have developed alternative education reform models that are demonstrating success in raising student achievement and turning around low-achieving schools. Consequently, we are adding new criterion (F)(2)(v) regarding the extent to which States enable LEAs to operate innovative and autonomous public schools other than charter schools, and we are revising the title of this criterion to Ensuring Successful Conditions for High-Performing Charter Schools and Other Innovative Schools. We also are adding, as the evidence required for (F)(2)(v), a description of how the State has met this criterion. Finally, we are adding a definition of *innovative, autonomous public schools* to give greater clarity to new criterion (F)(2)(v).

Changes: We have incorporated the criteria from proposed criterion (D)(2) into criterion (F)(2), which has been renamed ''Ensuring Successful Conditions for High-Performing Charter Schools and Other Innovative Schools.'' We also have revised (F)(2)(i) to refer to ''increasing the number of high-performing charter schools'' rather than ''increasing the number of charter schools,'' as in proposed (D)(2)(i). We have added a definition of *high-performing charter school* and defined it to mean: ''a charter school that has been in operation for at least three consecutive years and has demonstrated overall success, including (a) substantial progress in improving student achievement (as defined in this notice); and (b) the management and leadership necessary to overcome initial start-up problems and establish a thriving, financially viable charter school.'' In addition, new criterion (F)(2)(v) rewards the extent to which ''[t]he State enables LEAs to operate innovative, autonomous public schools other than charter

schools,'' and we will require, as evidence for (F)(2)(v) described in Appendix A to this notice, a description of how the State enables LEAs to operate innovative, autonomous public schools other than charter schools. Finally, we have added a definition of *innovative, autonomous public schools* and defined it to mean: ''open enrollment public schools that, in return for increased accountability for student achievement (as defined in this notice), have the flexibility and authority to define their instructional models and associated curriculum; select and replace staff; implement new structures and formats for the school day or year; and control their budgets.''

Charter School Caps

Comment: Many commenters objected to the language in criterion (F)(2)(i) because they believed it would require the elimination of ''caps'' on the number of charter schools in a State. Some commenters claimed that decisions related to charter school caps, like other charter school matters, should be left to the States and should not be a condition for receipt of Race to the Top funds. Other commenters raised substantive objections to eliminating caps, arguing that limiting the number of charter schools in a State was essential to maintaining accountability for charter schools by ensuring that States had the capacity to oversee charter schools, provide sufficient resources and technical assistance to new charter schools, and protect the interests of students and parents. In this context, several commenters noted that recent research appeared to have highlighted an inverse relationship between the number of charter schools in a State and the quality of those charter schools. Other commenters sought clarification of specific issues related to charter school caps, such as whether a State could meet criterion (F)(2)(i) if it had ''plenty of room'' under its existing cap, if caps might be applied to new charter schools while permitting expansion by proven charter school operators, or whether a cap that currently is not inhibiting charter school growth might do so later at any point during the lifetime of a Race to the Top grant. One commenter also recommended that the final notice should focus on the measurable outcomes of charter schools rather than their numbers. Other commenters urged that any lifting of charter school caps should be accompanied by stronger accountability for charter schools, including compliance with conflict of interest and open meeting laws, accountability for student achievement, increased financial oversight, and the implementation of effective evaluation systems. Another commenter recommended conditioning increases in the number of charter schools on leadership by a certified principal, adoption of a ''whole child'' instructional program, and the non-discriminatory enrollment of high-need student populations. One commenter called for the final notice to require new charter schools to use either a ''model with a proven record of effectiveness or a new model with an evidence-based strategy.''

Discussion: Our intention with respect to criterion (F)(2)(i) was not to eliminate reasonable conditions established by States for the approval of new charter schools, but to discourage arbitrary limitations that impede the educational innovation that can accompany the creation of new charter schools or that prevent the expansion of successful charter school models in a State. Moreover, while removing such limitations would increase the number of points that a State could earn under the criteria in (F), retaining those limitations would not make a State ineligible for a Race to the Top award. The Department agrees that States should have the discretion to set their own requirements for new charter schools, and that, contrary to the suggestions of some commenters, prescribing the use of certain educational methods or models would undermine the flexibility to innovate that is the hallmark of high-performing charter school operators. On the other hand, criterion (F)(2)(ii) is intended to reward States for strong authorizing practices, including those related to the approval and re-approval, monitoring and accountability (including reporting measurable outcomes), and closure of ineffective charter schools.

Changes: None.

Charter School Authorizers

Comment: Many commenters emphasized the importance of charter school authorizers in increasing the number of charter schools and the effective use of the charter school model to turn around the persistently lowest-achieving schools. Several commenters called for greater accountability for charter school authorizers, including the collection of data on the performance of charter schools in each State broken down by authorizer and an explanation of the financial and educational obligations of charter school authorizers. However, one commenter warned that the NPP's focus on how many charter schools an authorizer has closed as an indicator of accountability may be misplaced, as it could simply mean that the authorizer lacked a rigorous approval process on the front-end. This commenter called for States to create a system for assessing the quality of an authorizer's initial review of charter school applications, as part of an overall charter school authorizer review and oversight process. Another commenter recommended that the Secretary consider the extent to which States evaluate authorizers in accordance with national standards for quality authorizing. One commenter also warned against encouraging States to relax approval criteria in order to demonstrate a greater number of approvals as evidence that they do not ''inhibit increasing the number of charter schools in the State.'' Finally, one commenter claimed that charter schools are more effective and accountable when authorized by the LEA in which they operate, and urged the Secretary to clarify in the final notice that such locally authorized charter schools are preferable to charter schools authorized by organizations ''outside the K–12 system.''

Discussion: The Secretary agrees with the commenters that charter school authorizers play a key role in promoting quality and accountability throughout the charter school movement. He has cited recent, disappointing research from the Center for Research on Education Outcomes at Stanford University on charter school effectiveness in raising student achievement as ''a wake-up call'' for the charter school community, and has called on charter school authorizers to set a higher bar for approval and do a better job of holding charter schools accountable for performance.[9] Criterion (F)(2)(ii), which examines the extent to which a State has laws, statutes, regulations or guidelines on how charter authorizers approve, monitor, hold accountable, reauthorize, and close charter schools, will help the Department determine which authorizers are responding to the Secretary's call. On the other hand, given the large number of charter school authorizers—roughly half of all charter schools are authorized by individual LEAs rather than statewide chartering organizations, as well as the need for flexibility on the part of authorizers to continue to support innovation and experimentation, the Department does not believe it would be appropriate to use the Race to the Top program to

[9] ''Multiple Choice: Charter School Performance in 16 States,'' Center for Research on Education Outcomes (CREDO), Stanford University, 2009, *http://credo.stanford.edu/*.

mandate any particular new standards or oversight for charter authorizers. Similarly, the Department declines to endorse one type of authorizer over another. On the other hand, in recognition of the fact that the financial and management performance of charter schools are important factors in authorizing and renewal decisions by charter school authorizers, the Department has revised criterion (F)(2)(ii) to state that the use of student achievement is ''one significant factor, among others,'' in decision-making by charter school authorizers. And in recognition of the important role charter schools should serve in meeting the needs of all students, especially high-need students, we have added to the criterion that authorizers should find ways to ''encourage charter schools that serve student populations that are similar to local district student populations, especially relative to high-need students.''

We also are revising the minimum evidence States should submit in response to this criterion. Appendix A provides that such evidence should include, among other items, for each of the past five years: The number of charter school applications made in the State; the number of charter school applications approved; the number of charter school applications denied, and the reasons for the denials. This additional data will support an assessment of the rigor of a State's approval process. We are not, however, requiring in this final notice that this data be disaggregated by charter school authorizer, primarily because the very large number of LEA charter school authorizers in many States would make such disaggregation overly burdensome.

Changes: We have revised (F)(2)(ii) to ''require that student achievement (as defined in this notice) be one significant factor, among others'' that charter school authorizers should take into account in approving, monitoring, holding accountable, reauthorizing, and closing charter schools. We have referenced ''student achievement,'' rather than the term ''student academic achievement'' used in the NPP, to be consistent with the definition of *student achievement* included in this final notice. We have also specified that authorizers should ''encourage charter schools that serve student populations that are similar to local district student populations, especially relative to high-need students.'' Finally, we have revised Appendix A to add to the minimum evidence required for evaluating a State's performance against criterion (F)(2)(ii) the number of charter school applications made in the State in each of the past five years, the number of charter school applications approved, the number of charter school applications denied, and reasons for the denial (academic, financial, low enrollment, other).

Ensuring Charter School Quality

Comment: Several commenters recommended modifications to criterion (F)(2). One commenter warned that without a strong focus on quality, the charter school option under a restart model (referenced in criterion (E)(2)(ii) and described in detail in Appendix C) could undermine school intervention efforts by potentially creating a ''loophole'' under which a change in governance might mask the absence of substantive changes within a persistently lowest-performing school. To avoid such outcomes, these commenters recommended that the criteria in (F)(2) be revised to require the use of charter school models with a demonstrated record of effectiveness, add the specific components of successful charter schools, and reward States that had increased the number of high-quality charter schools, in particular those that serve at-risk students. Another commenter recommended an emphasis on charter schools as laboratories for the development of best practices in such areas as offering rigorous college- and career-preparation options. On the other hand, some commenters encouraged the Department to promote broader and more flexible approaches to charter school authorization, such as encouraging statewide authorizers in States that currently allow only local school boards to approve charter schools.

Discussion: The Department agrees with the overall emphasis of commenters on efforts to improve the quality of charter schools; indeed this is a key goal of criterion (F)(2). However, we believe this goal is best accomplished through strengthening State and local authorizing practices and ensuring equitable funding for charter schools, rather than by requiring the use of particular charter school models or specifying the use of certain components in newly created charter schools. If charter schools are to continue to be ''laboratories for the development of best practices,'' as proposed by one commenter, they need flexibility to innovate, not cookie-cutter patterns to follow. The Department also declines to weigh in on the debate over State versus local chartering agencies, as such issues are best determined by the authorities involved. Finally, we believe that criterion (F)(2), together with the minimum proposed evidence for this criterion, will effectively reward States that have created the conditions for increasing the number of high-performing charter schools.

Changes: None.

Charter School Autonomy

Comment: Many supporters of charter schools stressed that they must have autonomy to innovate while continuing to be exempt from State rules and regulations governing the regular public schools. Some of these commenters recommended adding a new criterion to (F)(2) on the extent to which a State ensures that its charter schools have ''a high degree of autonomy'' over budgets, programs, staffing, curriculum, use of time, and general day-to-day operations. Other commenters wrote of an ''accountability gap'' between charter schools and regular public schools, arguing that charter schools are not held to the same standards as regular public schools. One commenter recommended, for example, that criterion (F)(2)(ii) on charter school authorizers ensure that charter schools are held to the same accountability requirements as traditional public schools. Another commenter cited widespread allegations of financial mismanagement related to charter schools. One commenter also proposed collection of data on whether charter schools offer a similar range of activities as non-charter public schools, such as physical education, recess, and science courses.

Discussion: We agree that autonomy and flexibility to innovate are essential characteristics of successful charter schools. On the other hand, it is clear that this autonomy must be accompanied by strong accountability for performance, and this is what the Department is emphasizing under criterion (F)(2)(ii), which addresses the role of charter school authorizers in approving, monitoring, holding accountable, reauthorizing, and closing charter schools. One key aspect of this strong accountability for charter authorizers will be the extent to which student achievement plays a significant role in their decisions to approve, re-approve, or close charter schools. Striking the right balance between autonomy and accountability is difficult, but the Department believes that recent evidence that too many charter schools are not fulfilling their promises to raise student achievement demands a tilt toward stronger accountability; consequently the Secretary declines to add a new criterion promoting charter school autonomy. However, suggestions by commenters that the Department

examine the extent to which charter schools look and operate like regular public schools appear to miss a key purpose of the charter school movement, which is to explore whether, by operating differently from the regular public schools, charter schools can achieve better results, particularly for those high-need students who for too long have been poorly served by the regular school system.

Changes: None.

Charter School Funding

Comment: Many commenters supported criterion (F)(2)(iii) (proposed criterion (D)(2)(iii)), which examines the extent to which a State's charter schools receive (as set forth in Appendix B) equitable funding compared to traditional public schools, and a commensurate share of local, State, and Federal revenues. Other commenters recommended that the Department clarify the meaning of the term ''equitable funding'' for charter schools. Several commenters also recommended that the Department require States to report on the amount of funding provided for charter schools and charter school facilities in comparison to funding provided to traditional public schools. Other commenters opposed providing public funds, including facilities funding, to charter schools. Some commenters suggested linking funding for charter schools to student achievement, student characteristics, and the grade levels being served by those particular schools, as well as parental involvement.

Discussion: The Department appreciates the comments in support of ensuring more equitable treatment of charter schools, including the provision of equitable funding compared to traditional public schools. However, State and local funding systems, particularly as they relate to charter schools, are both complex and not always comparable, making it difficult to provide a universally applicable definition of ''equitable funding'' for charter schools or to develop and implement appropriate and reliable reporting metrics. We are making minor edits to criterion (F)(2)(iii) for the purpose of clarification, and we believe that the resulting language in the criterion, the guidance to reviewers provided in the Scoring Rubric in Appendix B, and the related minimum evidence requirements are sufficient to assess a State's progress in providing its charter schools with a commensurate share of local, State, and Federal revenues. We also do not agree with commenters who opposed public funding for charter schools. Charter schools are public schools, and should be entitled to an equitable share of local, State, and Federal education dollars like other public schools. States have developed funding systems that link funding for charter schools to student characteristics, such as poverty or disability status, but the Department is not aware of any public education system that links funding to student achievement or parental involvement, so evaluating States based on such linkages would have no impact on differentiating States for the purposes of this competition.

Changes: Criterion (F)(2)(iii) now reads, ''The State's charter schools receive (as set forth in Appendix B) equitable funding compared to traditional public schools, and a commensurate share of local, State, and Federal revenues.''

Charter School Facilities Funding

Comment: Many commenters expressed support for charter school facilities funding, which is the focus of criterion (F)(2)(iv) (proposed criterion (D)(2)(iv)). Several commenters recommended that the Department add language to this criterion to clarify that credit enhancement funds should be included when accounting for charter school facilities funding. Another commenter recommended the addition of language to criterion (F)(2)(iv) to require States to distribute facilities funding in an equitable manner. Other commenters recommended that charter schools be required to show sustainability before receiving facilities funding. One commenter suggested that the public should retain ownership interest in facilities that it finances.

Discussion: The Department understands that access to public facilities or funding for facilities is one of the major challenges confronting charter school operators, and is committed to helping charter schools secure facilities funding. However, we believe that criterion (F)(2)(iv) is sufficient to permit the Department to assess a State's commitment to and progress in supporting fair access to facilities and funding for facilities by public charter schools, including access to credit enhancement funds. As for the suggestion to add language on equitability to criterion (F)(2)(iv), it is not clear how this term would be meaningfully defined given that charter schools typically obtain access to facilities in markedly different ways than the regular public schools, which benefit from a half-century of public school construction, while charter schools may share public space, rent private space, or buy their own buildings. Determining what is ''equitable'' in these circumstances may be all but impossible. The Department does not agree with the recommendation that charter schools demonstrate sustainability before receiving facilities funding, since such a policy would represent a ''catch 22'' situation for many charter schools, which would have to demonstrate sustainability before receiving facilities funding, but often do not achieve sustainability until they have their own facilities. Finally, the issue of establishing a public ownership interest in publicly financed charter schools is a matter for State and local agencies that finance public charter schools.

Changes: None.

Comment: One commenter expressed concern that criterion (F)(2)(iv) referred to access to public facilities as an example of facilities supports States could provide to charter schools, claiming that opening up space in existing public schools to charter schools has led to overcrowding and larger class sizes.

Discussion: There is nothing in criterion (F)(2)(iv) that would require any State to adopt charter school facility access policies that lead to overcrowding and larger class sizes. The intent of this criterion is simply to ensure that States describe in their Race to the Top applications whether charter schools have equitable access to funding for facilities and to available public facilities. Local authorities would have discretion to make decisions about the feasibility of non-charter schools and charter schools sharing the same building, but this option is not required to meet criterion (F)(2)(iv).

Changes: None.

Charter School Metrics

Comment: A number of commenters proposed the collection of additional data and evidence related to the evaluation of a State's charter school policies and practices. Several commenters recommended that data collected on the number of schools closed by a State's charter school authorizers include a list of those that were closed due to academic reasons, financial issues, low enrollment, or mismanagement. Other commenters recommended that the final notice require States to provide the last five years of State charter school funding data so that the Department can examine the actual impact of State plans and statutory requirements for funding charter schools. Several commenters proposed that States provide information on the number of charter school applications over the past five

years, the number of charter schools approved and the number of students attending those schools, and reasons for the denial of other applications. One commenter also suggested that the States provide data comparing charter school performance with that of traditional public schools with similar demographic and other characteristics. Another commenter recommended requiring States to post on their web sites aggregate data comparing the ESEA improvement status of charter schools and regular public schools and to ensure that charter schools are audited in the same manner and with the same frequency as regular public schools.

Discussion: The NPP proposed the collection of the following minimum evidence related to criterion (F)(2) (proposed criterion (D)(2)): (1) A description of the State's charter school laws and a link or citation to the relevant statutory or regulatory sections; (2) the number and types of charter schools currently operating in the State; (3) a description of the State's approach to charter school accountability and authorization, and a copy of the State's applicable statutes, regulations, or other relevant documents; (4) the charter schools authorizers' historic performance on accountability, as evidenced by the number of charter schools closed or not renewed annually over the last five years, the reasons for each of these closures; (5) a copy of the State's applicable statutes, regulations, or other relevant legal documents with respect to equitable funding and facilities funding; (6) a description of the State's approach to charter school funding, the amount of funding passed through to charter schools per student and how these amounts compare with traditional per-student funding allocations; and (7) a description of the statewide facilities supports provided to charter schools, if any. The Department understands the desire of commenters for more and different types of data on charter schools, but is concerned about striking the right balance between collecting the data essential for evaluating Race to the Top applications and avoiding additional or duplicative burdens on States, charter school authorizers, charter schools, and LEAs. For example, charter school demographic and performance data, including AYP and identification for ESEA school improvement, generally are available from States and LEAs, but are not directly relevant to assessing a State's record in increasing the number of high-performing charter schools. Collecting actual funding data would be burdensome and, once collected, potentially difficult to analyze, particularly since about half of charter schools are authorized at the LEA and not the State level. The Department does believe, however, that additional, more detailed information on the charter school application process would be useful in measuring a State's performance under criterion (F)(2) without imposing significant additional burden on States and charter authorizers. For this reason, the final notice retains the required evidence set forth in the NPP and adds to the required evidence the number of charter applications received in each of the past five years, the number of applications approved and denied, and the reasons for denial.

Changes: We have revised Appendix A to add to the minimum evidence required for evaluating a State's performance against criterion (F)(2)(ii) the number of charter school applications made in the State in each of the past five years, the number of charter school applications approved, the number of charter school applications denied, and reasons for the denial (academic, financial, low enrollment, other).

Flexibility To Adopt Other Innovative Models

Comment: Many commenters recommended that the final Race to the Top priorities and requirements include flexibility for States to meet the State Reform Conditions in proposed criterion (D)(2) (new criterion (F)(2)) by describing other innovative school and governance reforms outside the charter school model that they have implemented in recent years. Several commenters provided examples of such non-charter models of innovation and reform, including magnet schools, schools within schools, and academies, and one commenter suggested simply substituting ''model innovative schools'' for ''charter schools'' in the criterion. One commenter recommended that the final notice permit States and LEAs to propose their own innovative school intervention models and strategies, supported by ''theoretical and research-based justification'' and an evaluation plan. Finally, one commenter urged a greater emphasis on LEAs, rather than individual schools, as the ''unit of change'' in turnaround efforts.

Discussion: The Department agrees that States applying for a Race to the Top grant should receive credit for enabling LEAs to operate innovative, autonomous public schools other than charter schools. Accordingly, we have added new criterion (F)(2)(v) and a related definition of *innovative, autonomous public schools.* This change also recognizes the important role of LEAs as incubators of new approaches to turning around low-achieving schools. In addition, two other criteria in section (F) provide an opportunity for States to explain how they have (a) created conditions favorable to education reform or innovation not described under other State Reform Conditions Criteria that have improved student outcomes, or (b) have plans or are implementing plans for significant reforms not described under other State Reform Plan Criteria that are expected to contribute to improving important student outcomes.

Changes: New criterion (F)(2)(v) gives a State credit for the extent to which it ''enables LEAs to operate innovative, autonomous public schools other than charter schools.'' Criterion (F)(3) (proposed criterion (E)(1)(iii), Demonstrating Other Significant Reform Conditions, will measure the extent to which a State, in addition to information provided under other State Reform Conditions Criteria, has created through law, regulation, or policy, other conditions favorable to education reform or innovation that have increased student achievement or graduation rates, narrowed achievement gaps, or resulted in other important outcomes.

Charter School Demographics

Comment: Several commenters claimed that charter schools do not serve as many high-need students as traditional public schools. In particular, some commenters stated that charter schools enroll few students with disabilities or English language learners and recommended that charter schools be required to accept and serve all students. Another commenter proposed language specifically requiring charter school laws to ensure equitable access for poor and minority students, students with disabilities, and English language learners. One commenter asserted that charter schools in one State ''are selectively resegregating schools based on language, special education, and poverty status and thus undercutting the equity and access guaranteed by civil rights and school adequacy legislation.'' In response to similar concerns, another commenter proposed that the final notice require charter school applications to include specific plans for educating students with disabilities, while another recommended a requirement for charter schools to ''take affirmative constitutional steps to become racially and economically integrated.'' Two commenters called for a new criterion within (F)(2) that would

measure the extent to which a State collects data on the student populations served by its charter schools, including students with disabilities, English language learners, and students from low-income families, as well as the extent to which the student populations overall in charter schools are comparable to those in non-charter schools.

Discussion: We agree that charter schools should be encouraged to serve student populations that are similar to local district student populations, especially relative to high-need students, and we are revising criterion (F)(2)(ii) to reflect this. We also note that, at least at the national level, the available data suggest that charter schools do serve as many high-need students as regular public schools. For example, the latest data from the Department's Schools and Staffing Survey show that in the 2007–2008 school year, 35.6 percent of charter school students received Title I services, compared to 29.1 percent of students in traditional public schools; the percentage of students with Individualized Education Programs in charter schools and traditional public schools was about the same at roughly 12 percent; and the percentage of English language learners served by charter schools exceeded the percentage of such students served by traditional public schools, 16.5 percent to 11.2 percent. Regarding the suggestion for further data collections, we note that the latter data, at least for established charter schools, are readily available through the Common Core of Data collected and maintained by the Department's National Center for Education Statistics.

Changes: Criterion (F)(2)(ii) now specifies that authorizers should find ways to ''encourage charter schools that serve student populations that are similar to local district student populations, especially relative to high-need students.''

Re-Engaging High School Dropouts

Comment: Three commenters recommended that the final notice include in (F)(2) a criterion focused on the extent to which a State encourages the development of charter schools that re-enroll high school dropouts, including the extent to which the State supports the provision of credit to such students based on performance rather than instructional time, efforts to promote on-time graduation, and early access to college coursework.

Discussion: The Department agrees that the Race to the Top criteria should encourage the development and implementation of strategies to re-engage students at risk of dropping out of high school and to re-enroll students who already have left school. However, we believe that such strategies would have the greatest impact as part of the Race to the Top competition if they are incorporated into school intervention models rather than limited to new charter schools. For example, as described in the responses to comments under section (E), Turning Around the Lowest-Achieving Schools, the transformation model adopted from the School Improvement Grants program includes several activities aimed at re-engaging high school dropouts, such as credit-recovery programs, re-engagement strategies, and performance-based assessments. In addition, the transformation model may include opportunities to enroll in advanced coursework, early-college high schools, and dual-enrollment programs.

Changes: None.

Non-LEA Charter Schools

Comment: One commenter expressed concern that non-LEA charter schools could be excluded from Race to the Top activities if their LEAs choose not to participate in the program. This commenter recommended that a State's Race to the Top application should include the participation and endorsement of its public charter schools regardless of their status as LEAs, and that non-LEA charter schools should be eligible for participation in Race to the Top activities and funding even if their LEA declines to participate.

Discussion: The Department understands the commenter's concern that the structural limitations of non-LEA charter schools may affect their ability to participate in the Race to the Top program if their LEAs elect not to participate in the program. To help provide a voice for these charter schools, criterion (A)(2)(ii)(b) adds State charter school membership associations to the list of stakeholders from which States are encouraged to obtain statements or actions of support in order to demonstrate statewide support for their Race to the Top plans. Also, States have discretion to use their share of Race to the Top grant funds (*i.e.,* the 50 percent of a State's award that is not allocated to participating LEAs according to relative shares of ESEA Title I, Part A formula allocations) to support Race to the Top activities in non-LEA charter schools, as well as any other public schools in participating and non-participating LEAs.

Changes: We have added State charter school membership organizations to the list of stakeholders in criterion (A)(2)(ii)(b) from which States can obtain statements or actions of support in order to demonstrate statewide support for their Race to the Top plans.

Charter Schools and Teacher Shortages

Comment: One commenter recommended that the final notice include provisions designed to help traditional public schools in areas with persistent teacher shortages to replace staff lost to area charter schools.

Discussion: The Department acknowledges that charter schools compete with existing regular public schools for students, teachers, staff, and other resources in the communities in which they operate. We also recognize that such resources may be in short supply in smaller communities and towns, particularly in isolated rural areas. However, dynamic charter schools can also attract new teachers and principals to the community or even the profession, and so we should not assume that any charter school gain is a loss for traditional public schools.

Changes: None.

Collective Bargaining

Comment: One commenter recommended the addition of language in criterion (F)(2) on the extent to which a State can show that it has not imposed barriers to the unionization of charter school employees.

Discussion: Criterion (F)(2) was intended to help assess, for the purpose of determining Race to the Top awards, the extent to which a State has removed barriers to the creation and expansion of high-performing charter schools. Because the Department believes that many high-performing charter schools have non-unionized employees, it does not believe that a State law or regulation that prohibits the unionization of charter school employees constitutes a barrier to the creation and expansion of high-performing charter schools. Accordingly, the Department declines to address this issue in this final notice.

Changes: None.

IV. Definitions

Proposed New Definitions

Comment: Commenters recommended adding a number of definitions for this program, including definitions for applied learning opportunities, college and career ready standards, chronic absenteeism, community, community engagement, community partners, comprehensive learning supports, conditions for learning, enrichment, family engagement, open educational resources, response to intervention, schools as the center of community,

stakeholder, student, student mobility, teacher, and universal design, as well as other specific terms related to Race to the Top requirements and criteria.

Discussion: As we discuss in other sections of this notice, we have added a number of definitions in response to comments, but we are not adding definitions for the terms suggested by these commenters. In some cases, we thought that defining some of the terms mentioned by the commenters could hinder the kind of innovation and fresh thinking that Race to the Top is intended to encourage and we did not wish to constrain the activities that might be promoted or supported by the Race to the Top program. In other cases, particularly where there is uncertainty or conflicting views on the meaning of terms, we were reluctant to make any decisions absent a more thorough consideration of the issues involved than has been provided through the public comment process on the Race to the Top program. The forthcoming reauthorization of the ESEA, for example, would be a more appropriate vehicle for defining many of the proposed terms that could have broad implications for a range of Federal education programs. Finally, in some cases, adding a definition was not essential for successful administration of the Race to the Top program.

Changes: None.

Final Definitions

Alternative routes to certification: See Section D, Great Teachers and Leaders, for the discussion of comments related to this definition.

College enrollment: This is a definition that has been added in response to comments. See Section A, State Success Factors, for the discussion.

Common set of K–12 standards: See Section B, Standards and Assessments, for the discussion of comments related to this definition.

Effective principal: See Section D, Great Teachers and Leaders, for the discussion of comments related to this definition.

Effective teacher: See Section D, Great Teachers and Leaders, for the discussion of comments related to this definition.

Formative Assessment

Comment: Commenters recommended several changes to the proposed definition of *formative assessment.* One commenter noted that formative assessments use a variety of strategies to provide timely feedback to teachers and students, but that not all formative assessments necessarily provide the ''instant'' feedback that is included in the proposed definition. Commenters suggested revising the definition to avoid excluding appropriate classroom practices that function as formative assessments. Other commenters recommended that the definition be changed to require that formative assessments adhere to the principles of universal design to ensure accessibility for all students; be designed to address a specific set of academic standards; and be integrated in comprehensive improvement plans. Other commenters recommended that the definition state that formative assessments may be developed by a test vendor or an LEA.

Discussion: The Department agrees with the commenter that ''instant'' feedback is not the goal of formative assessments; rather the goal is to provide feedback in a timely enough fashion for the information to be used to adjust instruction and to improve learning. Accordingly, we are changing ''instant feedback'' to ''timely feedback.'' We also agree that the definition of formative assessment should be appropriately broad and flexible to accommodate a variety of classroom practices; we are therefore changing the definition to refer to ''assessment questions, tools, and processes,'' rather than just ''processes.'' We decline to change the definition in the manner recommended by the other commenters because doing so would unnecessarily narrow the definition of a *formative assessment.*

Changes: We have changed the phrase ''formative assessment means an assessment process'' to ''formative assessment means assessment questions, tools, and processes.'' We also have changed the phrase ''to provide instant feedback on student understanding and to adjust ongoing teaching and learning accordingly'' to ''provide timely feedback for purposes of adjusting instruction to improve learning.''

Graduation Rate

Comment: Some commenters supported the proposed definition of *graduation rate,* noting that it is the same definition published by the Department in the Title I regulations the Department issued in October 2008. However, others suggested changes to the definition. One commenter called for the definition to include dropouts who re-enroll in high school and take longer than four years to graduate. Another commenter asked whether students who graduate from high school in five or six years would be included and urged the Department to give incentives to LEAs that re-enroll dropouts. Another commenter said the definition should take into account that students with disabilities served under the IDEA may remain in school until age 21. Finally, one commenter recommended including GED recipients in the definition, as well as students who need more than four years to graduate from high school, such as English language learners and other ''high risk'' students.

Discussion: The commenters are correct in noting that the *graduation rate* definition in the NPP was based on the definition in 34 CFR 200.19(b)(1), which was published as a final rule on October 29, 2008. In the NPP and this notice, graduation rate is defined as the four-year or extended-year adjusted cohort graduation rate. An extended-year adjusted cohort rate includes students who take more than four years to graduate and would include students who drop out of school and re-enroll, English language learners, students with disabilities, and other students who need more than four years to graduate with a regular high school diploma. We realize that the definition of *graduation rate* in the NPP could have been stated more clearly and we are, therefore, simplifying the definition in this notice to mean ''the four-year or extended-year adjusted cohort graduation rate as defined by 34 CFR 200.19(b)(1).'' Note, however, that the definition does not include GED recipients because a GED is not a regular high school diploma. Alternative credentials such as the GED are not aligned with a State's academic content standards and, if included in the definition of *graduation rate,* would provide a misleading account of the percentage of students who graduate with a diploma that reflects what a State determines all students should know and be able to do by the end of the 12th grade.

Changes: We have changed the language in the definition of *graduation rate* to clarify that *graduation rate* means ''the four-year or extended-year adjusted cohort graduation rate as defined by 34 CFR 200.19(b)(1).''

Highly effective principal: See Section D, Great Teachers and Leaders, for the discussion of comments related to this definition.

Highly effective teacher: See Section D, Great Teachers and Leaders, for the discussion of comments related to this definition.

High-minority school: This is a definition that has been added in response to comments. See Section D, Great Teachers and Leaders, for the discussion.

High-Need LEA

Comment: A few commenters noted that the definition of *high-need LEA* in

the NPP was inconsistent with the definition in section 14013 of the ARRA.

Discussion: We acknowledge this error and are replacing the proposed definition of *high-need LEA* with the definition in section 14013 of the ARRA.

Changes: We have replaced the proposed definition of high-need LEA with the following definition from section 14013 of the ARRA: ''an LEA (a) that serves not fewer than 10,000 children from families with incomes below the poverty line; or (b) for which not less than 20 percent of the children served by the LEA are from families with incomes below the poverty line.''

High-Need Students

Comment: Several commenters requested that the final notice include a definition of *high-need students.* A few commenters recommended that the definition of *high-need students* include students who have left school prematurely and students who are over age and under credited for on-time graduation. Another commenter recommended the definition include students who drop out of school and later re-enroll in school. A few commenters focused on the needs of struggling students who are off-track to graduate and at risk of dropping out, including students that need to balance school and work.

Discussion: We agree that we should define *high-need students* and are including in the definition references to students who are far below grade level, students who left school before receiving a regular high school diploma, and students at risk of not graduating with a diploma on time, among others.

Changes: We have added the following in the Definition section of the final notice: ''*High-need students* means students at risk of educational failure or otherwise in need of special assistance and support, such as students who are living in poverty, who attend high minority schools (as defined in this notice), who are far below grade level, who have left school before receiving a regular high school diploma, who are at risk of not graduating with a diploma on time, who are homeless, who are in foster care, who have been incarcerated, who have disabilities, or who are English language learners.''

High-performing charter school: This is a definition that has been added in response to comments. See Section F, General, for the discussion.

High-poverty school: See Section D, Great Teachers and Leaders, for the discussion of comments related to this definition.

High-quality assessment: See Section B, Standards and Assessments, for the discussion of comments related to this definition.

Increased learning time: This is a definition that has been added in response to comments. See Section E, Turning Around the Lowest-Achieving Schools, for the discussion.

Innovative, autonomous public schools: This is a definition that has been added in response to comments. See Section F, General, for the discussion.

Instructional improvement systems: See Section C, Data Systems to Support Instruction, for the discussion of comments related to this definition.

Interim Assessment

Comment: A few commenters suggested that the definition of *interim assessment* be amended to include the use of universal design principles.

Discussion: Because interim assessments are often created by teachers for their own use in the classroom, the Department believes that requiring that interim assessments use universal design principles would place too onerous a burden on teachers, who may not have the expertise to create assessments using universal design principles. However, the Department is in no way discouraging the use of universal design principles in interim or any other assessments.

Changes: None.

Involved LEAs: This is a definition that has been added in response to comments. See Section A, State Success Factors, for the discussion.

Low-minority school: This is a definition that has been added in response to comments. See Section D, Great Teachers and Leaders, for the discussion.

Low-poverty school: This is a definition that has been added in response to comments. See Section D, Great Teachers and Leaders, for the discussion.

Participating LEAs: This is a definition that has been added in response to comments. See Section A, State Success Factors, for the discussion.

Persistently lowest-achieving schools: See Section E, Turning Around the Lowest-Achieving Schools, for the discussion of comments related to this definition.

Rapid-Time

Comments: Commenters recommended that we reconsider or remove the statement in the definition of *rapid-time* that assessment data should be returned in 72 hours, citing the fact that current statewide longitudinal data systems do not allow for data to be processed this quickly. Commenters noted that the scoring processes for different types of items that could be included in formative, summative, and interim assessments and the means by which the assessment is administered (*e.g.,* online or on paper) could affect the timeline for returning data. One commenter suggested that States be allowed to create their own definitions of *rapid-time* and that the Department evaluate these definitions during its review of Race to the Top applications. Another commenter recommended defining *rapid-time* based on whether or not the data could be used to inform current instruction.

Discussion: The Department agrees with commenters that specifying the amount of time for returning assessment data should be removed from the definition of *rapid time.* We also are clarifying the definition of *rapid-time* by including a specific reference to locally-collected assessment data, as *rapid-time* data are specifically used to inform classroom-level decisions and thus consist primarily of data that are collected locally. Removing the concept that assessment data should be returned within 72 hours and clarifying that rapid time refers to locally-collected data address commenters' concerns regarding the potential negative impact the proposed definition could have had on the types of assessments and item types used on these assessments.

Changes: The Department has revised the definition of rapid-time to read as follows: ''*Rapid-time,* in reference to reporting and availability of locally-collected school- and LEA-level data, means that data are available quickly enough to inform current lessons, instruction, and related supports.''

Student Achievement

Comment: The Department received a very large number of comments on the proposed definition of *student achievement,* which used, as a basis, a student's scores on State assessments in reading/language arts, mathematics, and science required by section 1111(b)(3) of the ESEA. A majority of these comments focused on the language in the NPP regarding the definition of student achievement for non-tested grades and subjects, which referred to alternative measures of student performance such as student performance on interim assessments and the percentage of students enrolled in Advanced Placement courses who take Advanced Placement exams. These commenters suggested that such alternative measures also should include statewide

assessments whenever possible, the use of college or career-readiness tests, performance-based assessments, portfolio assessments, course completion rates, and career and technical education measures. Also, many commenters opposed the use of IEP goals as an example of an alternative student achievement measure. Other commenters recommended supplementing scores on ESEA assessments with multiple, alternative measures of student performance for all students, including specific suggestions such as attendance, on-time promotion rates, college enrollment and completion rates, and other State-proposed indicators.

Discussion: In reviewing these comments, it became clear that there were several components of the definition of *student achievement* that were unnecessarily confusing. First, the use of the phrase ''at a minimum,'' which we believed, for tested grades and subjects, provided States with the flexibility to supplement ESEA assessment results with a wide range of other measures of student achievement and performance, confused some commenters. To avoid further confusion we are revising the definition to remove the phrase ''at a minimum,'' and adding, for tested grades and subjects, the phrase, ''other measures of student learning, such as those described in paragraph (b) of this definition, provided they are rigorous and comparable across classrooms.'' As for alternative measures in non-tested grades, we note that the alternatives included in the proposed definition of *student achievement* were examples only; however, we agree with the many commenters who reminded us that IEPs are individualized and that IEP goals often include student needs that are not based on academic content. For these reasons, it is not appropriate to evaluate student achievement based on IEP goals, and we are removing IEPs from the list of possible alternative measures. We also are modifying the other examples of potential alternative measures of student performance for non-tested grades and subjects. Again, we note that these alternative measures are examples only, and States, LEAs, and schools have great latitude to use their own rigorous alternative measures of student achievement and performance in implementing their Race to the Top plans.

Changes: The definition of *student achievement* has been revised to read as follows: *Student achievement* means—

(a) For tested grades and subjects: (1) a student's score on the State's assessments under the ESEA; and, as appropriate, (2) other measures of student learning, such as those described in paragraph (b) of this definition, provided they are rigorous and comparable across classrooms.

(b) For non-tested grades and subjects: alternative measures of student learning and performance such as student scores on pre-tests and end-of-course tests; student performance on English language proficiency assessments; and other measures of student achievement that are rigorous and comparable across classrooms.

Student growth: See Section D, Great Teachers and Leaders, for the discussion of comments related to this definition.

Total Revenues available to the State: See Section F, General, for the discussion of comments related to this definition.

America COMPETES Act elements: See Section C, Data Systems to Support Instruction, for the discussion of comments related to this definition.

Final Priorities

When inviting applications for a competition using one or more priorities, we designate the type of each priority as absolute, competitive preference, or invitational through a notice in the **Federal Register**. The Secretary establishes the following priorities for this competition:

Absolute priority: Under an absolute priority, we consider only applications that meet the priority (34 CFR 75.105(c)(3)).

Competitive preference priority: Under 34 CFR 75.105(c)(2)(i), we give competitive preference to an application by awarding additional points to applications that meet this priority or selecting an application that meets the priority over an application of comparable merit that does not meet the priority.

Invitational priority: Under an invitational priority, we are particularly interested in applications that meet the priority. However, we do not give an application that meets the priority a preference over other applications (34 CFR 75.105(c)(1)).

Priorities

Priority 1: Absolute Priority—Comprehensive Approach to Education Reform

To meet this priority, the State's application must comprehensively and coherently address all of the four education reform areas specified in the ARRA as well as the State Success Factors Criteria in order to demonstrate that the State and its participating LEAs are taking a systemic approach to education reform. The State must demonstrate in its application sufficient LEA participation and commitment to successfully implement and achieve the goals in its plans; and it must describe how the State, in collaboration with its participating LEAs, will use Race to the Top and other funds to increase student achievement, decrease the achievement gaps across student subgroups, and increase the rates at which students graduate from high school prepared for college and careers.

Priority 2: Competitive Preference Priority—Emphasis on Science, Technology, Engineering, and Mathematics (STEM)

To meet this priority, the State's application must have a high-quality plan to address the need to (i) offer a rigorous course of study in mathematics, the sciences, technology, and engineering; (ii) cooperate with industry experts, museums, universities, research centers, or other STEM-capable community partners to prepare and assist teachers in integrating STEM content across grades and disciplines, in promoting effective and relevant instruction, and in offering applied learning opportunities for students; and (iii) prepare more students for advanced study and careers in the sciences, technology, engineering, and mathematics, including by addressing the needs of underrepresented groups and of women and girls in the areas of science, technology, engineering, and mathematics.

Priority 3: Invitational Priority—Innovations for Improving Early Learning Outcomes

The Secretary is particularly interested in applications that include practices, strategies, or programs to improve educational outcomes for high-need students who are young children (pre-kindergarten through third grade) by enhancing the quality of preschool programs. Of particular interest are proposals that support practices that (i) improve school readiness (including social, emotional, and cognitive); and (ii) improve the transition between preschool and kindergarten.

Priority 4: Invitational Priority—Expansion and Adaptation of Statewide Longitudinal Data Systems

The Secretary is particularly interested in applications in which the State plans to expand statewide longitudinal data systems to include or integrate data from special education programs, English language learner

programs,[10] early childhood programs, at-risk and dropout prevention programs, and school climate and culture programs, as well as information on student mobility, human resources (*i.e.,* information on teachers, principals, and other staff), school finance, student health, postsecondary education, and other relevant areas, with the purpose of connecting and coordinating all parts of the system to allow important questions related to policy, practice, or overall effectiveness to be asked, answered, and incorporated into effective continuous improvement practices.

The Secretary is also particularly interested in applications in which States propose working together to adapt one State's statewide longitudinal data system so that it may be used, in whole or in part, by one or more other States, rather than having each State build or continue building such systems independently.

Priority 5: Invitational Priority—P–20 Coordination, Vertical and Horizontal Alignment

The Secretary is particularly interested in applications in which the State plans to address how early childhood programs, K–12 schools, postsecondary institutions, workforce development organizations, and other State agencies and community partners (*e.g.,* child welfare, juvenile justice, and criminal justice agencies) will coordinate to improve all parts of the education system and create a more seamless preschool-through-graduate school (P–20) route for students. Vertical alignment across P–20 is particularly critical at each point where a transition occurs (*e.g.,* between early childhood and K–12, or between K–12 and postsecondary/careers) to ensure that students exiting one level are prepared for success, without remediation, in the next. Horizontal alignment, that is, coordination of services across schools, State agencies, and community partners, is also important in ensuring that high-need students (as defined in this notice) have access to the broad array of opportunities and services they need and that are beyond the capacity of a school itself to provide.

Priority 6: Invitational Priority—School-Level Conditions for Reform, Innovation, and Learning

The Secretary is particularly interested in applications in which the State's participating LEAs (as defined in this notice) seek to create the conditions for reform and innovation as well as the conditions for learning by providing schools with flexibility and autonomy in such areas as—

(i) Selecting staff;

(ii) Implementing new structures and formats for the school day or year that result in increased learning time (as defined in this notice);

(iii) Controlling the school's budget;

(iv) Awarding credit to students based on student performance instead of instructional time;

(v) Providing comprehensive services to high-need students (as defined in this notice) (*e.g.,* by mentors and other caring adults; through local partnerships with community-based organizations, nonprofit organizations, and other providers);

(vi) Creating school climates and cultures that remove obstacles to, and actively support, student engagement and achievement; and

(vii) Implementing strategies to effectively engage families and communities in supporting the academic success of their students.

Final Requirements

The Secretary establishes the following requirements for this program.

Eligibility Requirements

A State must meet the following requirements in order to be eligible to receive funds under this program.

(a) The State's applications for funding under Phase 1 and Phase 2 of the State Fiscal Stabilization Fund program must be approved by the Department prior to the State being awarded a Race to the Top grant.

(b) At the time the State submits its application, there must not be any legal, statutory, or regulatory barriers at the State level to linking data on student achievement (as defined in this notice) or student growth (as defined in this notice) to teachers and principals for the purpose of teacher and principal evaluation.

Application Requirements

(a) The State's application must be signed by the Governor, the State's chief school officer, and the president of the State board of education (if applicable). States will respond to this requirement in the application, Section III, Race to the Top Application Assurances. In addition, the assurances in Section IV must be signed by the Governor.

(b) The State must describe the progress it has made over the past several years in each of the four education reform areas (as described in criterion (A)(3)(i)).

(c) The State must include a budget that details how it will use grant funds and other resources to meet targets and perform related functions (as described in criterion (A)(2)(i)(d)), including how it will use funds awarded under this program to—

(1) Achieve its targets for improving student achievement and graduation rates and for closing achievement gaps (as described in criterion (A)(1)(iii)); the State must also describe its track record of improving student progress overall and by student subgroup (as described in criterion (A)(3)(ii)); and

(2) Give priority to high-need LEAs (as defined in this notice), in addition to providing 50 percent of the grant to participating LEAs (as defined in this notice) based on their relative shares of funding under Part A of Title I of the ESEA for the most recent year as required under section 14006(c) of the ARRA. (**Note:** Because all Race to the Top grants will be made in 2010, relative shares will be based on total funding received in FY 2009, including both the regular Title I, Part A appropriation and the amount made available by the ARRA).

(d) The State must provide, for each State Reform Conditions Criterion (listed in this notice) that it chooses to address, a description of the State's current status in meeting that criterion and, at a minimum, the information requested as supporting evidence for the criterion and the performance measures, if any (see Appendix A).

(e) The State must provide, for each Reform Plan Criterion (listed in this notice) that it chooses to address, a detailed plan for use of grant funds that includes, but need not be limited to—

(1) The key goals;

(2) The key activities to be undertaken and rationale for the activities, which should include why the specific activities are thought to bring about the change envisioned and how these activities are linked to the key goals;

(3) The timeline for implementing the activities;

(4) The party or parties responsible for implementing the activities;

(5) The information requested in the performance measures, where applicable (see Appendix A), and where the State proposes plans for reform efforts not covered by a specified performance measure, the State is encouraged to propose performance measures and annual targets for those efforts; and

(6) The information requested as supporting evidence, if any, for the criterion, together with any additional information the State believes will be

[10] The term English language learner, as used in this notice, is synonymous with the term limited English proficient, as defined in section 9101 of the ESEA.

helpful to peer reviewers in judging the credibility of the State's plan.

(f) The State must submit a certification from the State Attorney General that—

(1) The State's description of, and statements and conclusions concerning State law, statute, and regulation in its application are complete, accurate, and constitute a reasonable interpretation of State law, statute, and regulation; and

(2) At the time the State submits its application, the State does not have any legal, statutory, or regulatory barriers at the State level to linking data on student achievement or student growth to teachers and principals for the purpose of teacher and principal evaluation.

(g) When addressing issues relating to assessments required under the ESEA or subgroups in the selection criteria, the State must meet the following requirements:

(1) For student subgroups with respect to the NAEP, the State must provide data for the NAEP subgroups described in section 303(b)(2)(G) of the National Assessment of Educational Progress Authorization Act (20 U.S.C. 9622) (*i.e.*, race, ethnicity, socioeconomic status, gender, disability, and limited English proficiency). The State must also include the NAEP exclusion rate for students with disabilities and the exclusion rate for English language learners, along with clear documentation of the State's policies and practices for determining whether a student with a disability or an English language learner should participate in the NAEP and whether the student needs accommodations;

(2) For student subgroups with respect to high school graduation rates, college enrollment and credit accumulation rates, and the assessments required under the ESEA, the State must provide data for the subgroups described in section 1111(b)(2)(C)(v)(II) of the ESEA (*i.e.*, economically disadvantaged students, students from major racial and ethnic groups, students with disabilities, and students with limited English proficiency); and

(3) When asked to provide information regarding the assessments required under the ESEA, States should refer to section 1111(b)(3) of the ESEA; in addition, when describing this assessment data in the State's application, the State should note any factors (*e.g.*, changes in cut scores) that would impact the comparability of data from one year to the next.

Reporting Requirements

A State receiving Race to the Top funds must submit to the Department an annual report which must include, in addition to the standard elements, a description of the State's and its LEAs' progress to date on their goals, timelines, and budgets, as well as actual performance compared to the annual targets the State established in its application with respect to each performance measure. Further, a State receiving funds under this program and its participating LEAs are accountable for meeting the goals, timelines, budget, and annual targets established in the application; adhering to an annual fund drawdown schedule that is tied to meeting these goals, timelines, budget, and annual targets; and fulfilling and maintaining all other conditions for the conduct of the project. The Department will monitor a State's and its participating LEAs' progress in meeting the State's goals, timelines, budget, and annual targets and in fulfilling other applicable requirements. In addition, the Department may collect additional data as part of a State's annual reporting requirements.

To support a collaborative process between the State and the Department, the Department may require that applicants who are selected to receive an award enter into a written performance or cooperative agreement with the Department. If the Department determines that a State is not meeting its goals, timelines, budget, or annual targets or is not fulfilling other applicable requirements, the Department will take appropriate action, which could include a collaborative process between the Department and the State, or enforcement measures with respect to this grant, such as placing the State in high-risk status, putting the State on reimbursement payment status, or delaying or withholding funds.

A State that receives Race to the Top funds must also meet the reporting requirements that apply to all ARRA-funded programs. Specifically, the State must submit reports, within 10 days after the end of each calendar quarter, that contain the information required under section 1512(c) of the ARRA in accordance with any guidance issued by the Office of Management and Budget or the Department (ARRA Division A, Section 1512(c)).

In addition, for each year of the program, the State will submit a report to the Secretary, at such time and in such manner as the Secretary may require, that describes:

○ The uses of funds within the State;

○ how the State distributed the funds it received;

○ the number of jobs that the Governor estimates were saved or created with the funds;

○ the State's progress in reducing inequities in the distribution of highly qualified teachers, implementing a State longitudinal data system, and developing and implementing valid and reliable assessments for English language learners and students with disabilities; and

○ if applicable, a description of each modernization, renovation, or repair project approved in the State application and funded, including the amounts awarded and project costs (ARRA Division A, Section 14008).

Program Requirements

Evaluation: The Institute of Education Sciences (IES) will conduct a series of national evaluations of Race to the Top's State grantees as part of its evaluation of programs funded under the ARRA. The Department's goal for these evaluations is to ensure that its studies not only assess program impacts, but also provide valuable information to State and local educators to help inform and improve their practices.

The Department anticipates that the national evaluations will involve such components as—

• Surveys of States, LEAs, and/or schools, which will help identify how program funding is spent and the specific efforts and activities that are underway within each of the four education reform areas and across selected ARRA-funded programs;

• Case studies of promising practices in States, LEAs, and/or schools through surveys and other mechanisms; and

• Evaluations of outcomes, focusing on student achievement and other performance measures, to determine the impact of the reforms implemented under Race to the Top.

Race to the Top grantee States are not required to conduct independent evaluations, but may propose, within their applications, to use funds from Race to the Top to support such evaluations. Grantees must make available, through formal (*e.g.*, peer-reviewed journals) or informal (*e.g.*, newsletters, Web sites) mechanisms, the results of any evaluations they conduct of their funded activities. In addition, as described elsewhere in this notice and regardless of the final components of the national evaluation, Race to the Top States, LEAs, and schools are expected to identify and share promising practices, make work available within and across States, and make data available in appropriate ways to stakeholders and researchers so as to help all States focus on continuous improvement in service of student outcomes.

Participating LEA Scope of Work: The agreements signed by participating LEAs (as defined in this notice) must include a scope-of-work section. The scope of work submitted by LEAs and States as part of their Race to the Top applications will be preliminary. Preliminary scopes of work should include the portions of the State's proposed reform plans that the LEA is agreeing to implement. If a State is awarded a Race to the Top grant, its participating LEAs (as defined in this notice) will have up to 90 days to complete final scopes of work, which must contain detailed work plans that are consistent with their preliminary scopes of work and with the State's grant application, and should include the participating LEAs' specific goals, activities, timelines, budgets, key personnel, and annual targets for key performance measures.

Making Work Available: Unless otherwise protected by law or agreement as proprietary information, the State and its subgrantees must make any work (*e.g.*, materials, tools, processes, systems) developed under its grant freely available to others, including but not limited to by posting the work on a Web site identified or sponsored by the Department.

Technical Assistance: The State must participate in applicable technical assistance activities that may be conducted by the Department or its designees.

State Summative Assessments: No funds awarded under this competition may be used to pay for costs related to statewide summative assessments.

Final Selection Criteria

The Secretary establishes the following criteria for reviewing applications submitted under this program. In the Scoring Rubric, in Appendix B, the Secretary establishes the maximum number of points assigned to each criterion.

A. State Success Factors

(A)(1) *Articulating State's education reform agenda and LEAs' participation in it:* The extent to which—

(i) The State has set forth a comprehensive and coherent reform agenda that clearly articulates its goals for implementing reforms in the four education areas described in the ARRA and improving student outcomes statewide, establishes a clear and credible path to achieving these goals, and is consistent with the specific reform plans that the State has proposed throughout its application;

(ii) The participating LEAs (as defined in this notice) are strongly committed to the State's plans and to effective implementation of reform in the four education areas, as evidenced by Memoranda of Understanding (MOUs) (as set forth in Appendix D) [11] or other binding agreements between the State and its participating LEAs (as defined in this notice) that include—

(a) Terms and conditions that reflect strong commitment by the participating LEAs (as defined in this notice) to the State's plans;

(b) Scope-of-work descriptions that require participating LEAs (as defined in this notice) to implement all or significant portions of the State's Race to the Top plans; and

(c) Signatures from as many as possible of the LEA superintendent (or equivalent), the president of the local school board (or equivalent, if applicable), and the local teachers' union leader (if applicable) (one signature of which must be from an authorized LEA representative) demonstrating the extent of leadership support within participating LEAs (as defined in this notice); and

(iii) The LEAs that are participating in the State's Race to the Top plans (including considerations of the numbers and percentages of participating LEAs, schools, K–12 students, and students in poverty) will translate into broad statewide impact, allowing the State to reach its ambitious yet achievable goals, overall and by student subgroup, for—

(a) Increasing student achievement in (at a minimum) reading/language arts and mathematics, as reported by the NAEP and the assessments required under the ESEA;

(b) Decreasing achievement gaps between subgroups in reading/language arts and mathematics, as reported by the NAEP and the assessments required under the ESEA;

(c) Increasing high school graduation rates (as defined in this notice); and

(d) Increasing college enrollment (as defined in this notice) and increasing the number of students who complete at least a year's worth of college credit that is applicable to a degree within two years of enrollment in an institution of higher education.

(A)(2) *Building strong statewide capacity to implement, scale up, and sustain proposed plans:* The extent to which the State has a high-quality overall plan to—

(i) Ensure that it has the capacity required to implement its proposed plans by—

(a) Providing strong leadership and dedicated teams to implement the statewide education reform plans the State has proposed;

(b) Supporting participating LEAs (as defined in this notice) in successfully implementing the education reform plans the State has proposed, through such activities as identifying promising practices, evaluating these practices' effectiveness, ceasing ineffective practices, widely disseminating and replicating the effective practices statewide, holding participating LEAs (as defined in this notice) accountable for progress and performance, and intervening where necessary;

(c) Providing effective and efficient operations and processes for implementing its Race to the Top grant in such areas as grant administration and oversight, budget reporting and monitoring, performance measure tracking and reporting, and fund disbursement;

(d) Using the funds for this grant, as described in the State's budget and accompanying budget narrative, to accomplish the State's plans and meet its targets, including, where feasible, by coordinating, reallocating, or repurposing education funds from other Federal, State, and local sources so that they align with the State's Race to the Top goals; and

(e) Using the fiscal, political, and human capital resources of the State to continue, after the period of funding has ended, those reforms funded under the grant for which there is evidence of success; and

(ii) Use support from a broad group of stakeholders to better implement its plans, as evidenced by the strength of statements or actions of support from—

(a) The State's teachers and principals, which include the State's teachers' unions or statewide teacher associations; and

(b) Other critical stakeholders, such as the State's legislative leadership; charter school authorizers and State charter school membership associations (if applicable); other State and local leaders (*e.g.*, business, community, civil rights, and education association leaders); Tribal schools; parent, student, and community organizations (*e.g.*, parent-teacher associations, nonprofit organizations, local education foundations, and community-based organizations); and institutions of higher education.

(A)(3) *Demonstrating significant progress in raising achievement and closing gaps:* The extent to which the State has demonstrated its ability to—

(i) Make progress over the past several years in each of the four education reform areas, and used its ARRA and

[11] See Appendix D for more on participating LEA MOUs and for a model MOU.

other Federal and State funding to pursue such reforms;

(ii) Improve student outcomes overall and by student subgroup since at least 2003, and explain the connections between the data and the actions that have contributed to—

(a) Increasing student achievement in reading/language arts and mathematics, both on the NAEP and on the assessments required under the ESEA;

(b) Decreasing achievement gaps between subgroups in reading/language arts and mathematics, both on the NAEP and on the assessments required under the ESEA; and

(c) Increasing high school graduation rates.

B. Standards and Assessments

State Reform Conditions Criteria

(B)(1) *Developing and adopting common standards:* The extent to which the State has demonstrated its commitment to adopting a common set of high-quality standards, evidenced by (as set forth in Appendix B)—

(i) The State's participation in a consortium of States that—

(a) Is working toward jointly developing and adopting a common set of K–12 standards (as defined in this notice) that are supported by evidence that they are internationally benchmarked and build toward college and career readiness by the time of high school graduation; and

(b) Includes a significant number of States; and

(ii)(a) For Phase 1 applications, the State's high-quality plan demonstrating its commitment to and progress toward adopting a common set of K–12 standards (as defined in this notice) by August 2, 2010, or, at a minimum, by a later date in 2010 specified by the State, and to implementing the standards thereafter in a well-planned way; or

(b) For Phase 2 applications, the State's adoption of a common set of K–12 standards (as defined in this notice) by August 2, 2010, or, at a minimum, by a later date in 2010 specified by the State in a high-quality plan toward which the State has made significant progress, and its commitment to implementing the standards thereafter in a well-planned way.[12]

(B)(2) *Developing and implementing common, high-quality assessments:* The extent to which the State has demonstrated its commitment to improving the quality of its assessments, evidenced by (as set forth in Appendix B) the State's participation in a consortium of States that—

(i) Is working toward jointly developing and implementing common, high-quality assessments (as defined in this notice) aligned with the consortium's common set of K–12 standards (as defined in this notice); and

(ii) Includes a significant number of States.

Reform Plan Criteria

(B)(3) *Supporting the transition to enhanced standards and high-quality assessments:* The extent to which the State, in collaboration with its participating LEAs (as defined in this notice), has a high-quality plan for supporting a statewide transition to and implementation of internationally benchmarked K–12 standards that build toward college and career readiness by the time of high school graduation, and high-quality assessments (as defined in this notice) tied to these standards. State or LEA activities might, for example, include: developing a rollout plan for the standards together with all of their supporting components; in cooperation with the State's institutions of higher education, aligning high school exit criteria and college entrance requirements with the new standards and assessments; developing or acquiring, disseminating, and implementing high-quality instructional materials and assessments (including, for example, formative and interim assessments (both as defined in this notice)); developing or acquiring and delivering high-quality professional development to support the transition to new standards and assessments; and engaging in other strategies that translate the standards and information from assessments into classroom practice for all students, including high-need students (as defined in this notice).

C. Data Systems To Support Instruction

State Reform Conditions Criteria

(C)(1) *Fully implementing a statewide longitudinal data system:* The extent to which the State has a statewide longitudinal data system that includes all of the America COMPETES Act elements (as defined in this notice).

Reform Plan Criteria

(C)(2) *Accessing and using State data:* The extent to which the State has a high-quality plan to ensure that data from the State's statewide longitudinal data system are accessible to, and used to inform and engage, as appropriate, key stakeholders (*e.g.*, parents, students, teachers, principals, LEA leaders, community members, unions, researchers, and policymakers); and that the data support decision-makers in the continuous improvement of efforts in such areas as policy, instruction, operations, management, resource allocation, and overall effectiveness.[13]

(C)(3) *Using data to improve instruction:* The extent to which the State, in collaboration with its participating LEAs (as defined in this notice), has a high-quality plan to—

(i) Increase the acquisition, adoption, and use of local instructional improvement systems (as defined in this notice) that provide teachers, principals, and administrators with the information and resources they need to inform and improve their instructional practices, decision-making, and overall effectiveness;

(ii) Support participating LEAs (as defined in this notice) and schools that are using instructional improvement systems (as defined in this notice) in providing effective professional development to teachers, principals, and administrators on how to use these systems and the resulting data to support continuous instructional improvement; and

(iii) Make the data from instructional improvement systems (as defined in this notice), together with statewide longitudinal data system data, available and accessible to researchers so that they have detailed information with which to evaluate the effectiveness of instructional materials, strategies, and approaches for educating different types of students (*e.g.*, students with disabilities, English language learners, students whose achievement is well below or above grade level).

D. Great Teachers and Leaders

State Reform Conditions Criteria

(D)(1) *Providing high-quality pathways for aspiring teachers and principals:* The extent to which the State has—

(i) Legal, statutory, or regulatory provisions that allow alternative routes to certification (as defined in this notice) for teachers and principals, particularly routes that allow for providers in addition to institutions of higher education;

(ii) Alternative routes to certification (as defined in this notice) that are in use; and

(iii) A process for monitoring, evaluating, and identifying areas of

[12] Phase 2 applicants addressing selection criterion (B)(1)(ii) may amend their June 1, 2010 application submission through August 2, 2010 by submitting evidence of adopting common standards after June 1, 2010.

[13] Successful applicants that receive Race to the Top grant awards will need to comply with the Family Educational Rights and Privacy Act (FERPA), including 34 CFR Part 99, as well as State and local requirements regarding privacy.

teacher and principal shortage and for preparing teachers and principals to fill these areas of shortage.

Reform Plan Criteria

(D)(2) *Improving teacher and principal effectiveness based on performance:* The extent to which the State, in collaboration with its participating LEAs (as defined in this notice), has a high-quality plan and ambitious yet achievable annual targets to ensure that participating LEAs (as defined in this notice)—

(i) Establish clear approaches to measuring student growth (as defined in this notice) and measure it for each individual student;

(ii) Design and implement rigorous, transparent, and fair evaluation systems for teachers and principals that (a) differentiate effectiveness using multiple rating categories that take into account data on student growth (as defined in this notice) as a significant factor, and (b) are designed and developed with teacher and principal involvement;

(iii) Conduct annual evaluations of teachers and principals that include timely and constructive feedback; as part of such evaluations, provide teachers and principals with data on student growth for their students, classes, and schools; and

(iv) Use these evaluations, at a minimum, to inform decisions regarding—

(a) Developing teachers and principals, including by providing relevant coaching, induction support, and/or professional development;

(b) Compensating, promoting, and retaining teachers and principals, including by providing opportunities for highly effective teachers and principals (both as defined in this notice) to obtain additional compensation and be given additional responsibilities;

(c) Whether to grant tenure and/or full certification (where applicable) to teachers and principals using rigorous standards and streamlined, transparent, and fair procedures; and

(d) Removing ineffective tenured and untenured teachers and principals after they have had ample opportunities to improve, and ensuring that such decisions are made using rigorous standards and streamlined, transparent, and fair procedures.

(D)(3) *Ensuring equitable distribution of effective teachers and principals:* The extent to which the State, in collaboration with its participating LEAs (as defined in this notice), has a high-quality plan and ambitious yet achievable annual targets to—

(i) Ensure the equitable distribution of teachers and principals by developing a plan, informed by reviews of prior actions and data, to ensure that students in high-poverty and/or high-minority schools (both as defined in this notice) have equitable access to highly effective teachers and principals (both as defined in this notice) and are not served by ineffective teachers and principals at higher rates than other students; and

(ii) Increase the number and percentage of effective teachers (as defined in this notice) teaching hard-to-staff subjects and specialty areas including mathematics, science, and special education; teaching in language instruction educational programs (as defined under Title III of the ESEA); and teaching in other areas as identified by the State or LEA.

Plans for (i) and (ii) may include, but are not limited to, the implementation of incentives and strategies in such areas as recruitment, compensation, teaching and learning environments, professional development, and human resources practices and processes.

(D)(4) *Improving the effectiveness of teacher and principal preparation programs:* The extent to which the State has a high-quality plan and ambitious yet achievable annual targets to—

(i) Link student achievement and student growth (both as defined in this notice) data to the students' teachers and principals, to link this information to the in-State programs where those teachers and principals were prepared for credentialing, and to publicly report the data for each credentialing program in the State; and

(ii) Expand preparation and credentialing options and programs that are successful at producing effective teachers and principals (both as defined in this notice).

(D)(5) *Providing effective support to teachers and principals:* The extent to which the State, in collaboration with its participating LEAs (as defined in this notice), has a high-quality plan for its participating LEAs (as defined in this notice) to—

(i) Provide effective, data-informed professional development, coaching, induction, and common planning and collaboration time to teachers and principals that are, where appropriate, ongoing and job-embedded. Such support might focus on, for example, gathering, analyzing, and using data; designing instructional strategies for improvement; differentiating instruction; creating school environments supportive of data-informed decisions; designing instruction to meet the specific needs of high-need students (as defined in this notice); and aligning systems and removing barriers to effective implementation of practices designed to improve student learning outcomes; and

(ii) Measure, evaluate, and continuously improve the effectiveness of those supports in order to improve student achievement (as defined in this notice).

E. Turning Around the Lowest-Achieving Schools

State Reform Conditions Criteria

(E)(1) *Intervening in the lowest-achieving schools and LEAs:* The extent to which the State has the legal, statutory, or regulatory authority to intervene directly in the State's persistently lowest-achieving schools (as defined in this notice) and in LEAs that are in improvement or corrective action status.

Reform Plan Criteria

(E)(2) *Turning around the lowest-achieving schools:* The extent to which the State has a high-quality plan and ambitious yet achievable annual targets to—

(i) Identify the persistently lowest-achieving schools (as defined in this notice) and, at its discretion, any non-Title I eligible secondary schools that would be considered persistently lowest-achieving schools (as defined in this notice) if they were eligible to receive Title I funds; and

(ii) Support its LEAs in turning around these schools by implementing one of the four school intervention models (as described in Appendix C): Turnaround model, restart model, school closure, or transformation model (provided that an LEA with more than nine persistently lowest-achieving schools may not use the transformation model for more than 50 percent of its schools).

F. General

State Reform Conditions Criteria

(F)(1) *Making education funding a priority:* The extent to which—

(i) The percentage of the total revenues available to the State (as defined in this notice) that were used to support elementary, secondary, and public higher education for FY 2009 was greater than or equal to the percentage of the total revenues available to the State (as defined in this notice) that were used to support elementary, secondary, and public higher education for FY 2008; and

(ii) The State's policies lead to equitable funding (a) between high-need LEAs (as defined in this notice) and other LEAs, and (b) within LEAs,

between high-poverty schools (as defined in this notice) and other schools.

(F)(2) *Ensuring successful conditions for high-performing charter schools and other innovative schools:* The extent to which—

(i) The State has a charter school law that does not prohibit or effectively inhibit increasing the number of high-performing charter schools (as defined in this notice) in the State, measured (as set forth in Appendix B) by the percentage of total schools in the State that are allowed to be charter schools or otherwise restrict student enrollment in charter schools;

(ii) The State has laws, statutes, regulations, or guidelines regarding how charter school authorizers approve, monitor, hold accountable, reauthorize, and close charter schools; in particular, whether authorizers require that student achievement (as defined in this notice) be one significant factor, among others, in authorization or renewal; encourage charter schools that serve student populations that are similar to local district student populations, especially relative to high-need students (as defined in this notice); and have closed or not renewed ineffective charter schools;

(iii) The State's charter schools receive (as set forth in Appendix B) equitable funding compared to traditional public schools, and a commensurate share of local, State, and Federal revenues;

(iv) The State provides charter schools with funding for facilities (for leasing facilities, purchasing facilities, or making tenant improvements), assistance with facilities acquisition, access to public facilities, the ability to share in bonds and mill levies, or other supports; and the extent to which the State does not impose any facility-related requirements on charter schools that are stricter than those applied to traditional public schools; and

(v) The State enables LEAs to operate innovative, autonomous public schools (as defined in this notice) other than charter schools.

(F)(3) *Demonstrating other significant reform conditions:* The extent to which the State, in addition to information provided under other State Reform Conditions Criteria, has created, through law, regulation, or policy, other conditions favorable to education reform or innovation that have increased student achievement or graduation rates, narrowed achievement gaps, or resulted in other important outcomes.

Final Definitions: The Secretary establishes the following definitions for Race to the Top program terms that are not defined in the ARRA (or, by reference, in the ESEA).

Alternative routes to certification means pathways to certification that are authorized under the State's laws or regulations, that allow the establishment and operation of teacher and administrator preparation programs in the State, and that have the following characteristics (in addition to standard features such as demonstration of subject-matter mastery, and high-quality instruction in pedagogy and in addressing the needs of all students in the classroom including English language learners and student with disabilities): (a) Can be provided by various types of qualified providers, including both institutions of higher education and other providers operating independently from institutions of higher education; (b) are selective in accepting candidates; (c) provide supervised, school-based experiences and ongoing support such as effective mentoring and coaching; (d) significantly limit the amount of coursework required or have options to test out of courses; and (e) upon completion, award the same level of certification that traditional preparation programs award upon completion.

College enrollment refers to the enrollment of students who graduate from high school consistent with 34 CFR 200.19(b)(1) and who enroll in an institution of higher education (as defined in section 101 of the Higher Education Act, Public Law 105–244, 20 U.S.C. 1001) within 16 months of graduation.

Common set of K–12 standards means a set of content standards that define what students must know and be able to do and that are substantially identical across all States in a consortium. A State may supplement the common standards with additional standards, provided that the additional standards do not exceed 15 percent of the State's total standards for that content area.

Effective principal means a principal whose students, overall and for each subgroup, achieve acceptable rates (*e.g.,* at least one grade level in an academic year) of student growth (as defined in this notice). States, LEAs, or schools must include multiple measures, provided that principal effectiveness is evaluated, in significant part, by student growth (as defined in this notice). Supplemental measures may include, for example, high school graduation rates and college enrollment rates, as well as evidence of providing supportive teaching and learning conditions, strong instructional leadership, and positive family and community engagement.

Effective teacher means a teacher whose students achieve acceptable rates (*e.g.,* at least one grade level in an academic year) of student growth (as defined in this notice). States, LEAs, or schools must include multiple measures, provided that teacher effectiveness is evaluated, in significant part, by student growth (as defined in this notice). Supplemental measures may include, for example, multiple observation-based assessments of teacher performance.

Formative assessment means assessment questions, tools, and processes that are embedded in instruction and are used by teachers and students to provide timely feedback for purposes of adjusting instruction to improve learning.

Graduation rate means the four-year or extended-year adjusted cohort graduation rate as defined by 34 CFR 200.19(b)(1).

Highly effective principal means a principal whose students, overall and for each subgroup, achieve high rates (*e.g.,* one and one-half grade levels in an academic year) of student growth (as defined in this notice). States, LEAs, or schools must include multiple measures, provided that principal effectiveness is evaluated, in significant part, by student growth (as defined in this notice). Supplemental measures may include, for example, high school graduation rates; college enrollment rates; evidence of providing supportive teaching and learning conditions, strong instructional leadership, and positive family and community engagement; or evidence of attracting, developing, and retaining high numbers of effective teachers.

Highly effective teacher means a teacher whose students achieve high rates (*e.g.,* one and one-half grade levels in an academic year) of student growth (as defined in this notice). States, LEAs, or schools must include multiple measures, provided that teacher effectiveness is evaluated, in significant part, by student growth (as defined in this notice). Supplemental measures may include, for example, multiple observation-based assessments of teacher performance or evidence of leadership roles (which may include mentoring or leading professional learning communities) that increase the effectiveness of other teachers in the school or LEA.

High-minority school is defined by the State in a manner consistent with its Teacher Equity Plan. The State should provide, in its Race to the Top application, the definition used.

High-need LEA means an LEA (a) that serves not fewer than 10,000 children from families with incomes below the poverty line; or (b) for which not less than 20 percent of the children served by the LEA are from families with incomes below the poverty line.

High-need students means students at risk of educational failure or otherwise in need of special assistance and support, such as students who are living in poverty, who attend high-minority schools (as defined in this notice), who are far below grade level, who have left school before receiving a regular high school diploma, who are at risk of not graduating with a diploma on time, who are homeless, who are in foster care, who have been incarcerated, who have disabilities, or who are English language learners.

High-performing charter school means a charter school that has been in operation for at least three consecutive years and has demonstrated overall success, including (a) substantial progress in improving student achievement (as defined in this notice); and (b) the management and leadership necessary to overcome initial start-up problems and establish a thriving, financially viable charter school.

High-poverty school means, consistent with section 1111(h)(1)(C)(viii) of the ESEA, a school in the highest quartile of schools in the State with respect to poverty level, using a measure of poverty determined by the State.

High-quality assessment means an assessment designed to measure a student's knowledge, understanding of, and ability to apply, critical concepts through the use of a variety of item types and formats (*e.g.*, open-ended responses, performance-based tasks). Such assessments should enable measurement of student achievement (as defined in this notice) and student growth (as defined in this notice); be of high technical quality (*e.g.*, be valid, reliable, fair, and aligned to standards); incorporate technology where appropriate; include the assessment of students with disabilities and English language learners; and to the extent feasible, use universal design principles (as defined in section 3 of the Assistive Technology Act of 1998, as amended, 29 U.S.C. 3002) in development and administration.

Increased learning time means using a longer school day, week, or year schedule to significantly increase the total number of school hours to include additional time for (a) instruction in core academic subjects, including English; reading or language arts; mathematics; science; foreign languages; civics and government; economics; arts; history; and geography; (b) instruction in other subjects and enrichment activities that contribute to a well-rounded education, including, for example, physical education, service learning, and experiential and work-based learning opportunities that are provided by partnering, as appropriate, with other organizations; and (c) teachers to collaborate, plan, and engage in professional development within and across grades and subjects.[14]

Innovative, autonomous public schools means open enrollment public schools that, in return for increased accountability for student achievement (as defined in this notice), have the flexibility and authority to define their instructional models and associated curriculum; select and replace staff; implement new structures and formats for the school day or year; and control their budgets.

Instructional improvement systems means technology-based tools and other strategies that provide teachers, principals, and administrators with meaningful support and actionable data to systemically manage continuous instructional improvement, including such activities as: Instructional planning; gathering information (*e.g.*, through formative assessments (as defined in this notice), interim assessments (as defined in this notice), summative assessments, and looking at student work and other student data); analyzing information with the support of rapid-time (as defined in this notice) reporting; using this information to inform decisions on appropriate next instructional steps; and evaluating the effectiveness of the actions taken. Such systems promote collaborative problem-solving and action planning; they may also integrate instructional data with student-level data such as attendance, discipline, grades, credit accumulation, and student survey results to provide early warning indicators of a student's risk of educational failure.

Interim assessment means an assessment that is given at regular and specified intervals throughout the school year, is designed to evaluate students' knowledge and skills relative to a specific set of academic standards, and produces results that can be aggregated (*e.g.*, by course, grade level, school, or LEA) in order to inform teachers and administrators at the student, classroom, school, and LEA levels.

Involved LEAs means LEAs that choose to work with the State to implement those specific portions of the State's plan that necessitate full or nearly-full statewide implementation, such as transitioning to a common set of K–12 standards (as defined in this notice). Involved LEAs do not receive a share of the 50 percent of a State's grant award that it must subgrant to LEAs in accordance with section 14006(c) of the ARRA, but States may provide other funding to involved LEAs under the State's Race to the Top grant in a manner that is consistent with the State's application.

Low-minority school is defined by the State in a manner consistent with its Teacher Equity Plan. The State should provide, in its Race to the Top application, the definition used.

Low-poverty school means, consistent with section 1111(h)(1)(C)(viii) of the ESEA, a school in the lowest quartile of schools in the State with respect to poverty level, using a measure of poverty determined by the State.

Participating LEAs means LEAs that choose to work with the State to implement all or significant portions of the State's Race to the Top plan, as specified in each LEA's agreement with the State. Each participating LEA that receives funding under Title I, Part A will receive a share of the 50 percent of a State's grant award that the State must subgrant to LEAs, based on the LEA's relative share of Title I, Part A allocations in the most recent year, in accordance with section 14006(c) of the ARRA. Any participating LEA that does not receive funding under Title I, Part A (as well as one that does) may receive funding from the State's other 50 percent of the grant award, in accordance with the State's plan.

Persistently lowest-achieving schools means, as determined by the State: (i) Any Title I school in improvement, corrective action, or restructuring that (a) Is among the lowest-achieving five percent of Title I schools in improvement, corrective action, or restructuring or the lowest-achieving five Title I schools in improvement,

[14] Research supports the effectiveness of well-designed programs that expand learning time by a minimum of 300 hours per school year. (See Frazier, Julie A.; Morrison, Frederick J. ''The Influence of Extended-year Schooling on Growth of Achievement and Perceived Competence in Early Elementary School.'' Child Development. Vol. 69 (2), April 1998, pp. 495–497 and research done by Mass2020.) Extending learning into before- and after-school hours can be difficult to implement effectively, but is permissible under this definition with encouragement to closely integrate and coordinate academic work between in-school and out-of school. (See James-Burdumy, Susanne; Dynarski, Mark; Deke, John. ''When Elementary Schools Stay Open Late: Results from The National Evaluation of the 21st Century Community Learning Centers Program.'' *http://www.mathematica-mpr.com/publications/redirect_PubsDB.asp?strSite=http://epa.sagepub.com/cgi/content/abstract/29/4/296* Educational Evaluation and Policy Analysis, Vol. 29 (4), December 2007, Document No. PP07–121.)

corrective action, or restructuring in the State, whichever number of schools is greater; or (b) Is a high school that has had a graduation rate as defined in 34 CFR 200.19(b) that is less than 60 percent over a number of years; and (ii) Any secondary school that is eligible for, but does not receive, Title I funds that (a) Is among the lowest-achieving five percent of secondary schools or the lowest-achieving five secondary schools in the State that are eligible for, but do not receive, Title I funds, whichever number of schools is greater; or (b) Is a high school that has had a graduation rate as defined in 34 CFR 200.19(b) that is less than 60 percent over a number of years.

To identify the lowest-achieving schools, a State must take into account both (i) The academic achievement of the ''all students'' group in a school in terms of proficiency on the State's assessments under section 1111(b)(3) of the ESEA in reading/language arts and mathematics combined; and (ii) The school's lack of progress on those assessments over a number of years in the ''all students'' group.

Rapid-time, in reference to reporting and availability of locally-collected school- and LEA-level data, means that data are available quickly enough to inform current lessons, instruction, and related supports.

Student achievement means—

(a) For tested grades and subjects: (1) A student's score on the State's assessments under the ESEA; and, as appropriate, (2) other measures of student learning, such as those described in paragraph (b) of this definition, provided they are rigorous and comparable across classrooms.

(b) For non-tested grades and subjects: Alternative measures of student learning and performance such as student scores on pre-tests and end-of-course tests; student performance on English language proficiency assessments; and other measures of student achievement that are rigorous and comparable across classrooms.

Student growth means the change in student achievement (as defined in this notice) for an individual student between two or more points in time. A State may also include other measures that are rigorous and comparable across classrooms.

Total revenues available to the State means either (a) projected or actual total State revenues for education and other purposes for the relevant year; or (b) projected or actual total State appropriations for education and other purposes for the relevant year.

America COMPETES Act elements means (as specified in section 6401(e)(2)(D) of that Act): (1) A unique statewide student identifier that does not permit a student to be individually identified by users of the system; (2) student-level enrollment, demographic, and program participation information; (3) student-level information about the points at which students exit, transfer in, transfer out, drop out, or complete P–16 education programs; (4) the capacity to communicate with higher education data systems; (5) a State data audit system assessing data quality, validity, and reliability; (6) yearly test records of individual students with respect to assessments under section 1111(b) of the ESEA (20 U.S.C. 6311(b)); (7) information on students not tested by grade and subject; (8) a teacher identifier system with the ability to match teachers to students; (9) student-level transcript information, including information on courses completed and grades earned; (10) student-level college readiness test scores; (11) information regarding the extent to which students transition successfully from secondary school to postsecondary education, including whether students enroll in remedial coursework; and (12) other information determined necessary to address alignment and adequate preparation for success in postsecondary education.

This notice does not preclude us from proposing additional priorities, requirements, definitions, or selection criteria, subject to meeting applicable rulemaking requirements.

Note: This notice does not solicit applications. In any year in which we choose to use these priorities, requirements, definitions, and selection criteria, we invite applications through a notice in the **Federal Register.**

Executive Order 12866

Under Executive Order 12866, the Secretary must determine whether this regulatory action is ''significant'' and therefore subject to the requirements of the Executive Order and subject to review by OMB. Section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as an action likely to result in a rule that may (1) have an annual effect on the economy of $100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments, or communities in a material way (also referred to as an ''economically significant'' rule); (2) create serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. Pursuant to the Executive Order, it has been determined that this regulatory action will have an annual effect on the economy of more than $100 million because the amount of government transfers provided through the Race to the Top Fund will exceed that amount. Therefore, this action is ''economically significant'' and subject to OMB review under section 3(f)(1) of the Executive Order.

The potential costs associated with this regulatory action are those resulting from statutory requirements and those we have determined as necessary for administering this program effectively and efficiently.

In assessing the potential costs and benefits—both quantitative and qualitative—of this regulatory action, we have determined that the benefits of the final priorities, requirements, definitions, and criteria justify the costs.

We have determined, also, that this regulatory action does not unduly interfere with State, local, and tribal governments in the exercise of their governmental functions.

Response to comments on cost/benefit analysis:

Administrative Burdens and Costs

Comment: While one commenter noted that Race to the Top would provide significant funding to pay for reform plans, a second commenter stated that Race to the Top would not provide enough money to cover State administrative costs, while another described the NPP's requirements as overly burdensome and bureaucratic. One commenter recommended that the Department reduce the number of criteria and the detail in each because of the administrative and staff burdens involved in completing an application. Two commenters said the NPP estimate of time required to complete Race to the Top applications and data collection was too low. Two other commenters said that the Department should work to ensure an ''integrated and coordinated approach'' to requesting data and information with this and other programs and was concerned that the current number of requirements might discourage States from applying. Three commenters recommended that States include LEAs in developing their Race to the Top plans to improve the likelihood of successful

implementation, control costs, and increase benefits.

Discussion: The Department agrees that sufficient funds will be available through the Race to the Top program, other Federal education programs, and State and local education resources to successfully implement Race to the Top plans. The Department also agrees that involving LEAs in developing Race to the Top plans will result in stronger, more cost-effective State plans. As for claims that Race to the Top requirements are overly burdensome and bureaucratic, the Department believes that each of the criteria and other requirements included in this final notice are essential for successfully evaluating Race to the Top applications, appropriately funding winning applications, and ensuring accountability for the use of Race to the Top funds. The Department also believes that its estimate of the time required to complete Race to the Top applications is reasonably accurate across the range of circumstances experienced by different States and LEAs. It is possible that some States will be deterred from applying for a Race to the Top grant because of the comprehensive nature of the program's requirements, but this is true of other voluntary competitive grant programs. The Department is working to streamline definitions and data collection across all ARRA programs as much as possible to minimize application and administrative burdens on States and LEAs. Finally, winning States will have considerable flexibility to use the 50 percent of Race to the Top funds that are not allocated to participating LEAs through the Title I, Part A formula to cover a wide range of costs related to administering awards, including grant oversight, monitoring, evaluation, data collection, and other activities.

Changes: None.

Using Other Federal Funding

Comment: One commenter suggested that the Department remind States of the flexibility of some Federal funding sources and encourage States to describe any Federal barriers to implementing their State plans and to request waivers of those provisions.

Discussion: The final notice encourages States, in criterion (A)(2)(i)(d), to coordinate, reallocate, or repurpose other Federal, State, and local sources ''where feasible'' to align such resources with Race to the Top goals. In response to the commenter, we note that such waivers and flexibilities are often limited by statute. However, the Department fully supports efforts to coordinate the use of funds in order to make the most efficient and effective use of limited resources and will continue to consider States' requests for waivers that are permissible under current Federal statutes and regulations.

Changes: None.

Impact on State Pension Plans

Comment: One commenter stated that a potential cost of this competition would be the reduced teacher contributions to the public pension plan if charter schools continue to multiply in the State.

Discussion: The Department is not in a position to consider the potential impact of increasing numbers of charter schools on contributions to teacher pension plans. However, we note that charter schools are public schools, and to the extent that charter school teachers are eligible to contribute to such pension plans, it seems reasonable that they would do so.

Changes: None.

Need for Federal Regulatory Action

These final priorities, requirements, definitions, and criteria are needed to implement the Race to the Top program. The Secretary does not believe that the statute, by itself, provides a sufficient level of detail to ensure that Race to the Top truly serves as a mechanism for driving significant education reform in the States. The authorizing language is very brief, and we believe the Congress likely expected the Secretary to augment this language, through rulemaking, in order to give greater meaning to the statutory provisions. Additionally, the statute expressly provides the Secretary the authority to require States to include in their application such information as the Secretary may reasonably require and to determine which States receive grants on the basis of other criteria as the Secretary determines appropriate.

In the absence of specific criteria for Race to the Top grants, the Department would use the general criteria in 34 CFR 75.210 of the Education Department General Administrative Regulations in selecting States to receive grants. The Secretary does not believe the use of those general criteria would be appropriate for the Race to the Top competition, because they do not focus on the educational reforms that States must be implementing in order to receive a Race to the Top grant, on the specific uses of funds under Race to the Top, or on the plans that the Secretary believes States should develop for their Race to the Top grants.

Summary of Costs and Benefits

The Department believes that the final priorities, requirements, definitions, and selection criteria will not impose significant costs on States, or on the LEAs and other entities that will receive assistance through the Race to the Top Fund. As discussed elsewhere, this final regulatory action is intended to create a framework for the award of approximately $4 billion in support of State and local efforts to implement critical educational reforms and to making substantial gains in student achievement, closing achievement gaps, improving high school graduation rates, and ensuring student preparation for success in college and careers. Without promulgation of priorities, requirements, definitions, and criteria for the Race to the Top competition, the Department would not have clear and defensible criteria for making very large grants to States.

The Department believes that the costs imposed on States by the final priorities, requirements, definitions, and selection criteria will be limited to the paperwork burden discussed elsewhere in this notice. The benefits conveyed on a State through its receipt of a grant will greatly exceed those costs. In addition, even States that apply but are unsuccessful in the competition may derive benefits, as the process of working with LEAs and other stakeholders on the State application may help accelerate the pace of education reforms in the State.

Accounting Statement

As required by OMB Circular A–4 (available at *http://www.Whitehouse.gov/omb/Circulars/a004/a-4.pdf*), in the following table, we have prepared an accounting statement showing the classification of the expenditures associated with the provisions of this regulatory action. This table provides our best estimate of the Federal payments to be made to States under this program as a result of this regulatory action. Expenditures are classified as transfers to States.

TABLE—ACCOUNTING STATEMENT CLASSIFICATION OF ESTIMATED EXPENDITURES

Category	Transfers (in millions)
Annual Monetized Transfers.	$3,956.
From Whom to Whom	Federal Government to States.

As previously explained, ARRA provides approximately $4.3 billion for the Race to the Top Fund (referred to in

the statute as State Incentive Grants). In this notice, we require additional specific priorities, requirements, definitions, and criteria regarding the applications that individual States submit for approximately $4 billion of Race to the Top funds. At a later date, we may announce a competition for a separate Race to the Top Assessment Program, for approximately $350 million, to support the development of assessments by consortia of States.

Paperwork Reduction Act of 1995

The application requirements and criteria finalized in this notice will require the collection of information that is subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The Department has received emergency approval for the information collections described below under Information Collection Reference Number 200910–1810–004.

Application Requirements

There are seven application requirements that States must meet when submitting their applications:

(a) Required signatures.

(b) Progress in the four education reform areas (as described in criterion (A)(3)(i)).

(c) The State's proposed budget (as described in criterion (A)(2)(i)(d)), including how it will (1) Achieve its targets (as described in criterion (A)(1)(iii)) and (2) give priority to high-need LEAs.

(d) Required information for State Reform Conditions Criteria.

(e) Required information for Reform Plan Criteria.

(f) Attorney General certification.

(g) Required information for addressing issues relating to assessments required under the ESEA or subgroups.

(Please see the Application Requirements section for detailed descriptions.)

Selection Criteria

There are 19 criteria that States may address when submitting their applications. These are—

(A)(1) *Articulating State's education reform agenda and LEAs' participation in it;*

(A)(2) *Building strong statewide capacity to implement, scale up, and sustain proposed plans;*

(A)(3) *Demonstrating significant progress in raising achievement and closing gaps;*

(B)(1) *Developing and adopting common standards;*

(B)(2) *Developing and implementing common, high-quality assessments;*

(B)(3) *Supporting the transition to enhanced standards and high-quality assessments;*

(C)(1) *Fully implementing a statewide longitudinal data system;*

(C)(2) *Accessing and using State data;*

(C)(3) *Using data to improve instruction;*

(D)(1) *Providing high-quality pathways for aspiring teachers and principals;*

(D)(2) *Improving teacher and principal effectiveness based on performance;*

(D)(3) *Ensuring equitable distribution of effective teachers and principals;*

(D)(4) *Improving the effectiveness of teacher and principal preparation programs;*

(D)(5) *Providing effective support to teachers and principals;*

(E)(1) *Intervening in the lowest-achieving schools and LEAs;*

(E)(2) *Turning around the lowest-achieving schools;*

(F)(1) *Making education funding a priority;*

(F)(2) *Ensuring successful conditions for high-performing charter schools and other innovative schools;*

(F)(3) *Demonstrating other significant reform conditions.*

(Please see the ''Selection Criteria'' section for detailed descriptions.)

We estimate that each SEA would spend approximately 681 hours of staff time to address the application requirements and criteria, prepare the application, and obtain necessary clearances. This estimate has increased slightly from the estimate of 642 hours in the NPP due to changes in the criteria. The total number of hours for all 52 SEAs is an estimated 35,412 hours (52 SEAs (the 50 States plus the District of Columbia and Puerto Rico) times 681 hours equals 35,412 hours). We estimate the average total cost per hour of the State-level staff who carry out this work to be $30.00 an hour. The total estimated cost for all States would be $1,062,360 ($30.00 × 35,412 hours = $1,062,360).

Regulatory Flexibility Act Certification: The Secretary certifies that this regulatory action will not have a significant economic impact on a substantial number of small entities. The Secretary makes this certification because the only entities eligible to apply for grants are States, and States are not small entities.

Intergovernmental Review: This program is subject to Executive Order 12372 and the regulations in 34 CFR Part 79. One of the objectives of the Executive Order is to foster an intergovernmental partnership and a strengthened federalism. The Executive Order relies on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

This document provides early notification of our specific plans and actions for this program.

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

Electronic Access to This Document: You can 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.

Dated: November 10, 2009.

Arne Duncan,

Secretary of Education.

Appendix A Evidence and Performance Measures

A. State Success Factors

(A)(1) Articulating State's Education Reform Agenda and LEAs' Participation in it

Evidence

Evidence for (A)(1)(ii):

- An example of the State's standard Participating LEA MOU, and description of variations used, if any.
- The completed summary table indicating which specific portions of the State's plan each LEA is committed to implementing, and relevant summary statistics (see Summary Table for (A)(1)(ii)(b)).
- The completed summary table indicating which LEA leadership signatures have been obtained (see Summary Table for (A)(1)(ii)(c)).

Evidence for (A)(1)(iii):

- The completed summary table indicating the numbers and percentages of participating LEAs, schools, K–12 students, and students in poverty (see Summary Table for (A)(1)(iii)).
- Tables and graphs that show the State's goals, overall and by subgroup, requested in the criterion, together with the supporting narrative. In addition, describe what the goals would look like were the State not to receive an award under this program.

Evidence for (A)(1)(ii) and (A)(1)(iii):

- The completed detailed table, by LEA, that includes the information requested in the criterion (see Detailed Table for (A)(1)).

Performance Measures

- None required.

(A)(2) Building Strong Statewide Capacity to Implement, Scale up, and Sustain Proposed Plans

Evidence

Evidence for (A)(2)(i)(d):

- The State's budget, as completed in Section XI of the application. The narrative that accompanies and explains the budget and how it connects to the State's plan, as completed in Section XI of the application.

Evidence for (A)(2)(ii):

- A summary in the narrative of the statements or actions and inclusion of key statements or actions in the Appendix.

Performance Measures

- None required.

(A)(3) Demonstrating Significant Progress in Raising Achievement and Closing Gaps

Evidence

Evidence for (A)(3)(ii):

NAEP and ESEA results since at least 2003. Include in the Appendix all the data requested in the criterion as a resource for peer reviewers for each year in which a test was given or data was collected. Note that this data will be used for reference only and can be in raw format. In the narrative, provide the analysis of this data and any tables or graphs that best support the narrative.

Performance Measures

- None required.

(B) Standards and Assessments

(B)(1) Developing and Adopting Common Standards

Evidence

Evidence for (B)(1)(i):

- A copy of the Memorandum of Agreement, executed by the State, showing that it is part of a standards consortium.
- A copy of the final standards or, if the standards are not yet final, a copy of the draft standards and anticipated date for completing the standards.
- Documentation that the standards are or will be internationally benchmarked and that, when well-implemented, will help to ensure that students are prepared for college and careers.
- The number of States participating in the standards consortium and the list of these States.

Evidence for (B)(1)(ii):

For Phase 1 applicants:

- A description of the legal process in the State for adopting standards, and the State's plan, current progress, and timeframe for adoption.

For Phase 2 applicants:

- Evidence that the State has adopted the standards. Or, if the State has not yet adopted the standards, a description of the legal process in the State for adopting standards and the State's plan, current progress, and timeframe for adoption.

Performance Measures

- None required.

(B)(2) Developing and Implementing Common, High-quality Assessments

Evidence

Evidence for (B)(2):

- A copy of the Memorandum of Agreement, executed by the State, showing that it is part of a consortium that intends to develop high-quality assessments (as defined in this notice) aligned with the consortium's common set of K–12 standards; or documentation that the State's consortium has applied, or intends to apply, for a grant through the separate Race to the Top Assessment Program (to be described in a subsequent notice); or other evidence of the State's plan to develop and adopt common, high-quality assessments (as defined in this notice).
- The number of States participating in the assessment consortium and the list of these States.

Performance Measures

- None required.

(B)(3) Supporting the Transition To Enhanced Standards and High-Quality Assessments

Evidence

- Any supporting evidence the State believes will be helpful to peer reviewers.

Performance Measures

- Optional.

(C) Data Systems To Support Instruction

(C)(1) Fully Implementing a Statewide Longitudinal Data System

Evidence

- Documentation for each of the America COMPETES Act elements (as defined in this notice) that is included in the State's statewide longitudinal data system.

Performance Measures

- None required.

(C)(2) Accessing and Using State Data

Evidence

- Any supporting evidence the State believes will be helpful to peer reviewers.

Performance Measures

- Optional.

(C)(3) Using Data To Improve Instruction

Evidence

- Any supporting evidence the State believes will be helpful to peer reviewers.

Performance Measures

- Optional.

(D) Great Teachers and Leaders

(D)(1) Providing High-Quality Pathways for Aspiring Teachers and Principals

Evidence for (D)(1)(i):

- A description of the State's applicable laws, statutes, regulations, or other relevant legal documents, including information on the elements of the State's alternative routes (as described in the alternative routes to certification definition in this notice).

Evidence for (D)(1)(ii):

- A list of the alternative certification programs operating in the State under the State's alternative routes to certification (as defined in this notice), and for each:
  - The elements of the program (as described in the alternative routes to certification definition in this notice).
  - The number of teachers and principals that successfully completed each program in the previous academic year.
  - The total number of teachers and principals certified statewide in the previous academic year.

Performance Measures

- None required.

(D)(2) Improving Teacher and Principal Effectiveness Based on Performance

Evidence

- Any supporting evidence the State believes will be helpful to peer reviewers.

Performance Measures

General goals to be provided at time of application, including baseline data and annual targets:

- (D)(2)(i) Percentage of participating LEAs that measure student growth (as defined in this notice).
- (D)(2)(ii) Percentage of participating LEAs with qualifying evaluation systems for teachers.

- (D)(2)(ii) Percentage of participating LEAs with qualifying evaluation systems for principals.
- (D)(2)(iv) Percentage of participating LEAs with qualifying evaluation systems that are used to inform:
  - (D)(2)(iv)(a) Developing teachers and principals.
  - (D)(2)(iv)(b) Compensating teachers and principals.
  - (D)(2)(iv)(b) Promoting teachers and principals.
  - (D)(2)(iv)(b) Retaining effective teachers and principals.
  - (D)(2)(iv)(c) Granting tenure and/or full certification (where applicable) to teachers and principals.
  - (D)(2)(iv)(d) Removing ineffective tenured and untenured teachers and principals.

General data to be provided at time of application, including baseline data:

- Total number of participating LEAs.
- Total number of principals in participating LEAs.
- Total number of teachers in participating LEAs.

Data to be requested of grantees in the future:

- (D)(2)(ii) Number of teachers and principals in participating LEAs with qualifying evaluation systems.
- (D)(2)(iii) Number of teachers and principals in participating LEAs with qualifying evaluation systems who were evaluated as effective or better in the prior academic year.
- (D)(2)(iii) Number of teachers and principals in participating LEAs with qualifying evaluation systems who were evaluated as ineffective in the prior academic year.
- (D)(2)(iv)(b) Number of teachers and principals in participating LEAs with qualifying evaluation systems whose evaluations were used to inform compensation decisions in the prior academic year.
- (D)(2)(iv)(b) Number of teachers and principals in participating LEAs with qualifying evaluation systems who were evaluated as effective or better and were retained in the prior academic year.
- (D)(2)(iv)(c) Number of teachers in participating LEAs with qualifying evaluation systems who were eligible for tenure in the prior academic year.
- (D)(2)(iv)(c) Number of teachers in participating LEAs with qualifying evaluation systems whose evaluations were used to inform tenure decisions in the prior academic year.
- (D)(2)(iv)(d) Number of teachers and principals in participating LEAs who were removed for being ineffective in the prior academic year.

(D)(3) Ensuring Equitable Distribution of Effective Teachers and Principals

Evidence

Evidence for (D)(3)(i):

- Definitions of high-minority and low-minority schools as defined by the State for the purposes of the State's Teacher Equity Plan.

Performance Measures

Note: All information below is requested for Participating LEAs.

Performance Measures for (D)(3)(i):

General goals to be provided at time of application, including baseline data and annual targets:

- Percentage of teachers in schools that are high-poverty, high-minority, or both (as defined in this notice) who are highly effective (as defined in this notice).
- Percentage of teachers in schools that are low-poverty, low-minority, or both (as defined in this notice) who are highly effective (as defined in this notice).
- Percentage of teachers in schools that are high-poverty, high-minority, or both (as defined in this notice) who are ineffective.
- Percentage of teachers in schools that are low-poverty, low-minority, or both (as defined in this notice) who are ineffective.
- Percentage of principals leading schools that are high-poverty, high-minority, or both (as defined in this notice) who are highly effective (as defined in this notice).
- Percentage of principals leading schools that are low-poverty, low-minority, or both (as defined in this notice) who are highly effective (as defined in this notice).
- Percentage of principals leading schools that are high-poverty, high-minority, or both (as defined in this notice) who are ineffective.
- Percentage of principals leading schools that are low-poverty, low-minority, or both (as defined in this notice) who are ineffective.

General data to be provided at time of application, including baseline data:

- Total number of schools that are high-poverty, high-minority, or both (as defined in this notice).
- Total number of schools that are low-poverty, low-minority, or both (as defined in this notice).
- Total number of teachers in schools that are high-poverty, high-minority, or both (as defined in this notice).
- Total number of teachers in schools that are low-poverty, low-minority, or both (as defined in this notice).
- Total number of principals leading schools that are high-poverty, high-minority, or both (as defined in this notice).
- Total number of principals leading schools that are low-poverty, low-minority, or both (as defined in this notice).

Data to be requested of grantees in the future:

- Number of teachers and principals in schools that are high-poverty, high-minority, or both (as defined in this notice) who were evaluated as highly effective (as defined in this notice) in the prior academic year.
- Number of teachers and principals in schools that are high-poverty, high-minority, or both (as defined in this notice) who were evaluated as ineffective in the prior academic year.
- Number of teachers and principals in schools that are low-poverty, low-minority, or both (as defined in this notice) who were evaluated as highly effective (as defined in this notice) in the prior academic year.
- Number of teachers and principals in schools that are low-poverty, low-minority, or both (as defined in this notice) who were evaluated as ineffective in the prior academic year.

Performance Measures for (D)(3)(ii):

General goals to be provided at time of application, including baseline data and annual targets:

- Percentage of mathematics teachers who were evaluated as effective or better.
- Percentage of science teachers who were evaluated as effective or better.
- Percentage of special education teachers who were evaluated as effective or better.
- Percentage of teachers in language instruction educational programs who were evaluated as effective or better.

General data to be provided at time of application, including baseline data:

- Total number of mathematics teachers.
- Total number of science teachers.
- Total number of special education teachers.
- Total number of teachers in language instruction educational programs.

Data to be requested of grantees in the future:

- Number of mathematics teachers in participating LEAs who were evaluated as effective or better in the prior academic year.
- Number of science teachers in participating LEAs who were evaluated as effective or better in the prior academic year.
- Number of special education teachers in participating LEAs who were evaluated as effective or better in the prior academic year.

• Number of teachers in language instruction educational programs in participating LEAs who were evaluated as effective or better in the prior academic year.

(D)(4) Improving the Effectiveness of Teacher and Principal Preparation Programs

Evidence

• Any supporting evidence the State believes will be helpful to peer reviewers.

Performance Measures

General goals to be provided at time of application, including baseline data and annual targets:

• Percentage of teacher preparation programs in the State for which the public can access data on the achievement and growth (as defined in this notice) of the graduates' students.

• Percentage of principal preparation programs in the State for which the public can access data on the achievement and growth (as defined in this notice) of the graduates' students.

General data to be provided at time of application, including baseline data:

• Total number of teacher credentialing programs in the State.

• Total number of principal credentialing programs in the State.

• Total number of teachers in the State.

• Total number of principals in the State.

Data to be requested of grantees in the future:

• Number of teacher credentialing programs in the State for which the information (as described in the criterion) is publicly reported.

• Number of teachers prepared by each credentialing program in the State for which the information (as described in the criterion) is publicly reported.

• Number of principal credentialing programs in the State for which the information (as described in the criterion) is publicly reported.

• Number of principals prepared by each credentialing program in the State for which the information (as described in the criterion) is publicly reported.

• Number of teachers in the State whose data are aggregated to produce publicly available reports on the State's credentialing programs.

• Number of principals in the State whose data are aggregated to produce publicly available reports on the State's credentialing programs.

(D)(5) Providing Effective Support to Teachers and Principals

Evidence

• Any supporting evidence the State believes will be helpful to peer reviewers.

Performance Measures

• Optional.

(E) Turning Around the Lowest-Achieving Schools

(E)(1) Intervening in the Lowest-Achieving Schools and LEAs

Evidence

Evidence for (E)(1):

• A description of the State's applicable laws, statutes, regulations, or other relevant legal documents.

Performance Measures

• None required.

(E)(2) Turning Around the Lowest-Achieving Schools

Evidence

• The State's historic performance on school turnaround, as evidenced by the total number of persistently lowest-achieving schools (as defined in this notice) that States or LEAs attempted to turn around in the last five years, the approach used, and the results and lessons learned to date.

Performance Measures

• The number of schools for which one of the four school intervention models (described in Appendix C) will be initiated each year.

(F) General

(F)(1) Making Education Funding a Priority

Evidence

Evidence for (F)(1)(i):

• Financial data to show whether and to what extent expenditures, as a percentage of the total revenues available to the State (as defined in this notice), increased, decreased, or remained the same.

Evidence for (F)(1)(ii):

• Any supporting evidence the State believes will be helpful to peer reviewers.

Performance Measures

• None required.

(F)(2) Ensuring Successful Conditions for High-Performing Charter Schools and Other Innovative Schools

Evidence

Evidence for (F)(2)(i):

• A description of the State's applicable laws, statutes, regulations, or other relevant legal documents.

• The number of charter schools allowed under State law and the percentage this represents of the total number of schools in the State.

• The number and types of charter schools currently operating in the State.

Evidence for (F)(2)(ii):

• A description of the State's approach to charter school accountability and authorization, and a description of the State's applicable laws, statutes, regulations, or other relevant legal documents.

• For each of the last five years:

○ The number of charter school applications made in the State.

○ The number of charter school applications approved.

○ The number of charter school applications denied and reasons for the denials (academic, financial, low enrollment, other).

○ The number of charter schools closed (including charter schools that were not reauthorized to operate).

○ The reasons for the closures or non-renewals (academic, financial, low enrollment, other).

Evidence for (F)(2)(iii):

• A description of the State's applicable statutes, regulations, or other relevant legal documents.

• A description of the State's approach to charter school funding, the amount of funding passed through to charter schools per student, and how those amounts compare with traditional public school per-student funding allocations.

Evidence for (F)(2)(iv):

• A description of the State's applicable statutes, regulations, or other relevant legal documents.

• A description of the statewide facilities supports provided to charter schools, if any.

Evidence for (F)(2)(v):

• A description of how the State enables LEAs to operate innovative, autonomous public schools (as defined in this notice) other than charter schools.

Performance Measures

• None required.

(F)(3) Demonstrating Other Significant Reform Conditions

Evidence

Evidence for (F)(3):

• A description of the State's other applicable key education laws, statutes, regulations, or relevant legal documents.

Performance Measures

• None required.

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APPENDIX B. SCORING RUBRIC

I. Introduction

To help ensure inter-reviewer reliability and transparency for State Race to the Top applicants, the U.S. Department of Education has created and is publishing a rubric for scoring State applications. The pages that follow detail the rubric and allocation of point values that reviewers will be using. Race to the Top grants will be awarded on a competitive basis to States in two phases. The rubric will be used by reviewers in each phase to ensure consistency across and within review panels.

The rubric allocates points to each criterion and, in selected cases, to sub-criteria as well. In all, the Race to the Top scoring rubric includes 19 criteria and one competitive priority that collectively add up to 500 points. Several of these criteria account for a large number of points; others account for a comparatively small portion of a State's score.

It is important to emphasize that over half the points that reviewers may award to States are based on States' accomplishments prior to applying—their successes in increasing student achievement, decreasing the achievement gaps, increasing graduation rates, enlisting strong statewide support and commitment to their proposed plans, and creating legal conditions conducive to education reform and innovation. Finally, it bears underscoring that reviewers will be assessing multiple aspects of States' Race to the Top applications. States that fail to earn points or earn a low number of points on one criterion, can still win a Race to the Top award by presenting strong applications and histories of accomplishments on other criteria.

Notwithstanding the guidance being provided to reviewers, reviewers will still be required to make many thoughtful judgments about the quality of States' applications. Beyond judging a State's commitment to the four reform areas specified in the ARRA, reviewers will be assessing, based on the criteria, the comprehensiveness and feasibility of States' applications and plans. Reviewers will be asked to evaluate, for example, if States have set ambitious but achievable annual targets in their applications. Reviewers will need to make informed judgments about States' goals, the activities the State has chosen to undertake and the rationales for such activities, and the timeline and credibility of State plans.

Applicants address the absolute and competitive priorities throughout their applications. The absolute priority must be met in order for an applicant to receive funding. Applications that address the competitive priority comprehensively will earn extra points under that priority. Invitational priorities are extensions to the core reform areas; applicants are invited to address these, but are not granted additional points for doing so.

In this appendix there is information about the point values for each criterion and priority, guidance on scoring, and the rubric that will be provided to reviewers.

II. Points Overview

The chart below shows the maximum number of points that may be assigned to each criterion.

Selection Criteria	Points	Percent
A. State Success Factors	125	25%
(A)(1) Articulating State's education reform agenda and LEAs' participation in it	65	
(i) Articulating comprehensive, coherent reform agenda	*5*	
(ii) Securing LEA commitment	*45*	
(iii) Translating LEA participation into statewide impact	*15*	
(A)(2) Building strong statewide capacity to implement, scale up, and sustain proposed plans	30	
(i) Ensuring the capacity to implement	*20*	
(ii) Using broad stakeholder support	*10*	
(A)(3) Demonstrating significant progress in raising achievement and closing gaps	30	
(i) Making progress in each reform area	*5*	
(ii) Improving student outcomes	*25*	
B. Standards and Assessments	70	14%
(B)(1) Developing and adopting common standards	40	
(i) Participating in consortium developing high-quality standards	*20*	
(ii) Adopting standards	*20*	
(B)(2) Developing and implementing common, high-quality assessments	10	
(B)(3) Supporting the transition to enhanced standards and high-quality assessments	20	
C. Data Systems to Support Instruction	47	9%
(C)(1) Fully implementing a statewide longitudinal data system	24	
(C)(2) Accessing and using State data	5	
(C)(3) Using data to improve instruction	18	
D. Great Teachers and Leaders	138	28%
Eligibility Requirement (b)	eligibility	
(D)(1) Providing high-quality pathways for aspiring teachers and principals	21	
(D)(2) Improving teacher and principal effectiveness based on performance	58	
(i) Measuring student growth	*5*	
(ii) Developing evaluation systems	*15*	
(iii) Conducting annual evaluations	*10*	
(iv) Using evaluations to inform key decisions	*28*	
(D)(3) Ensuring equitable distribution of effective teachers and principals	25	
(i) Ensuring equitable distribution in high-poverty or high-minority schools	*15*	
(ii) Ensuring equitable distribution in hard-to-staff subjects and specialty areas	*10*	
(D)(4) Improving the effectiveness of teacher and principal preparation programs	14	
(D)(5) Providing effective support to teachers and principals	20	
E. Turning Around the Lowest-Achieving Schools	50	10%
(E)(1) Intervening in the lowest-achieving schools and LEAs	10	
(E)(2) Turning around the lowest-achieving schools	40	
(i) Identifying the persistently lowest-achieving schools	*5*	
(ii) Turning around the persistently lowest-achieving schools	*35*	
F. General	55	11%
Eligibility Requirement (a)	eligibility	
(F)(1) Making education funding a priority	10	
(F)(2) Ensuring successful conditions for high-performing charter schools and other innovative s	40	
(F)(3) Demonstrating other significant reform conditions	5	
Competitive Preference Priority 2: Emphasis on STEM	15	3%
TOTAL	**500**	**100%**

Subtotal: Accomplishments	260	52%
Subtotal: Plans	240	48%

III. About Scoring

About State Reform Conditions Criteria: The goal for State Reform Conditions Criteria is to ensure that, wherever possible, reviewers are provided with criterion-specific guidance that is clear and specific, making the decisions as "objective" as possible. (See application requirement (d) for the guidance provided to States concerning responding to State Reform Conditions Criteria in their applications.)

About Reform Plan Criteria: For Reform Plan Criteria, reviewers will be given general guidance on how to evaluate the information that each State submits; this guidance will be consistent with application requirement (e). Reviewers will allot points based on the quality of the State's plan and, where specified in the text of the criterion, whether the State has set ambitious yet achievable annual targets for that plan. In making these judgments, reviewers will consider the extent to which the State has:

- *A high-quality plan.* In determining the quality of a State's plan for a given Reform Plan Criterion, reviewers will evaluate the key goals, the activities to be undertaken and rationale for the activities, the timeline, the parties responsible for implementing the activities, and the credibility of the plan (as judged, in part, by the information submitted as supporting evidence). States are required to submit this information for each Reform Plan Criterion that the State addresses. States may also submit additional information that they believe will be helpful to peer reviewers.

- *Ambitious yet achievable annual targets* (only for those criteria that specify this). In determining whether a State has ambitious yet achievable annual targets for a given Reform Plan Criterion, reviewers will examine the State's targets in the context of the State's plan and the evidence submitted (if any) in support of the plan. There is no specific target that reviewers will be looking for here; nor will higher targets necessarily be rewarded above lower ones. Rather, reviewers will reward States for developing targets that – in light of the State's plan – are "ambitious yet achievable."

Note that the evidence that States submit may be relevant both to judging whether the State has a high-quality plan and whether its annual targets are ambitious yet achievable.

About Assigning Points: For each criterion, reviewers will assign points to an application. In general, the Department has specified total point values at the criterion level and in some instances, at the sub-criterion level. In the cases where the point totals have not been allocated to sub-criteria, each sub-criterion is weighted equally.

The reviewers will use the general ranges below as a guide when awarding points.

Maximum Point Value	Quality of Applicant's Response		
	Low	Medium	High
45	0 – 12	13 – 33	34 – 45
40	0 – 10	11 – 29	30 – 40
35	0 – 9	10 – 25	26 – 35
30	0 – 8	9 – 21	22 – 30
25	0 – 7	8 – 18	19 – 25

Maximum Point Value	Quality of Applicant's Response		
	Low	Medium	High
21	0 – 5	6 – 15	16 – 21
20	0 – 5	6 – 14	15 – 20
15	0 – 4	5 – 10	11 – 15
14	0 – 4	5 – 9	10 – 14
10	0 – 2	3 – 7	8 – 10
7	0 – 2	3 – 4	5 – 7
5	0 – 1	2 – 3	4 – 5

About Priorities: There are three types of priorities in the Race to the Top competition.

- The absolute priority cuts across the entire application and should not be addressed separately. It will be assessed, after the proposal has been fully reviewed and evaluated, to ensure that the application has met the priority. If an application has not met the priority, it will be eliminated from the competition.
- The competitive priority also cuts across the entire application. It is worth 15 points. Applicants will earn all or none of it, making it truly a competitive preference. In those cases where there is a disparity in the reviewers' determinations on the priority, the Department will award the competitive priority points only if a majority of the reviewers on a panel determine that an application should receive the priority points.
- The invitational priorities are addressed in their own separate sections. While applicants are invited to write to the invitational priorities, these will not earn points.

In the Event of a Tie: If two or more applications have the same score and there is not sufficient funding to support all of the tied applicants, the applicants' scores on criterion (A)(1)(ii), Securing LEA Commitment, will be used to break the tie.

IV. Reviewer Guidance for Criteria

A. State Success Factors

General Reviewer Guidance for (A)(1): In judging the quality of the applicant's response to this criterion, reviewers should refer to what the criterion asks, to the evidence requested in the application and presented by the applicant (if any), and to the elements of a high-quality plan as set forth in application requirement (d).

Reviewer Guidance Specific to (A)(1)(ii):

- *The model Memorandum of Understanding (MOU), provided in Appendix D to this notice, is an example of a strong MOU.*

(A)(1) **(maximum total points: 65)** Articulating State's education reform agenda and LEAs' participation in it: The extent to which—

(i) **(maximum subpoints: 5)** The State has set forth a comprehensive and coherent reform agenda that clearly articulates its goals for implementing reforms in the four education areas described in the ARRA and improving student outcomes statewide, establishes a clear and credible path to achieving these goals, and is consistent with the specific reform plans that the State has proposed throughout its application;

(ii) **(maximum subpoints: 45)** The participating LEAs (as defined in this notice) are strongly committed to the State's plans and to effective implementation of reform in the four education areas, as evidenced by Memoranda of Understanding (MOUs) (as set forth in Appendix D) or other binding agreements between the State and its participating LEAs (as defined in this notice) that include—

(a) Terms and conditions that reflect strong commitment by the participating LEAs (as defined in this notice) to the State's plans;

(b) Scope-of-work descriptions that require participating LEAs (as defined in this notice) to implement all or significant portions of the State's Race to the Top plans; and

(c) Signatures from as many as possible of the LEA superintendent (or equivalent), the president of the local school board (or equivalent, if applicable), and the local teachers' union leader (if applicable) (one signature of which must be from an authorized LEA representative) demonstrating the extent of leadership support within participating LEAs (as defined in this notice); and

(iii) **(maximum subpoints: 15)** The LEAs that are participating in the State's Race to the Top plans (including considerations of the numbers and percentages of participating LEAs, schools, K-12 students, and students in poverty) will translate into broad statewide impact, allowing the State to reach its ambitious yet achievable goals, overall and by student subgroup, for—

(a) Increasing student achievement in (at a minimum) reading/language arts and mathematics, as reported by the NAEP and the assessments required under the ESEA;

(b) Decreasing achievement gaps between subgroups in reading/language arts and mathematics, as reported by the NAEP and the assessments required under the ESEA;

(c) Increasing high school graduation rates (as defined in this notice); and

(d) Increasing college enrollment (as defined in this notice) and increasing the number of students who complete at least a year's worth of college credit that is applicable to a degree within two years of enrollment in an institution of higher education.

General Reviewer Guidance for (A)(2): In judging the quality of the applicant's response to this criterion, reviewers should refer to what the criterion asks, to the evidence requested in the application and presented by the applicant (if any), and to the elements of a high-quality plan as set forth in application requirement (d).

(A)(2) **(maximum total points: 30)** Building strong statewide capacity to implement, scale up, and sustain proposed plans: The extent to which the State has a high-quality overall plan to—

(i) **(maximum subpoints: 20)** Ensure that it has the capacity required to implement its proposed plans by—

(a) Providing strong leadership and dedicated teams to implement the statewide education reform plans the State has proposed;

(b) Supporting participating LEAs (as defined in this notice) in successfully implementing the education reform plans the State has proposed, through such activities as identifying promising practices, evaluating these practices' effectiveness, ceasing ineffective practices, widely disseminating and replicating the effective practices statewide, holding participating LEAs (as defined in this notice) accountable for progress and performance, and intervening where necessary;

(c) Providing effective and efficient operations and processes for implementing its Race to the Top grant in such areas as grant administration and oversight, budget reporting and monitoring, performance measure tracking and reporting, and fund disbursement;

(d) Using the funds for this grant, as described in the State's budget and accompanying budget narrative, to accomplish the State's plans and meet its targets, including where feasible, by

coordinating, reallocating, or repurposing education funds from other Federal, State, and local sources so that they align with the State's Race to the Top goals;

(e) Using the fiscal, political, and human capital resources of the State to continue, after the period of funding has ended, those reforms funded under the grant for which there is evidence of success; and

(ii) **(maximum subpoints: 10)** Use support from a broad group of stakeholders to better implement its plans, as evidenced by the strength of statements or actions of support from—

(a) The State's teachers and principals, which include the State's teachers' unions or statewide teacher associations; and

(b) Other critical stakeholders, such as the State's legislative leadership; charter school authorizers and State charter school membership associations (if applicable); other State and local leaders (e.g., business, community, civil rights, and education association leaders); Tribal schools; parent, student, and community organizations (e.g., parent-teacher associations, nonprofit organizations, local education foundations, and community-based organizations); and institutions of higher education.

General Reviewer Guidance for (A)(3): In judging the quality of the applicant's response to this criterion, reviewers should refer to what the criterion asks, and to the evidence requested in the application and presented by the applicant (if any).

(A)(3) **(maximum total points: 30)** Demonstrating significant progress in raising achievement and closing gaps: The extent to which the State has demonstrated its ability to—

(i) **(maximum subpoints: 5)** Make progress over the past several years in each of the four education reform areas, and used its ARRA and other Federal and State funding to pursue such reforms;

(ii) **(maximum subpoints: 25)** Improve student outcomes overall and by student subgroup since at least 2003, and explain the connections between the data and the actions that have contributed to—

(a) Increasing student achievement in reading/language arts and mathematics, both on the NAEP and on the assessments required under the ESEA;

(b) Decreasing achievement gaps between subgroups in reading/language arts and mathematics, both on the NAEP and on the assessments required under the ESEA; and

(c) Increasing high school graduation rates.

B. Standards and Assessments

State Reform Conditions Criteria

General Reviewer Guidance for (B)(1): In judging the quality of the applicant's response to this criterion, reviewers should refer to what the criterion asks and to the evidence requested in the application and presented by the applicant (if any).

Reviewer Guidance Specific to (B)(1)(i)(b)—Significant Number of States:

- *"High" points for a significant number of States are earned if the consortium includes a majority of the States in the country.*
- *"Medium" or "low" points are earned if the consortium includes one-half of the States in the country or less.*

Reviewer Guidance Specific to (B)(1)(ii):

- *"High" points are earned for: Phase 1 applicants' commitment to and progress toward adoption by August 2, 2010; and Phase 2 applicants' adoption by August 2, 2010.*
- *No "Medium" points are assigned for this criterion.*
- *"Low" points are earned for a high-quality plan to adopt by a later specified date in 2010.*
- *No points are earned for a plan that is not high-quality or for a plan to adopt later than 2010.*

(B)(1) **(maximum total points: 40)** Developing and adopting common standards: The extent to which the State has demonstrated its commitment to adopting a common set of high-quality standards, evidenced by (as set forth in Appendix B)—

(i) **(maximum subpoints: 20)** The State's participation in a consortium of States that—

(a) Is working toward jointly developing and adopting a common set of K-12 standards (as defined in this notice) that are supported by evidence that they are internationally benchmarked and build toward college and career readiness by the time of high school graduation; and

(b) Includes a significant number of States; and

(ii) **(maximum subpoints: 20)** (a) For Phase 1 applications, the State's high-quality plan demonstrating its commitment to and progress toward adopting a common set of K-12 standards (as defined in this notice) by August 2, 2010, or, at a minimum, by a later date in 2010 specified by the State, and to implementing the standards thereafter in a well-planned way; or

(b) For Phase 2 applications, the State's adoption of a common set of K-12 standards (as defined in this notice) by August 2, 2010, or, at a minimum, by a later date in 2010 specified by the State in a high-quality plan toward which the State has made significant progress, and its commitment to implementing the standards thereafter in a well-planned way.[15]

General Reviewer Guidance for (B)(2): In judging the quality of the applicant's response to this criterion, reviewers should refer to what the criterion asks and to the evidence requested in the application and presented by the applicant (if any).

Reviewer Guidance Specific to (B)(2)(ii)—Significant Number of States:

- *"High" points for a significant number of States are earned if the consortium includes a majority of the States in the country.*
- *"Medium" or "low" points are earned if the consortium includes one-half of the States in the country or less.*

(B)(2) **(maximum total points: 10)** Developing and implementing common, high-quality assessments: The extent to which the State has demonstrated its commitment to improving the quality of its assessments, evidenced by (as set forth in Appendix B) the State's participation in a consortium of States that—

(i) Is working toward jointly developing and implementing common, high-quality assessments (as defined in this notice) aligned with the consortium's common set of K-12 standards (as defined in this notice); and

(ii) Includes a significant number of States.

[15] Phase 2 applicants addressing selection criterion (B)(1)(ii) may amend their June 1, 2010 application submission by submitting evidence of adopting common standards after June 1, 2010 but before August 2, 2010.

Reform Plan Criteria

General Reviewer Guidance for (B)(3): In judging the quality of the applicant's plan and annual targets (if any) for this criterion, reviewers should refer to what the criterion asks, to the evidence requested in the application and presented by the applicant (if any), and to the elements of a high-quality plan as set forth in application requirement (d).

(B)(3) **(maximum total points: 20)** Supporting the transition to enhanced standards and high-quality assessments: The extent to which the State, in collaboration with its participating LEAs (as defined in this notice), has a high-quality plan for supporting a statewide transition to and implementation of internationally benchmarked K-12 standards that build toward college and career readiness by the time of high school graduation, and high-quality assessments (as defined in this notice) tied to these standards. State or LEA activities might, for example, include: developing a rollout plan for the standards together with all of their supporting components; in cooperation with the State's institutions of higher education, aligning high school exit criteria and college entrance requirements with the new standards and assessments; developing or acquiring, disseminating, and implementing high-quality instructional materials and assessments (including, for example, formative and interim assessments (both as defined in this notice)); developing or acquiring and delivering high-quality professional development to support the transition to new standards and assessments; and engaging in other strategies that translate the standards and information from assessments into classroom practice for all students, including high-need students (as defined in this notice).

C. Data Systems to Support Instruction

State Reform Conditions Criteria

General Reviewer Guidance for (C)(1): In judging the quality of the applicant's response to this criterion, reviewers should refer to what the criterion asks and to the evidence requested in the application and presented by the applicant (if any).

Reviewer Guidance Specific to (C)(1):

- *Applicants earn two (2) points for every element the State has, out of 12 elements possible.*

(C)(1) **(maximum total points: 24)** Fully implementing a statewide longitudinal data system: The extent to which the State has a statewide longitudinal data system that includes all of the America COMPETES Act elements (as defined in this notice).

Reform Plan Criteria

General Reviewer Guidance for (C)(2): In judging the quality of the applicant's plan and annual targets (if any) for this criterion, reviewers should refer to what the criterion asks, to the evidence requested in the application and presented by the applicant (if any), and to the elements of a high-quality plan as set forth in application requirement (d).

(C)(2) **(maximum total points: 5)** Accessing and using State data: The extent to which the State has a high-quality plan to ensure that data from the State's statewide longitudinal data system are accessible to, and used to inform and engage, as appropriate, key stakeholders (e.g.,

parents, students, teachers, principals, LEA leaders, community members, unions, researchers, and policymakers); and that the data support decision-makers in the continuous improvement of efforts in such areas as policy, instruction, operations, management, resource allocation, and overall effectiveness.[16]

General Reviewer Guidance for (C)(3): In judging the quality of the applicant's plan and annual targets (if any) for this criterion, reviewers should refer to what the criterion asks, to the evidence requested in the application and presented by the applicant (if any), and to the elements of a high-quality plan as set forth in application requirement (d).

(C)(3) **(maximum total points: 18)** Using data to improve instruction: The extent to which the State, in collaboration with its participating LEAs (as defined in this notice), has a high-quality plan to—

(i) Increase the acquisition, adoption, and use of local instructional improvement systems (as defined in this notice) that provide teachers, principals, and administrators with the information and resources they need to inform and improve their instructional practices, decision-making, and overall effectiveness;

(ii) Support participating LEAs (as defined in this notice) and schools that are using instructional improvement systems (as defined in this notice) in providing effective professional development to teachers, principals, and administrators on how to use these systems and the resulting data to support continuous instructional improvement; and

(iii) Make the data from instructional improvement systems (as defined in this notice), together with statewide longitudinal data system data, available and accessible to researchers so that they have detailed information with which to evaluate the effectiveness of instructional materials, strategies, and approaches for educating different types of students (e.g., students with disabilities, English language learners, students whose achievement is well below or above grade level).

D. Great Teachers and Leaders

State Reform Conditions Criteria

General Reviewer Guidance for (D)(1): In judging the quality of the applicant's response to this criterion, reviewers should refer to what the criterion asks and to the evidence requested in the application and presented by the applicant (if any).

Reviewer Guidance Specific to (D)(1):

- *The criterion must be judged for both teachers and principals.*

Reviewer Guidance Specific to (D)(1)(i):

- *"High" points are earned by States that have alternative routes that (a) permit providers who operate independently of institutions of higher education (IHEs), and (b) include at least 4 of the 5 elements listed in the definition of alternative routes to certification (as defined in this notice).*
- *"Medium" points are earned by States that have alternative routes that (a) permit providers who operate independently of IHEs, and (b) include at least 2 of the 5 elements listed in the definition of alternative routes to certification (as defined in this notice).*

[16] Successful applicants that receive Race to the Top grant awards will need to comply with the Family Educational Rights and Privacy Act (FERPA), including 34 CFR Part 99, as well as State and local requirements regarding privacy.

- *"Low" points are earned by States that have alternative routes that (a) do not permit providers who operate independently of IHEs, OR (b) include only 1 of the 5 elements listed in the definition of alternative routes to certification (as defined in this notice).*

(D)(1) **(maximum total points: 21)** Providing high-quality pathways for aspiring teachers and principals: The extent to which the State has—

(i) Legal, statutory, or regulatory provisions that allow alternative routes to certification (as defined in this notice) for teachers and principals, particularly routes that allow for providers in addition to institutions of higher education;

(ii) Alternative routes to certification (as defined in this notice) that are in use; and

(iii) A process for monitoring, evaluating, and identifying areas of teacher and principal shortage and for preparing teachers and principals to fill these areas of shortage.

Reform Plan Criteria

General Reviewer Guidance for (D)(2): In judging the quality of the applicant's response to this criterion and annual targets, reviewers should refer to what the criterion asks, to the evidence requested in the application and presented by the applicant (if any), and to the elements of a high-quality plan as set forth in application requirement (d).

Reviewer Guidance Specific to (D)(2):

- *The criterion must be judged for both teachers and principals.*

(D)(2) **(maximum total points: 58)** Improving teacher and principal effectiveness based on performance: The extent to which the State, in collaboration with its participating LEAs (as defined in this notice), has a high-quality plan and ambitious yet achievable annual targets to ensure that participating LEAs (as defined in this notice)—

(i) **(maximum subpoints: 5)** Establish clear approaches to measuring student growth (as defined in this notice) and measure it for each individual student;

(ii) **(maximum subpoints: 15)** Design and implement rigorous, transparent, and fair evaluation systems for teachers and principals that (a) differentiate effectiveness using multiple rating categories that take into account data on student growth (as defined in this notice) as a significant factor, and (b) are designed and developed with teacher and principal involvement;

(iii) **(maximum subpoints: 10)** Conduct annual evaluations of teachers and principals that include timely and constructive feedback; as part of such evaluations, provide teachers and principals with data on student growth for their students, classes, and schools; and

(iv) **(maximum subpoints: 28)** Use these evaluations, at a minimum, to inform decisions regarding—

(a) Developing teachers and principals, including by providing relevant coaching, induction support, and/or professional development;

(b) Compensating, promoting, and retaining teachers and principals, including by providing opportunities for highly effective teachers and principals (both as defined in this notice) to obtain additional compensation and be given additional responsibilities;

(c) Whether to grant tenure and/or full certification (where applicable) to teachers and principals using rigorous standards and streamlined, transparent, and fair procedures; and

(d) Removing ineffective tenured and untenured teachers and principals after they have had ample opportunities to improve, and ensuring that such decisions are made using rigorous standards and streamlined, transparent, and fair procedures.

General Reviewer Guidance for (D)(3): In judging the quality of the applicant's plan and annual targets for this criterion, reviewers should refer to what the criterion asks, to the evidence requested in the application and presented by the applicant (if any), and to the elements of a high-quality plan as set forth in application requirement (d).

(D)(3) **(maximum total points: 25)** Ensuring equitable distribution of effective teachers and principals: The extent to which the State, in collaboration with its participating LEAs (as defined in this notice), has a high-quality plan and ambitious yet achievable annual targets to—

(i) **(maximum subpoints: 15)** Ensure the equitable distribution of teachers and principals by developing a plan, informed by reviews of prior actions and data, to ensure that students in high-poverty and/or high-minority schools (both as defined in this notice) have equitable access to highly effective teachers and principals (both as defined in this notice) and are not served by ineffective teachers and principals at higher rates than other students; and

(ii) **(maximum subpoints: 10)** Increase the number and percentage of effective teachers (as defined in this notice) teaching hard-to-staff subjects and specialty areas including mathematics, science, and special education; teaching in language instruction educational programs (as defined under Title III of the ESEA); and teaching in other areas as identified by the State or LEA.

Plans for (i) and (ii) may include, but are not limited to, the implementation of incentives and strategies in such areas as recruitment, compensation, teaching and learning environments, professional development, and human resources practices and processes.

General Reviewer Guidance for (D)(4): In judging the quality of the applicant's plan and annual targets for this criterion, reviewers should refer to what the criterion asks, to the evidence requested in the application and presented by the applicant (if any), and to the elements of a high-quality plan as set forth in application requirement (d).

Reviewer Guidance Specific to (D)(4):

- *The criterion must be judged for both teachers and principals.*

(D)(4) **(maximum total points: 14)** Improving the effectiveness of teacher and principal preparation programs: The extent to which the State has a high-quality plan and ambitious yet achievable annual targets to—

(i) Link student achievement and student growth (both as defined in this notice) data to the students' teachers and principals, to link this information to the in-State programs where those teachers and principals were prepared for credentialing, and to publicly report the data for each credentialing program in the State; and

(ii) Expand preparation and credentialing options and programs that are successful at producing effective teachers and principals (both as defined in this notice).

General Reviewer Guidance for (D)(5): In judging the quality of the applicant's plan and annual targets (if any) for this criterion, reviewers should refer to what the criterion asks, to the evidence requested in the application and presented by the applicant (if any), and to the elements of a high-quality plan as set forth in application requirement (d).

(D)(5) **(maximum total points: 20)** Providing effective support to teachers and principals: The extent to which the State, in collaboration with its participating LEAs (as defined in this notice), has a high-quality plan for its participating LEAs (as defined in this notice) to—

(i) Provide effective, data-informed professional development, coaching, induction, and common planning and collaboration time to teachers and principals that are, where appropriate, ongoing and job-embedded. Such support might focus on, for example, gathering, analyzing, and using data; designing instructional strategies for improvement; differentiating instruction; creating school environments supportive of data-informed decisions; designing instruction to meet the specific needs of high-need students (as defined in this notice); and aligning systems and removing barriers to effective implementation of practices designed to improve student learning outcomes; and

(ii) Measure, evaluate, and continuously improve the effectiveness of those supports in order to improve student achievement (as defined in this notice).

E. Turning Around the Lowest-Achieving Schools

State Reform Conditions Criteria

General Reviewer Guidance for (E)(1): In judging the quality of the applicant's response to this criterion, reviewers should refer to what the criterion asks and to the evidence requested in the application and presented by the applicant (if any).

Reviewer Guidance Specific to (E)(1):

- *10 points are earned by States that can intervene directly in both schools and LEAs.*
- *5 points are earned by States that can intervene directly in either schools or LEAs, but not both.*
- *0 points are earned by States that cannot intervene in either schools or LEAs.*

(E)(1) **(maximum total points: 10)** Intervening in the lowest-achieving schools and LEAs: The extent to which the State has the legal, statutory, or regulatory authority to intervene directly in the State's persistently lowest-achieving schools (as defined in this notice) and in LEAs that are in improvement or corrective action status.

Reform Plan Criteria

General Reviewer Guidance for (E)(2): In judging the quality of the applicant's plan and annual targets for this criterion, reviewers should refer to what the criterion asks, to the evidence requested in the application and presented by the applicant (if any), and to the elements of a high-quality plan as set forth in application requirement (d).

(E)(2) **(maximum total points: 40)** Turning around the lowest-achieving schools: The extent to which the State has a high-quality plan and ambitious yet achievable annual targets to—

(i) **(maximum subpoints: 5)** Identify the persistently lowest-achieving schools (as defined in this notice) and, at its discretion, any non-Title I eligible secondary schools that would be considered persistently lowest-achieving schools (as defined in this notice) if they were eligible to receive Title I funds; and

(ii) **(maximum subpoints: 35)** Support its LEAs in turning around these schools by implementing one of the four school intervention models (as described in Appendix C): turnaround model, restart model, school closure, or transformation model (provided that an LEA with more than nine persistently lowest-achieving schools may not use the transformation model for more than 50 percent of its schools).

F. General

State Reform Conditions Criteria

General Reviewer Guidance for (F)(1): In judging the quality of the applicant's response to this criterion, reviewers should refer to what the criterion asks and to the evidence requested in the application and presented by the applicant (if any).

Reviewer Guidance Specific to (F)(1)(i):

- *"High" points are earned if the percentage of the total revenues available to the State that were used to support elementary, secondary, and public higher education increased from FY2008 to FY2009.*
- *"Medium" points are earned if the percentage of the total revenues available to the State that were used to support elementary, secondary, and public higher education were substantially unchanged from FY2008 to FY2009.*
- *"Low" points are earned if the percentage of the total revenues available to the State that were used to support elementary, secondary, and public higher education decreased from FY2008 to FY2009.*

(F)(1) **(maximum total points: 10)** Making education funding a priority: The extent to which—

(i) The percentage of the total revenues available to the State (as defined in this notice) that were used to support elementary, secondary, and public higher education for FY 2009 was greater than or equal to the percentage of the total revenues available to the State (as defined in this notice) that were used to support elementary, secondary, and public higher education for FY 2008; and

(ii) The State's policies lead to equitable funding (a) between high-need LEAs (as defined in this notice) and other LEAs, and (b) within LEAs, between high-poverty schools (as defined in this notice) and other schools.

General Reviewer Guidance for (F)(2): In judging the quality of the applicant's response to this criterion, reviewers should refer to what the criterion asks and to the evidence requested in the application and presented by the applicant (if any).

Reviewer Guidance Specific to (F)(2)(i):

- *"High" points are earned if the State either has no cap on the number of charter schools, or it has a "high" cap (defined as a cap such that, if it were filled, ≥10% of the total schools in the State would be charter schools); and the State does not have restrictions, such as those referenced in the "note to reviewers" below, that would be considered even mildly inhibiting.*
- *"Medium" points are earned if the State has a "medium" cap on the number of charter schools (defined as a cap such that, if it were filled, ≥5% and <10% of the total schools in the State would be charter schools); or the charter school law has sufficient flexibility to allow for an increase in the number of charter schools as if it were a medium or higher cap (e.g. by allowing for the creation of multiple campuses under the same charter); and the State does not have restrictions, such as those referenced in the "note to reviewers" below, that would be considered moderately or severely inhibiting.*
- *"Low" points are earned if the State has a "low" cap on the number of charter schools (defined as a cap such that, if it were filled, <5% of the total schools in the State would be charter schools) OR if the State has restrictions, such as those referenced in the "note to reviewers" below, that would be considered severely inhibiting.*
- *No points are earned if the State has no charter school law.*
- *Note to reviewers: Charter school laws are so complex that it is hard to write rules to capture each possible obstacle to charter school growth; therefore, this rubric is meant to guide reviewers, not to bind them. For example, if a State limits the number of charter schools by limiting the share of statewide or district-level funding that can go to charter schools, rather than by explicitly limiting the number of charter schools, reviewers should convert the funding restriction into an approximately equivalent limit on the number of schools and fit that into the guidelines here. As reviewers assess the inhibitions on charter schools, they should look for restrictions such as: disallowing certain types of charter schools (e.g., startups or conversions); restricting charter schools to operate in certain geographic areas; and limiting the number, percent, or demographics of students that may enroll in charter schools. Some States have "smart caps" designed to restrict growth to high-performing charter schools; this is not a problem unless it effectively restricts any new (i.e., unproven) charter schools from starting.*

Reviewer Guidance Specific to (F)(2)(iii):

- *"High" points are earned if the per-pupil funding to charter school students is ≥90% of that which is provided to traditional public school students.*
- *"Medium" points are earned if the per-pupil funding to charter school students is 80-89% of that which is provided to traditional public school students.*
- *"Low" points are earned if the per-pupil funding to charter school students is ≤79% of that which is provided to traditional public school students, or the State does not have a charter school law.*
- *No points are earned if the State has no charter school law.*

(F)(2) **(maximum total points: 40)** Ensuring successful conditions for high-performing charter schools and other innovative schools: The extent to which—

(i) The State has a charter school law that does not prohibit or effectively inhibit increasing the number of high-performing charter schools (as defined in this notice) in the State, measured (as

set forth in Appendix B) by the percentage of total schools in the State that are allowed to be charter schools or otherwise restrict student enrollment in charter schools.

(ii) The State has laws, statutes, regulations, or guidelines regarding how charter school authorizers approve, monitor, hold accountable, reauthorize, and close charter schools; in particular, whether authorizers require that student achievement (as defined in this notice) be one significant factor, among others, in authorization or renewal; encourage charter schools that serve student populations that are similar to local district student populations, especially relative to high-need students (as defined in this notice); and have closed or not renewed ineffective charter schools.

(iii) The State's charter schools receive (as set forth in Appendix B) equitable funding compared to traditional public schools, and a commensurate share of local, State, and Federal revenues.

(iv) The State provides charter schools with funding for facilities (for leasing facilities, purchasing facilities, or making tenant improvements), assistance with facilities acquisition, access to public facilities, the ability to share in bonds and mill levies, or other supports; and the extent to which the State does not impose any facility-related requirements on charter schools that are stricter than those applied to traditional public schools.

(v) The State enables LEAs to operate innovative, autonomous public schools (as defined in this notice) other than charter schools.

General Reviewer Guidance for (F)(3): In judging the quality of the applicant's response to this criterion, reviewers should refer to what the criterion asks and to the evidence requested in the application and presented by the applicant (if any).

(F)(3) **(maximum total points: 5)** Demonstrating other significant reform conditions: The extent to which the State, in addition to information provided under other State Reform Conditions Criteria, has created, through law, regulation, or policy, other conditions favorable to education reform or innovation that have increased student achievement or graduation rates, narrowed achievement gaps, or resulted in other important outcomes.

V. Reviewer Guidance for Priorities

Absolute Priority Guidance: The application will be judged to ensure that it has met the absolute priority set forth below. The absolute priority cuts across the entire application and should not be addressed separately. It is assessed, after the proposal has been fully reviewed and evaluated, to ensure that the application has met the priority. If an application has not met the priority, it will be eliminated from the competition.

Priority 1: Absolute Priority – Comprehensive Approach to Education Reform

To meet this priority, the State's application must comprehensively and coherently address all of the four education reform areas specified in the ARRA as well as the State Success Factors Criteria in order to demonstrate that the State and its participating LEAs are taking a systemic approach to education reform. The State must demonstrate in its application sufficient LEA participation and commitment to successfully implement and achieve the goals in its plans; and it must describe how the State, in collaboration with its participating LEAs, will use Race to the Top and other funds to increase student achievement, decrease the achievement gaps across student subgroups, and increase the rates at which students graduate from high school prepared for college and careers.

Competitive Priority Guidance: The application will be judged to determine whether it has met the competitive preference priority set forth below. The competitive preference priority will be evaluated in the context of the State's entire application. Therefore, a State that is responding to this priority should address it throughout the application, as appropriate, and provide a summary of its approach to addressing the priority. The reviewers will assess the priority as part of their review of a State's application and determine whether it has been met.

Priority 2: Competitive Preference Priority – Emphasis on Science, Technology, Engineering, and Mathematics (STEM). (competitive preference points: 15, all or nothing)

To meet this priority, the State's application must have a high-quality plan to address the need to (i) offer a rigorous course of study in mathematics, the sciences, technology, and engineering; (ii) cooperate with industry experts, museums, universities, research centers, or other STEM-capable community partners to prepare and assist teachers in integrating STEM content across grades and disciplines, in promoting effective and relevant instruction, and in offering applied learning opportunities for students; and (iii) prepare more students for advanced study and careers in the sciences, technology, engineering, and mathematics, including by addressing the needs of underrepresented groups and of women and girls in the areas of science, technology, engineering, and mathematics.

Invitational Priority Guidance: No points are awarded for invitational priorities.

Priority 3: Invitational Priority – Innovations for Improving Early Learning Outcomes.

The Secretary is particularly interested in applications that include practices, strategies, or programs to improve educational outcomes for high-need students who are young children (pre-kindergarten through third grade) by enhancing the quality of preschool programs. Of particular interest are proposals that support practices that (i) improve school readiness (including social, emotional, and cognitive); and (ii) improve the transition between preschool and kindergarten.

Invitational Priority Guidance: No points are awarded for invitational priorities.

Priority 4: Invitational Priority – Expansion and Adaptation of Statewide Longitudinal Data Systems.

The Secretary is particularly interested in applications in which the State plans to expand statewide longitudinal data systems to include or integrate data from special education programs, English language learner programs,[17] early childhood programs, at-risk and dropout prevention programs, and school climate and culture programs, as well as information on student mobility, human resources (i.e., information on teachers, principals, and other staff), school finance, student health, postsecondary education, and other relevant areas, with the purpose of connecting and coordinating all parts of the system to allow important questions related to policy, practice, or overall effectiveness to be asked, answered, and incorporated into effective continuous improvement practices.

The Secretary is also particularly interested in applications in which States propose working together to adapt one State's statewide longitudinal data system so that it may be used, in whole or in part, by one or more other States, rather than having each State build or continue building such systems independently.

[17] The term English language learner, throughout this notice, is meant to include students who are limited English proficient, as defined in section 9101 of the ESEA.

Invitational Priority Guidance: *No points are awarded for invitational priorities.*

Priority 5: Invitational Priority – P-20 Coordination, Vertical and Horizontal Alignment.

The Secretary is particularly interested in applications in which the State plans to address how early childhood programs, K-12 schools, postsecondary institutions, workforce development organizations, and other State agencies and community partners (e.g., child welfare, juvenile justice, and criminal justice agencies) will coordinate to improve all parts of the education system and create a more seamless preschool-through-graduate school (P-20) route for students. Vertical alignment across P-20 is particularly critical at each point where a transition occurs (e.g., between early childhood and K-12, or between K-12 and postsecondary/careers) to ensure that students exiting one level are prepared for success, without remediation, in the next. Horizontal alignment, that is, coordination of services across schools, State agencies, and community partners, is also important in ensuring that high-need students (as defined in this notice) have access to the broad array of opportunities and services they need and that are beyond the capacity of a school itself to provide.

Invitational Priority Guidance: *No points are awarded for invitational priorities.*

Priority 6: Invitational Priority – School-Level Conditions for Reform, Innovation, and Learning.

The Secretary is particularly interested in applications in which the State's participating LEAs (as defined in this notice) seek to create the conditions for reform and innovation as well as the conditions for learning by providing schools with flexibility and autonomy in such areas as--

(i) Selecting staff;

(ii) Implementing new structures and formats for the school day or year that result in increased learning time (as defined in this notice);

(iii) Controlling the school's budget;

(iv) Awarding credit to students based on student performance instead of instructional time;

(v) Providing comprehensive services to high-need students (as defined in this notice) (e.g., by mentors and other caring adults; through local partnerships with community-based organizations, nonprofit organizations, and other providers);

(vi) Creating school climates and cultures that remove obstacles to, and actively support, student engagement and achievement; and

(vii) Implementing strategies to effectively engage families and communities in supporting the academic success of their students.

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Appendix C School Intervention Models

There are four school intervention models referred to in Selection Criterion (E)(2): Turnaround model, restart model, school closure, or transformation model. Each is described below.

(a) *Turnaround model.* (1) A turnaround model is one in which an LEA must—

(i) Replace the principal and grant the principal sufficient operational flexibility (including in staffing, calendars/time, and budgeting) to implement fully a comprehensive approach in order to substantially improve student achievement outcomes and increase high school graduation rates;

(ii) Using locally adopted competencies to measure the effectiveness of staff who can work within the turnaround environment to meet the needs of students,

(A) Screen all existing staff and rehire no more than 50 percent; and

(B) Select new staff;

(iii) Implement such strategies as financial incentives, increased opportunities for promotion and career growth, and more flexible work conditions that are designed to recruit, place, and retain staff with the skills necessary to meet the needs of the students in the turnaround school;

(iv) Provide staff with ongoing, high-quality, job-embedded professional development that is aligned with the school's comprehensive instructional program and designed with school staff to ensure that they are equipped to facilitate effective teaching and learning and have the capacity to successfully implement school reform strategies;

(v) Adopt a new governance structure, which may include, but is not limited to, requiring the school to report to a new ''turnaround office'' in the LEA or SEA, hire a ''turnaround leader'' who reports directly to the Superintendent or Chief Academic Officer, or enter into a multi-year contract with the LEA or SEA to obtain added flexibility in exchange for greater accountability;

(vi) Use data to identify and implement an instructional program that is research-based and ''vertically aligned'' from one grade to the next as

well as aligned with State academic standards;

(vii) Promote the continuous use of student data (such as from formative, interim, and summative assessments) to inform and differentiate instruction in order to meet the academic needs of individual students;

(viii) Establish schedules and implement strategies that provide increased learning time (as defined in this notice); and

(ix) Provide appropriate social-emotional and community-oriented services and supports for students.

(2) A turnaround model may also implement other strategies such as—

(i) Any of the required and permissible activities under the transformation model; or

(ii) A new school model (*e.g.*, themed, dual language academy).

(b) *Restart model.* A restart model is one in which an LEA converts a school or closes and reopens a school under a charter school operator, a charter management organization (CMO), or an education management organization (EMO) that has been selected through a rigorous review process. (A CMO is a non-profit organization that operates or manages charter schools by centralizing or sharing certain functions and resources among schools. An EMO is a for-profit or non-profit organization that provides ''whole-school operation'' services to an LEA.) A restart model must enroll, within the grades it serves, any former student who wishes to attend the school.

(c) *School closure.* School closure occurs when an LEA closes a school and enrolls the students who attended that school in other schools in the LEA that are higher achieving. These other schools should be within reasonable proximity to the closed school and may include, but are not limited to, charter schools or new schools for which achievement data are not yet available.

(d) *Transformation model.* A transformation model is one in which an LEA implements each of the following strategies:

(1) *Developing and increasing teacher and school leader effectiveness.*

(i) *Required activities.* The LEA must—

(A) Replace the principal who led the school prior to commencement of the transformation model;

(B) Use rigorous, transparent, and equitable evaluation systems for teachers and principals that—

(*1*) Take into account data on student growth (as defined in this notice) as a significant factor as well as other factors such as multiple observation-based assessments of performance and ongoing collections of professional practice reflective of student achievement and increased high-school graduations rates; and

(*2*) Are designed and developed with teacher and principal involvement;

(C) Identify and reward school leaders, teachers, and other staff who, in implementing this model, have increased student achievement and high-school graduation rates and identify and remove those who, after ample opportunities have been provided for them to improve their professional practice, have not done so;

(D) Provide staff with ongoing, high-quality, job-embedded professional development (*e.g.,* regarding subject-specific pedagogy, instruction that reflects a deeper understanding of the community served by the school, or differentiated instruction) that is aligned with the school's comprehensive instructional program and designed with school staff to ensure they are equipped to facilitate effective teaching and learning and have the capacity to successfully implement school reform strategies; and

(E) Implement such strategies as financial incentives, increased opportunities for promotion and career growth, and more flexible work conditions that are designed to recruit, place, and retain staff with the skills necessary to meet the needs of the students in a transformation school.

(ii) *Permissible activities.* An LEA may also implement other strategies to develop teachers' and school leaders' effectiveness, such as—

(A) Providing additional compensation to attract and retain staff with the skills necessary to meet the needs of the students in a transformation school;

(B) Instituting a system for measuring changes in instructional practices resulting from professional development; or

(C) Ensuring that the school is not required to accept a teacher without the mutual consent of the teacher and principal, regardless of the teacher's seniority.

(2) *Comprehensive instructional reform strategies.*

(i) *Required activities.* The LEA must—

(A) Use data to identify and implement an instructional program that is research-based and ''vertically aligned'' from one grade to the next as well as aligned with State academic standards; and

(B) Promote the continuous use of student data (such as from formative, interim, and summative assessments) to inform and differentiate instruction in order to meet the academic needs of individual students.

(ii) *Permissible activities.* An LEA may also implement comprehensive instructional reform strategies, such as—

(A) Conducting periodic reviews to ensure that the curriculum is being implemented with fidelity, is having the intended impact on student achievement, and is modified if ineffective;

(B) Implementing a schoolwide ''response-to-intervention'' model;

(C) Providing additional supports and professional development to teachers and principals in order to implement effective strategies to support students with disabilities in the least restrictive environment and to ensure that limited English proficient students acquire language skills to master academic content;

(D) Using and integrating technology-based supports and interventions as part of the instructional program; and

(E) In secondary schools—

(*1*) Increasing rigor by offering opportunities for students to enroll in advanced coursework (such as Advanced Placement or International Baccalaureate; or science, technology, engineering, and mathematics courses, especially those that incorporate rigorous and relevant project-, inquiry-, or design-based contextual learning opportunities), early-college high schools, dual enrollment programs, or thematic learning academies that prepare students for college and careers, including by providing appropriate supports designed to ensure that low-achieving students can take advantage of these programs and coursework;

(*2*) Improving student transition from middle to high school through summer transition programs or freshman academies;

(*3*) Increasing graduation rates through, for example, credit-recovery programs, re-engagement strategies, smaller learning communities, competency-based instruction and performance-based assessments, and acceleration of basic reading and mathematics skills; or

(*4*) Establishing early-warning systems to identify students who may be at risk of failing to achieve to high standards or graduate.

(3) *Increasing learning time and creating community-oriented schools.*

(i) *Required activities.* The LEA must—

(A) Establish schedules and implement strategies that provide increased learning time (as defined in this notice); and

(B) Provide ongoing mechanisms for family and community engagement.

(ii) *Permissible activities.* An LEA may also implement other strategies that extend learning time and create community-oriented schools, such as—

(A) Partnering with parents and parent organizations, faith- and community-based organizations, health clinics, other State or local agencies, and others to create safe school environments that meet students' social, emotional, and health needs;

(B) Extending or restructuring the school day so as to add time for such strategies as advisory periods that build relationships between students, faculty, and other school staff;

(C) Implementing approaches to improve school climate and discipline, such as implementing a system of positive behavioral supports or taking steps to eliminate bullying and student harassment; or

(D) Expanding the school program to offer full-day kindergarten or pre-kindergarten.

(4) *Providing operational flexibility and sustained support.*

(i) *Required activities.* The LEA must—

(A) Give the school sufficient operational flexibility (such as staffing, calendars/time, and budgeting) to implement fully a comprehensive approach to substantially improve student achievement outcomes and increase high school graduation rates; and

(B) Ensure that the school receives ongoing, intensive technical assistance and related support from the LEA, the SEA, or a designated external lead partner organization (such as a school turnaround organization or an EMO).

(ii) *Permissible activities.* The LEA may also implement other strategies for providing operational flexibility and intensive support, such as—

(A) Allowing the school to be run under a new governance arrangement, such as a turnaround division within the LEA or SEA; or

(B) Implementing a per-pupil school-based budget formula that is weighted based on student needs.

If a school identified as a persistently lowest-achieving school has implemented, in whole or in part within the last two years, an intervention that meets the requirements of the turnaround, restart, or transformation models, the school may continue or complete the intervention being implemented.

Appendix D Participating LEA Memorandum of Understanding

Background

Participating LEAs (as defined in this notice) in a State's Race to the Top plans are required to enter into a Memorandum of Understanding (MOU) or other binding agreement with the State that specifies the scope of the work being implemented by the participating LEA (as defined in this notice).

To support States in working efficiently with LEAs to determine which LEAs will participate in the State's Race to the Top application, the U.S. Department of Education has produced a model MOU, which is attached. This model MOU may serve as a template for States; however, States are not required to use it. They may use a different document that includes the key features noted below and in the model, and they should consult with their State and local attorneys on what is most appropriate for their State that includes, at a minimum, these key elements.

The purpose of the model MOU is to help to specify a relationship that is specific to Race to the Top and is not meant to detail all typical aspects of State/LEA grant management or administration. At a minimum, a strong MOU should include the following, each of which is described in detail below: (i) Terms and conditions; (ii) a scope of work; and, (iii) signatures.

(i) Terms and conditions: Each participating LEA (as defined in this notice) should sign a standard set of terms and conditions that includes, at a minimum, key roles and responsibilities of the State and the LEA; State recourse for LEA non-performance; and assurances that make clear what the participating LEA (as defined in this notice) is agreeing to do.

(ii) Scope of work: MOUs should include a scope of work (included in the model MOU as Exhibit I) that is completed by each participating LEA (as defined in this notice). The scope of work must be signed and dated by an authorized LEA and State official. In the interest of time and with respect for the effort it will take for LEAs to develop detailed work plans, the scope of work submitted by LEAs and States as part of their Race to the Top applications may be preliminary. Preliminary scopes of work should include the portions of the State's proposed reform plans that the LEA is agreeing to implement. (Note that in order to participate in a State's Race to the Top application an LEA must agree to implement all or significant portions of the State's reform plans.)

If a State is awarded a Race to the Top grant, the participating LEAs (as defined in this notice) will have up to 90 days to complete final scopes of work (which could be attached to the model MOU as Exhibit II), which must contain detailed work plans that are consistent with the preliminary scope of work and with the State's grant application, and should include the participating LEA's (as defined in this notice) specific goals, activities, timelines, budgets, key personnel, and annual targets for key performance measures.

(iii) Signatures: The signatures demonstrate (a) an acknowledgement of the relationship between the LEA and the State, and (b) the strength of the participating LEA's (as defined in this notice) commitment.

- With respect to the relationship between the LEA and the State, the State's counter-signature on the MOU indicates that the LEA's commitment is consistent with the requirement that a participating LEA (as defined in this notice) implement all or significant portions of the State's plans.
- The strength of the participating LEA's (as defined in this notice) commitment will be demonstrated by the signatures of the LEA superintendent (or an equivalent authorized signatory), the president of the local school board (or equivalent, if applicable) and the local teacher's union leader (if applicable).

Please note the following with regard to the State's Race to the Top application:

- In its application, the State need only provide an example of the State's standard Participating LEA MOU; it does not have to provide copies of every MOU signed by its participating LEAs (as defined in this notice). If, however, States and LEAs have made any changes to the State's standard MOU, the State must provide description of the changes that were made. Please note that the Department may, at any time, request copies of all MOUs between the State and its participating LEAs.
- Please see criterion (A)(1)(ii) and (A)(1)(iii), and the evidence requested in the application, for more information and ways in which States will be asked to summarize information about the LEA MOUs.

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Model Participating LEA Memorandum of Understanding

This Memorandum of Understanding ("MOU") is entered into by and between _____ ("State") and _____ ("Participating LEA"). The purpose of this agreement is to establish a framework of collaboration, as well as articulate specific roles and responsibilities in support of the State in its implementation of an approved Race to the Top grant project.

I. SCOPE OF WORK

Exhibit I, the Preliminary Scope of Work, indicates which portions of the State's proposed reform plans ("State Plan") the Participating LEA is agreeing to implement. (Note that, in order to participate, the LEA must agree to implement all or significant portions of the State Plan.)

II. PROJECT ADMINISTRATION

A. PARTICIPATING LEA RESPONSIBILITIES

In assisting the State in implementing the tasks and activities described in the State's Race to the Top application, the Participating LEA subgrantee will:

1) Implement the LEA plan as identified in Exhibits I and II of this agreement;
2) Actively participate in all relevant convenings, communities of practice, or other practice-sharing events that are organized or sponsored by the State or by the U.S. Department of Education ("ED");
3) Post to any website specified by the State or ED, in a timely manner, all non-proprietary products and lessons learned developed using funds associated with the Race to the Top grant;
4) Participate, as requested, in any evaluations of this grant conducted by the State or ED;
5) Be responsive to State or ED requests for information including on the status of the project, project implementation, outcomes, and any problems anticipated or encountered;
6) Participate in meetings and telephone conferences with the State to discuss (a) progress of the project, (b) potential dissemination of resulting non-proprietary products and lessons learned, (c) plans for subsequent years of the Race to the Top grant period, and (d) other matters related to the Race to the Top grant and associated plans.

B. STATE RESPONSIBILITIES

In assisting Participating LEAs in implementing their tasks and activities described in the State's Race to the Top application, the State grantee will:

1) Work collaboratively with, and support the Participating LEA in carrying out the LEA Plan as identified in Exhibits I and II of this agreement;
2) Timely distribute the LEA's portion of Race to the Top grant funds during the course of the project period and in accordance with the LEA Plan identified in Exhibit II;
3) Provide feedback on the LEA's status updates, annual reports, any interim reports, and project plans and products; and
4) Identify sources of technical assistance for the project.

C. JOINT RESPONSIBILITIES

1) The State and the Participating LEA will each appoint a key contact person for the Race to the Top grant.

2) These key contacts from the State and the Participating LEA will maintain frequent communication to facilitate cooperation under this MOU.
3) State and Participating LEA grant personnel will work together to determine appropriate timelines for project updates and status reports throughout the whole grant period.
4) State and Participating LEA grant personnel will negotiate in good faith to continue to achieve the overall goals of the State's Race to the Top grant, even when the State Plan requires modifications that affect the Participating LEA, or when the LEA Plan requires modifications.

D. STATE RECOURSE FOR LEA NON-PERFORMANCE

If the State determines that the LEA is not meeting its goals, timelines, budget, or annual targets or is not fulfilling other applicable requirements, the State grantee will take appropriate enforcement action, which could include a collaborative process between the State and the LEA, or any of the enforcement measures that are detailed in 34 CFR section 80.43 including putting the LEA on reimbursement payment status, temporarily withholding funds, or disallowing costs.

III. ASSURANCES

The Participating LEA hereby certifies and represents that it:
1) Has all requisite power and authority to execute this MOU;
2) Is familiar with the State's Race to the Top grant application and is supportive of and committed to working on all or significant portions of the State Plan;
3) Agrees to be a Participating LEA and will implement those portions of the State Plan indicated in Exhibit I, if the State application is funded,
4) Will provide a Final Scope of Work to be attached to this MOU as Exhibit II only if the State's application is funded; will do so in a timely fashion but no later than 90 days after a grant is awarded; and will describe in Exhibit II the LEA's specific goals, activities, timelines, budgets, key personnel, and annual targets for key performance measures ("LEA Plan ") in a manner that is consistent with the Preliminary Scope of Work (Exhibit I) and with the State Plan; and
5) Will comply with all of the terms of the Grant, the State's subgrant, and all applicable Federal and State laws and regulations, including laws and regulations applicable to the Program, and the applicable provisions of EDGAR (34 CFR Parts 75, 77, 79, 80, 82, 84, 85, 86, 97, 98 and 99).

IV. MODIFICATIONS

This Memorandum of Understanding may be amended only by written agreement signed by each of the parties involved, and in consultation with ED.

V. DURATION/TERMINATION

This Memorandum of Understanding shall be effective, beginning with the date of the last signature hereon and, if a grant is received, ending upon the expiration of the grant project period, or upon mutual agreement of the parties, whichever occurs first.

VI. SIGNATURES

LEA Superintendent (or equivalent authorized signatory) - required:

_____

Signature/Date

_____

Print Name/Title

President of Local School Board (or equivalent, if applicable):

_____

Signature/Date

_____

Print Name/Title

Local Teachers' Union Leader (if applicable):

_____

Signature/Date

_____

Print Name/Title

Authorized State Official - required:
By its signature below, the State hereby accepts the LEA as a Participating LEA.

_____

Signature/Date

_____

Print Name/Title

A. EXHIBIT I – PRELIMINARY SCOPE OF WORK

LEA hereby agrees to participate in implementing the State Plan in each of the areas identified below.

Elements of State Reform Plans	LEA Participation (Y/N)	Comments from LEA (optional)
B. Standards and Assessments		
(B)(3) Supporting the transition to enhanced standards and high-quality assessments		
C. Data Systems to Support Instruction		
(C)(3) Using data to improve instruction:		
(i) Use of local instructional improvement systems		
(ii) Professional development on use of data		
(iii) Availability and accessibility of data to researchers		
D. Great Teachers and Leaders		
(D)(2) Improving teacher and principal effectiveness based on performance:		
(i) Measure student growth		
(ii) Design and implement evaluation systems		
(iii) Conduct annual evaluations		
(iv)(a) Use evaluations to inform professional development		
(iv)(b) Use evaluations to inform compensation, promotion, and retention		
(iv)(c) Use evaluations to inform tenure and/or full certification		
(iv)(d) Use evaluations to inform removal		
(D)(3) Ensuring equitable distribution of effective teachers and principals:		
(i) High-poverty and/or high-minority schools		
(ii) Hard-to-staff subjects and specialty areas		
(D)(5) Providing effective support to teachers and principals:		
(i) Quality professional development		
(ii) Measure effectiveness of professional development		
E. Turning Around the Lowest-Achieving Schools		
(E)(2) Turning around the lowest-achieving schools		

For the Participating LEA

Authorized Signature/Date

Print Name/Title

For the State

Authorized Signature/Date

Print Name/Title

[FR Doc. E9–27426 Filed 11–17–09; 8:45 am]
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Federal Register

Wednesday,
November 18, 2009

Part IV

Department of Education

Overview Information; Race to the Top Fund; Notice Inviting Applications for New Awards for Fiscal Year (FY) 2010; Notice

DEPARTMENT OF EDUCATION

Overview Information; Race to the Top Fund; Notice Inviting Applications for New Awards for Fiscal Year (FY) 2010

Catalog of Federal Domestic Assistance (CFDA) Number: 84.395A.

DATES: *Applications Available:* November 18, 2009.

Deadline for Notice of Intent to Apply for Phase 1: December 8, 2009.

Date of Meeting for Potential Applicants: The Department intends to hold two technical assistance planning workshops. The first will be in Denver, Colorado, on December 3, 2009. The second will be in the Washington, DC area on December 10, 2009. We recommend that applicants attend one of these two workshops.

Deadlines for Transmittal of Applications:

Phase 1. Applications: January 19, 2010.

Phase 2 Applications: June 1, 2010. Phase 2 applicants addressing selection criterion (B)(1)(ii)(b) may amend their June 1, 2010 application submission through August 2, 2010 by submitting evidence of having adopted common standards after June 1, 2010. No other information may be submitted after June 1, 2010 in an amended application.

Deadlines for Intergovernmental Review:

Phase 1 Applications: March 18, 2010.

Phase 2 Applications: August 2, 2010.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The purpose of the Race to the Top Fund, a competitive grant program authorized under the American Recovery and Reinvestment Act of 2009 (ARRA), is to encourage and reward States that are creating the conditions for education innovation and reform; achieving significant improvement in student outcomes, including making substantial gains in student achievement, closing achievement gaps, improving high school graduation rates, and ensuring student preparation for success in college and careers; and implementing ambitious plans in four core education reform areas:

(a) Adopting internationally-benchmarked standards and assessments that prepare students for success in college and the workplace;

(b) Building data systems that measure student success and inform teachers and principals in how they can improve their practices;

(c) Increasing teacher effectiveness and achieving equity in teacher distribution; and

(d) Turning around our lowest-achieving schools.

Priorities: These priorities are from the notice of final priorities, requirements, definitions, and selection criteria for this program, published elsewhere in this issue of the **Federal Register**.

Absolute Priority: For FY 2010, this priority is an absolute priority. Under 34 CFR 75.105(c)(3), we consider only applications that meet this priority. Applicants should address this priority throughout their applications.

Priority 1: Absolute Priority—Comprehensive Approach to Education Reform.

To meet this priority, the State's application must comprehensively and coherently address all of the four education reform areas specified in the ARRA as well as the State Success Factors Criteria in order to demonstrate that the State and its participating LEAs are taking a systemic approach to education reform. The State must demonstrate in its application sufficient LEA participation and commitment to successfully implement and achieve the goals in its plans; and it must describe how the State, in collaboration with its participating LEAs, will use Race to the Top and other funds to increase student achievement, decrease the achievement gaps across student subgroups, and increase the rates at which students graduate from high school prepared for college and careers.

Competitive Preference Priority: For FY 2010, this priority is a competitive preference priority. Under 34 CFR 75.105(c)(2)(i), we award 15 additional points to applications that meet this priority. Applicants should address this priority throughout their applications.

Priority 2: Competitive Preference Priority—Emphasis on Science, Technology, Engineering, and Mathematics (STEM).

To meet this priority, the State's application must have a high-quality plan to address the need to (i) offer a rigorous course of study in mathematics, the sciences, technology, and engineering; (ii) cooperate with industry experts, museums, universities, research centers, or other STEM-capable community partners to prepare and assist teachers in integrating STEM content across grades and disciplines, in promoting effective and relevant instruction, and in offering applied learning opportunities for students; and (iii) prepare more students for advanced study and careers in the sciences, technology, engineering, and mathematics, including by addressing the needs of underrepresented groups and of women and girls in the areas of science, technology, engineering, and mathematics.

Invitational Priorities: For FY 2010, these priorities are invitational priorities. With an invitational priority, we signal our interest in receiving applications that meet the priority; however, consistent with 34 CFR 75.105(c)(1), we do not give an application that meets an invitational priority preference over other applications.

Priority 3: Invitational Priority—Innovations for Improving Early Learning Outcomes.

The Secretary is particularly interested in applications that include practices, strategies, or programs to improve educational outcomes for high-need students who are young children (pre-kindergarten through third grade) by enhancing the quality of preschool programs. Of particular interest are proposals that support practices that (i) improve school readiness (including social, emotional, and cognitive); and (ii) improve the transition between preschool and kindergarten.

Priority 4: Invitational Priority—Expansion and Adaptation of Statewide Longitudinal Data Systems.

The Secretary is particularly interested in applications in which the State plans to expand statewide longitudinal data systems to include or integrate data from special education programs, English language learner programs,[1] early childhood programs, at-risk and dropout prevention programs, and school climate and culture programs, as well as information on student mobility, human resources (*i.e.*, information on teachers, principals, and other staff), school finance, student health, postsecondary education, and other relevant areas, with the purpose of connecting and coordinating all parts of the system to allow important questions related to policy, practice, or overall effectiveness to be asked, answered, and incorporated into effective continuous improvement practices.

The Secretary is also particularly interested in applications in which States propose working together to adapt one State's statewide longitudinal data system so that it may be used, in whole or in part, by one or more other States, rather than having each State build or continue building such systems independently.

Priority 5: Invitational Priority—P–20 Coordination, Vertical and Horizontal Alignment.

[1] The term English language learner, as used in this notice, is synonymous with the term limited English proficient, as defined in section 9101 of the ESEA.

The Secretary is particularly interested in applications in which the State plans to address how early childhood programs, K–12 schools, postsecondary institutions, workforce development organizations, and other State agencies and community partners (*e.g.*, child welfare, juvenile justice, and criminal justice agencies) will coordinate to improve all parts of the education system and create a more seamless preschool-through-graduate school (P–20) route for students. Vertical alignment across P–20 is particularly critical at each point where a transition occurs (*e.g.*, between early childhood and K–12, or between K–12 and postsecondary/careers) to ensure that students exiting one level are prepared for success, without remediation, in the next. Horizontal alignment, that is, coordination of services across schools, State agencies, and community partners, is also important in ensuring that high-need students (as defined in this notice) have access to the broad array of opportunities and services they need and that are beyond the capacity of a school itself to provide.

Priority 6: Invitational Priority—School-Level Conditions for Reform, Innovation, and Learning.

The Secretary is particularly interested in applications in which the State's participating LEAs (as defined in this notice) seek to create the conditions for reform and innovation as well as the conditions for learning by providing schools with flexibility and autonomy in such areas as—

(i) Selecting staff;

(ii) Implementing new structures and formats for the school day or year that result in increased learning time (as defined in this notice);

(iii) Controlling the school's budget;

(iv) Awarding credit to students based on student performance instead of instructional time;

(v) Providing comprehensive services to high-need students (as defined in this notice) (*e.g.,* by mentors and other caring adults; through local partnerships with community-based organizations, nonprofit organizations, and other providers);

(vi) Creating school climates and cultures that remove obstacles to, and actively support, student engagement and achievement; and

(vii) Implementing strategies to effectively engage families and communities in supporting the academic success of their students.

Final Requirements: The following requirements are from the notice of final priorities, requirements, definitions, and selection criteria, published elsewhere in this issue of the **Federal Register**.

Application Requirements:

(a) The State's application must be signed by the Governor, the State's chief school officer, and the president of the State board of education (if applicable). States will respond to this requirement in the application, Section III, Race to the Top Application Assurances. In addition, the assurances in Section IV must be signed by the Governor.

(b) The State must describe the progress it has made over the past several years in each of the four education reform areas (as described in criterion (A)(3)(i)).

(c) The State must include a budget that details how it will use grant funds and other resources to meet targets and perform related functions (as described in criterion (A)(2)(i)(d)), including how it will use funds awarded under this program to—

(1) Achieve its targets for improving student achievement and graduation rates and for closing achievement gaps (as described in criterion (A)(1)(iii)); the State must also describe its track record of improving student progress overall and by student subgroup (as described in criterion (A)(3)(ii)); and

(2) Give priority to high-need LEAs (as defined in this notice), in addition to providing 50 percent of the grant to participating LEAs (as defined in this notice) based on their relative shares of funding under Part A of Title I of the Elementary and Secondary Education Act of 1965 (ESEA) for the most recent year as required under section 14006(c) of the ARRA. (**Note:** Because all Race to the Top grants will be made in 2010, relative shares will be based on total funding received in FY 2009, including both the regular Title I, Part A appropriation and the amount made available by the ARRA).

(d) The State must provide, for each State Reform Conditions Criterion (listed in this notice) that it chooses to address, a description of the State's current status in meeting that criterion and, at a minimum, the information requested as supporting evidence for the criterion and the performance measures, if any (*see* Appendix A).

(e) The State must provide, for each Reform Plan Criterion (listed in this notice) that it chooses to address, a detailed plan for use of grant funds that includes, but need not be limited to—

(1) The key goals;

(2) The key activities to be undertaken and rationale for the activities, which should include why the specific activities are thought to bring about the change envisioned and how these activities are linked to the key goals;

(3) The timeline for implementing the activities;

(4) The party or parties responsible for implementing the activities;

(5) The information requested in the performance measures, where applicable (*see* Appendix A), and where the State proposes plans for reform efforts not covered by a specified performance measure, the State is encouraged to propose performance measures and annual targets for those efforts; and

(6) The information requested as supporting evidence, if any, for the criterion, together with any additional information the State believes will be helpful to peer reviewers in judging the credibility of the State's plan.

(f) The State must submit a certification from the State Attorney General that—

(1) The State's description of, and statements and conclusions concerning State law, statute, and regulation in its application are complete, accurate, and constitute a reasonable interpretation of State law, statute, and regulation; and

(2) At the time the State submits its application, the State does not have any legal, statutory, or regulatory barriers at the State level to linking data on student achievement or student growth to teachers and principals for the purpose of teacher and principal evaluation.

(g) When addressing issues relating to assessments required under the ESEA or subgroups in the selection criteria, the State must meet the following requirements:

(1) For student subgroups with respect to the National Assessment of Educational Progress (NAEP), the State must provide data for the NAEP subgroups described in section 303(b)(2)(G) of the National Assessment of Educational Progress Authorization Act (20 U.S.C. 9622) (*i.e.,* race, ethnicity, socioeconomic status, gender, disability, and limited English proficiency). The State must also include the NAEP exclusion rate for students with disabilities and the exclusion rate for English language learners, along with clear documentation of the State's policies and practices for determining whether a student with a disability or an English language learner should participate in the NAEP and whether the student needs accommodations;

(2) For student subgroups with respect to high school graduation rates, college enrollment and credit accumulation rates, and the assessments required under the ESEA, the State must provide data for the subgroups described in section 1111(b)(2)(C)(v)(II) of the ESEA (*i.e.,* economically

disadvantaged students, students from major racial and ethnic groups, students with disabilities, and students with limited English proficiency); and

(3) When asked to provide information regarding the assessments required under the ESEA, States should refer to section 1111(b)(3) of the ESEA; in addition, when describing this assessment data in the State's application, the State should note any factors (*e.g.,* changes in cut scores) that would impact the comparability of data from one year to the next.

Program Requirements:

Evaluation: The Institute of Education Sciences (IES) will conduct a series of national evaluations of Race to the Top's State grantees as part of its evaluation of programs funded under the ARRA. The Department's goal for these evaluations is to ensure that its studies not only assess program impacts, but also provide valuable information to State and local educators to help inform and improve their practices.

The Department anticipates that the national evaluations will involve such components as—

- Surveys of States, LEAs, and/or schools, which will help identify how program funding is spent and the specific efforts and activities that are underway within each of the four education reform areas and across selected ARRA-funded programs;
- Case studies of promising practices in States, LEAs, and/or schools through surveys and other mechanisms; and
- Evaluations of outcomes, focusing on student achievement and other performance measures, to determine the impact of the reforms implemented under Race to the Top.

Race to the Top grantee States are not required to conduct independent evaluations, but may propose, within their applications, to use funds from Race to the Top to support such evaluations. Grantees must make available, through formal (*e.g.,* peer-reviewed journals) or informal (*e.g.,* newsletters, Web sites) mechanisms, the results of any evaluations they conduct of their funded activities. In addition, as described elsewhere in this notice and regardless of the final components of the national evaluation, Race to the Top States, LEAs, and schools are expected to identify and share promising practices, make work available within and across States, and make data available in appropriate ways to stakeholders and researchers so as to help all States focus on continuous improvement in service of student outcomes.

Participating LEAs Scope of Work: The agreements signed by participating LEAs (as defined in this notice) must include a scope-of-work section. The scope of work submitted by LEAs and States as part of their Race to the Top applications will be preliminary. Preliminary scopes of work should include the portions of the State's proposed reform plans that the LEA is agreeing to implement. If a State is awarded a Race to the Top grant, its participating LEAs (as defined in this notice) will have up to 90 days to complete final scopes of work, which must contain detailed work plans that are consistent with their preliminary scopes of work and with the State's grant application, and should include the participating LEAs' specific goals, activities, timelines, budgets, key personnel, and annual targets for key performance measures.

Making Work Available: Unless otherwise protected by law or agreement as proprietary information, the State and its subgrantees must make any work (*e.g.,* materials, tools, processes, systems) developed under its grant freely available to others, including but not limited to by posting the work on a Web site identified or sponsored by the Department.

Technical Assistance: The State must participate in applicable technical assistance activities that may be conducted by the Department or its designees.

State Summative Assessments: No funds awarded under this competition may be used to pay for costs related to statewide summative assessments.

Program Definitions: These definitions are from the notice of final priorities, requirements, definitions, and selection criteria for this program, published elsewhere in this issue of the **Federal Register.**

Alternative routes to certification means pathways to certification that are authorized under the State's laws or regulations, that allow the establishment and operation of teacher and administrator preparation programs in the State, and that have the following characteristics (in addition to standard features such as demonstration of subject-matter mastery, and high-quality instruction in pedagogy and in addressing the needs of all students in the classroom including English language learners and student with disabilities): (a) Can be provided by various types of qualified providers, including both institutions of higher education and other providers operating independently from institutions of higher education; (b) are selective in accepting candidates; (c) provide supervised, school-based experiences and ongoing support such as effective mentoring and coaching; (d) significantly limit the amount of coursework required or have options to test out of courses; and (e) upon completion, award the same level of certification that traditional preparation programs award upon completion.

College enrollment refers to the enrollment of students who graduate from high school consistent with 34 CFR 200.19(b)(1) and who enroll in an institution of higher education (as defined in section 101 of the Higher Education Act, Public Law 105–244, 20 U.S.C. 1001) within 16 months of graduation.

Common set of K–12 standards means a set of content standards that define what students must know and be able to do and that are substantially identical across all States in a consortium. A State may supplement the common standards with additional standards, provided that the additional standards do not exceed 15 percent of the State's total standards for that content area.

Effective principal means a principal whose students, overall and for each subgroup, achieve acceptable rates (*e.g.,* at least one grade level in an academic year) of student growth (as defined in this notice). States, LEAs, or schools must include multiple measures, provided that principal effectiveness is evaluated, in significant part, by student growth (as defined in this notice). Supplemental measures may include, for example, high school graduation rates and college enrollment rates, as well as evidence of providing supportive teaching and learning conditions, strong instructional leadership, and positive family and community engagement.

Effective teacher means a teacher whose students achieve acceptable rates (*e.g.,* at least one grade level in an academic year) of student growth (as defined in this notice). States, LEAs, or schools must include multiple measures, provided that teacher effectiveness is evaluated, in significant part, by student growth (as defined in this notice). Supplemental measures may include, for example, multiple observation-based assessments of teacher performance.

Formative assessment means assessment questions, tools, and processes that are embedded in instruction and are used by teachers and students to provide timely feedback for purposes of adjusting instruction to improve learning.

Graduation rate means the four-year or extended-year adjusted cohort graduation rate as defined by 34 CFR 200.19(b)(1).

Highly effective principal means a principal whose students, overall and for each subgroup, achieve high rates (*e.g.,* one and one-half grade levels in an academic year) of student growth (as defined in this notice). States, LEAs, or schools must include multiple measures, provided that principal effectiveness is evaluated, in significant part, by student growth (as defined in this notice). Supplemental measures may include, for example, high school graduation rates; college enrollment rates; evidence of providing supportive teaching and learning conditions, strong instructional leadership, and positive family and community engagement; or evidence of attracting, developing, and retaining high numbers of effective teachers.

Highly effective teacher means a teacher whose students achieve high rates (*e.g.,* one and one-half grade levels in an academic year) of student growth (as defined in this notice). States, LEAs, or schools must include multiple measures, provided that teacher effectiveness is evaluated, in significant part, by student growth (as defined in this notice). Supplemental measures may include, for example, multiple observation-based assessments of teacher performance or evidence of leadership roles (which may include mentoring or leading professional learning communities) that increase the effectiveness of other teachers in the school or LEA.

High-minority school is defined by the State in a manner consistent with its Teacher Equity Plan. The State should provide, in its Race to the Top application, the definition used.

High-need LEA means an LEA (a) that serves not fewer than 10,000 children from families with incomes below the poverty line; or (b) for which not less than 20 percent of the children served by the LEA are from families with incomes below the poverty line.

High-need students means students at risk of educational failure or otherwise in need of special assistance and support, such as students who are living in poverty, who attend high-minority schools (as defined in this notice), who are far below grade level, who have left school before receiving a regular high school diploma, who are at risk of not graduating with a diploma on time, who are homeless, who are in foster care, who have been incarcerated, who have disabilities, or who are English language learners.

High-performing charter school means a charter school that has been in operation for at least three consecutive years and has demonstrated overall success, including (a) substantial progress in improving student achievement (as defined in this notice); and (b) the management and leadership necessary to overcome initial start-up problems and establish a thriving, financially viable charter school.

High-poverty school means, consistent with section 1111(h)(1)(C)(viii) of the ESEA, a school in the highest quartile of schools in the State with respect to poverty level, using a measure of poverty determined by the State.

High-quality assessment means an assessment designed to measure a student's knowledge, understanding of, and ability to apply, critical concepts through the use of a variety of item types and formats (*e.g.,* open-ended responses, performance-based tasks). Such assessments should enable measurement of student achievement (as defined in this notice) and student growth (as defined in this notice); be of high technical quality (*e.g.,* be valid, reliable, fair, and aligned to standards); incorporate technology where appropriate; include the assessment of students with disabilities and English language learners; and to the extent feasible, use universal design principles (as defined in section 3 of the Assistive Technology Act of 1998, as amended, 29 U.S.C. 3002) in development and administration.

Increased learning time means using a longer school day, week, or year schedule to significantly increase the total number of school hours to include additional time for (a) instruction in core academic subjects, including English; reading or language arts; mathematics; science; foreign languages; civics and government; economics; arts; history; and geography; (b) instruction in other subjects and enrichment activities that contribute to a well-rounded education, including, for example, physical education, service learning, and experiential and work-based learning opportunities that are provided by partnering, as appropriate, with other organizations; and (c) teachers to collaborate, plan, and engage in professional development within and across grades and subjects.[2]

Innovative, autonomous public schools means open enrollment public schools that, in return for increased accountability for student achievement (as defined in this notice), have the flexibility and authority to define their instructional models and associated curriculum; select and replace staff; implement new structures and formats for the school day or year; and control their budgets.

Instructional improvement systems means technology-based tools and other strategies that provide teachers, principals, and administrators with meaningful support and actionable data to systemically manage continuous instructional improvement, including such activities as: instructional planning; gathering information (*e.g.,* through formative assessments (as defined in this notice), interim assessments (as defined in this notice), summative assessments, and looking at student work and other student data); analyzing information with the support of rapid-time (as defined in this notice) reporting; using this information to inform decisions on appropriate next instructional steps; and evaluating the effectiveness of the actions taken. Such systems promote collaborative problem-solving and action planning; they may also integrate instructional data with student-level data such as attendance, discipline, grades, credit accumulation, and student survey results to provide early warning indicators of a student's risk of educational failure.

Interim assessment means an assessment that is given at regular and specified intervals throughout the school year, is designed to evaluate students' knowledge and skills relative to a specific set of academic standards, and produces results that can be aggregated (*e.g.,* by course, grade level, school, or LEA) in order to inform teachers and administrators at the student, classroom, school, and LEA levels.

Involved LEAs means LEAs that choose to work with the State to implement those specific portions of the State's plan that necessitate full or nearly-full statewide implementation, such as transitioning to a common set of K–12 standards (as defined in this notice). Involved LEAs do not receive a share of the 50 percent of a State's grant award that it must subgrant to LEAs in accordance with section 14006(c) of the

[2] Research supports the effectiveness of well-designed programs that expand learning time by a minimum of 300 hours per school year. (See Frazier, Julie A.; Morrison, Frederick J. ''The Influence of Extended-year Schooling on Growth of Achievement and Perceived Competence in Early Elementary School.'' Child Development. Vol. 69 (2), April 1998, pp.495–497 and research done by Mass2020.) Extending learning into before- and after-school hours can be difficult to implement effectively, but is permissible under this definition with encouragement to closely integrate and coordinate academic work between in-school and out-of school. (See James-Burdumy, Susanne; Dynarski, Mark; Deke, John. ''*When Elementary Schools Stay Open Late:* Results from The National Evaluation of the 21st Century Community Learning Centers Program.'' *http://www.mathematica-mpr.com/publications/redirect_PubsDB.asp?strSite=http://epa.sagepub.com/cgi/content/abstract/29/4/296* Educational Evaluation and Policy Analysis, Vol. 29 (4), December 2007, Document No. PP07–121.)

ARRA, but States may provide other funding to involved LEAs under the State's Race to the Top grant in a manner that is consistent with the State's application.

Low-minority school is defined by the State in a manner consistent with its Teacher Equity Plan. The State should provide, in its Race to the Top application, the definition used.

Low-poverty school means, consistent with section 1111(h)(1)(C)(viii) of the ESEA, a school in the lowest quartile of schools in the State with respect to poverty level, using a measure of poverty determined by the State.

Participating LEAs means LEAs that choose to work with the State to implement all or significant portions of the State's Race to the Top plan, as specified in each LEA's agreement with the State. Each participating LEA that receives funding under Title I, Part A will receive a share of the 50 percent of a State's grant award that the State must subgrant to LEAs, based on the LEA's relative share of Title I, Part A allocations in the most recent year, in accordance with section 14006(c) of the ARRA. Any participating LEA that does not receive funding under Title I, Part A (as well as one that does) may receive funding from the State's other 50 percent of the grant award, in accordance with the State's plan.

Persistently lowest-achieving schools means, as determined by the State: (i) Any Title I school in improvement, corrective action, or restructuring that (a) Is among the lowest-achieving five percent of Title I schools in improvement, corrective action, or restructuring or the lowest-achieving five Title I schools in improvement, corrective action, or restructuring in the State, whichever number of schools is greater; or (b) Is a high school that has had a graduation rate as defined in 34 CFR 200.19(b) that is less than 60 percent over a number of years; and (ii) Any secondary school that is eligible for, but does not receive, Title I funds that (a) Is among the lowest-achieving five percent of secondary schools or the lowest-achieving five secondary schools in the State that are eligible for, but do not receive, Title I funds, whichever number of schools is greater; or (b) Is a high school that has had a graduation rate as defined in 34 CFR 200.19(b) that is less than 60 percent over a number of years.

To identify the lowest-achieving schools, a State must take into account both (i) The academic achievement of the ''all students'' group in a school in terms of proficiency on the State's assessments under section 1111(b)(3) of the ESEA in reading/language arts and mathematics combined; and (ii) The school's lack of progress on those assessments over a number of years in the ''all students'' group.

Rapid-time, in reference to reporting and availability of locally-collected school- and LEA-level data, means that data are available quickly enough to inform current lessons, instruction, and related supports.

Student achievement means—

(a) For tested grades and subjects: (1) A student's score on the State's assessments under the ESEA; and, as appropriate, (2) other measures of student learning, such as those described in paragraph (b) of this definition, provided they are rigorous and comparable across classrooms.

(b) For non-tested grades and subjects: Alternative measures of student learning and performance such as student scores on pre-tests and end-of-course tests; student performance on English language proficiency assessments; and other measures of student achievement that are rigorous and comparable across classrooms.

Student growth means the change in student achievement (as defined in this notice) for an individual student between two or more points in time. A State may also include other measures that are rigorous and comparable across classrooms.

Total revenues available to the State means either (a) projected or actual total State revenues for education and other purposes for the relevant year; or (b) projected or actual total State appropriations for education and other purposes for the relevant year.

America COMPETES Act elements means (as specified in section 6401(e)(2)(D) of that Act): (1) A unique statewide student identifier that does not permit a student to be individually identified by users of the system; (2) student-level enrollment, demographic, and program participation information; (3) student-level information about the points at which students exit, transfer in, transfer out, drop out, or complete P–16 education programs; (4) the capacity to communicate with higher education data systems; (5) a State data audit system assessing data quality, validity, and reliability; (6) yearly test records of individual students with respect to assessments under section 1111(b) of the ESEA (20 U.S.C. 6311(b)); (7) information on students not tested by grade and subject; (8) a teacher identifier system with the ability to match teachers to students; (9) student-level transcript information, including information on courses completed and grades earned; (10) student-level college readiness test scores; (11) information regarding the extent to which students transition successfully from secondary school to postsecondary education, including whether students enroll in remedial coursework; and (12) other information determined necessary to address alignment and adequate preparation for success in postsecondary education.

Program Authority: American Recovery and Reinvestment Act of 2009, Division A, Section 14006, Public Law 111–5.

Applicable Regulations: (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 79, 80, 81, 82, 84, 85, 86, 97, 98, and 99. (b) The notice of final priorities, requirements, definitions, and selection criteria, published elsewhere in this issue of the **Federal Register.**

II. Award Information

Type of Award: Discretionary grant.

Estimated Available Funds: $4 billion to be awarded in two Phases.

Estimated Range of Awards: $20 million—$700 million.

Note: The Department is not bound by any estimates in this notice. The Department will decide on the size of each State's award based on a detailed review of the budget the State requests, considering such factors as the size of the State, level of LEA participation, and the proposed activities.

Project Period: Up to 48 months.

Budget Guidance: States are encouraged to develop budgets that match the needs they have outlined in their applications.

To support States in planning their budgets, the Department has developed nonbinding budget ranges for each State; these are listed below. These ranges may be used as rough blueprints to guide States as they think through their budgets, but States may prepare budgets that are above or below the ranges specified. The categories were developed by ranking every State according to its share of the national population of children ages 5 through 17, and identifying the natural breaks. Then, based on population, overlapping budget ranges were developed for each category.

Category 1—$350–700 million: California, Texas, New York, Florida.

Category 2—$200–400 million: Illinois, Pennsylvania, Ohio, Georgia, Michigan, North Carolina, New Jersey.

Category 3—$150–250 million: Virginia, Arizona, Indiana, Washington, Tennessee, Massachusetts, Missouri, Maryland, Wisconsin.

Category 4—$60–175 million: Minnesota, Colorado, Alabama, Louisiana, South Carolina, Puerto Rico,

Kentucky, Oklahoma, Oregon, Connecticut, Utah, Mississippi, Iowa, Arkansas, Kansas, Nevada.

Category 5—$20–75 million: New Mexico, Nebraska, Idaho, West Virginia, New Hampshire, Maine, Hawaii, Rhode Island, Montana, Delaware, South Dakota, Alaska, North Dakota, Vermont, Wyoming, District of Columbia.

III. Eligibility Information

1. *Eligible Applicants:* Eligible applicants are the 50 States, the District of Columbia, and Puerto Rico (referred to in this notice as State).

A State must meet the following requirements in order to be eligible to receive funds under this program.

(a) The State's applications for funding under Phase 1 and Phase 2 of the State Fiscal Stabilization Fund program must be approved by the Department prior to the State being awarded a Race to the Top grant.

(b) At the time the State submits its application, there must not be any legal, statutory, or regulatory barriers at the State level to linking data on student achievement (as defined in this notice) or student growth (as defined in this notice) to teachers and principals for the purpose of teacher and principal evaluation.

2. *Cost Sharing or Matching:* This program does not require cost sharing or matching.

IV. Application and Submission Information

1. *Address to Request Application Package:*

You can obtain an application package via the Internet or from the Education Publications Center (ED Pubs). To obtain a copy via the Internet, use the following address: *http://www.ed.gov/programs/racetothetop/index.html.* To obtain a copy from ED Pubs, write, fax, or call the following: Education Publications Center, P.O. Box 1398, Jessup, MD 20794–1398. Telephone, toll free: 1–877–433–7827. FAX: (301) 470–1244. If you use a telecommunications device for the deaf (TDD), call, toll free: 1–877–576–7734.

You can also contact ED Pubs at its Web site: *http://www.ed.gov/pubs/edpubs.html* or at its e-mail address: *edpubs@inet.ed.gov.*

If you request an application from ED Pubs, be sure to identify this program or competition as follows: CFDA 84.395A.

Individuals with disabilities can obtain a copy of the application package in an accessible format (*e.g.,* braille, large print, audiotape, or computer diskette) by contacting the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice.

2. *Content and Form of Application Submission:* Requirements concerning the content of the application, together with the forms States must submit, are in the application package for this competition.

Page Limit: The application narrative (Section VI) is where the applicant addresses the selection criteria that reviewers use to evaluate applications. The Department recommends that applicants limit their narrative responses in Section VI of the application to no more than 100 pages of State-authored text, and limit their appendices to no more than 250 pages. The following standards are recommended:

- A ''page'' is 8.5″ x 11″, on one side only, with 1″ margins at the top, bottom, and both sides.
- Each page is numbered.
- Line spacing is set to 1.5 spacing, and the font used is 12 point Times New Roman.

3. *Submission Dates and Times:*

Applications Available: November 18, 2009.

Deadline for Notice of Intent to Apply: The Department will be able to develop a more efficient process for reviewing grant applications if we have a better understanding of the number of applications we will receive. Therefore, we strongly encourage each potential applicant to send an e-mail notice of its intent to apply for funding for Phase 1 to the e-mail address *RacetotheTop@ed.gov* by December 8, 2009. The Secretary may issue a deadline for notice of intent to apply for Phase 2 funding at a later time. The notice of intent to apply is optional; States may still submit applications if they have not notified the Department of their intention to apply.

Date of Meeting for Potential Applicants:

To assist States in preparing the application and to respond to questions, the Department intends to host two Technical Assistance Planning Workshops for potential applicants prior to the Phase 1 application submission deadline. The first will be in Denver, Colorado on December 3, 2009. The second will be in the Washington, DC area on December 10, 2009. We recommend that applicants attend one of these two workshops.

The purpose of the workshops would be for Department staff to review the selection criteria, requirements, and priorities with teams of participants responsible for drafting State applications, as well as for Department staff to answer technical questions about the Race to the Top program. The Department plans to release more details regarding the workshops in late November. Updates will be available at the Race to the Top Web site *http://www.ed.gov/programs/racetothetop.* Attendance at the workshops is strongly encouraged. For those who cannot attend, transcripts of the meetings will be available on our Web site. Announcements of any other conference calls or webinars and Frequently Asked Questions will also be available on the Race to the Top Web site.

Deadline for Transmittal of Applications:

Phase 1 Applications: January 19, 2010.

Phase 2 Applications: June 1, 2010. Phase 2 applicants addressing selection criterion (B)(1)(ii)(b) may amend their June 1, 2010 application submissions through August 2, 2010 by submitting evidence of having adopted common standards after June 1, 2010. No other information may be submitted in an amended application after June 1, 2010.

Deadlines for Intergovernmental Review:

Phase 1 Applications: March 18, 2010.

Phase 2 Applications: August 2, 2010.

Applications for grants under this competition, as well as any amendments regarding adoption of common standards that Phase 2 applicants may file after June 1 and through August 2, 2010, must be submitted in electronic format on a CD or DVD, with CD–ROM or DVD–ROM preferred. In addition, States must submit an original and one hard copy of Sections III and IV of the application, which include the Race to the Top Application Assurances and the Accountability, Transparency, Reporting and Other Assurances. E-mailed submissions will not be read. For information (including dates and times) about how to submit your electronic application, please refer to section IV.6, *Other Submission Requirements* in this notice. Evidence, if any, of adoption of common standards submitted after June 1, 2010, but by August 2, 2010, must be submitted using the same submission process described in section IV, *Application and Submission Information* of this notice.

The Department will not consider an application that does not comply with the deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice. If the Department provides an accommodation or auxiliary aid to an individual with a disability in connection with the application

process, the individual's application remains subject to all other requirements and limitations in this notice.

4. *Intergovernmental Review:* This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this competition.

5. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

6. *Other Submission Requirements:* Applications for grants under this competition must be submitted by mail or hand delivery. The Department strongly recommends the use of overnight mail. Applications postmarked on the deadline date but arriving late will not be read.

a. *Application Submission Format and Deadline.* Applications for grants under this competition, as well as any amendments regarding adoption of common standards that Phase 2 applicants may file after June 1 and through August 2, 2010, must be submitted in electronic format on a CD or DVD, with CD–ROM or DVD–ROM preferred. In addition, they must submit a signed original of Sections III and IV of the application and one copy of that signed original. Sections III and IV of the application include the Race to the Top Application Assurances and the Accountability, Transparency, Reporting and Other Assurances.

All electronic application files must be in a .DOC (document), .DOCX (document), .RTF (rich text), or .PDF (Portable Document) format. Each file name should clearly identify the part of the application to which the content is responding. If a State submits a file type other than the four file types specified in this paragraph, the Department will not review that material. States should not password-protect these files.

The CD or DVD should be clearly labeled with the State's name and any other relevant information.

The Department must receive all grant applications by 4:30:00 p.m., Washington, DC time, on the application deadline date. We will not accept an application for this competition after 4:30:00 p.m., Washington, DC time, on the application deadline date. Therefore, we strongly recommend that applicants arrange for mailing or hand delivery of their applications in advance of the application deadline date.

b. *Submission of Applications by Mail.* States may submit their application (*i.e.,* the CD or DVD, the signed original of Sections III and IV of the application, and the copy of that original) by mail (either through the U.S. Postal Service or a commercial carrier). We must receive the applications on or before the application deadline date. Therefore, to avoid delays, we strongly recommend sending applications via overnight mail. Mail applications to the Department at the following address: U.S. Department of Education, Application Control Center, *Attention:* (CFDA Number 84.395A) LBJ Basement Level 1, 400 Maryland Avenue, SW., Washington, DC 20202–4260.

If we receive an application after the application deadline, we will not consider that application.

c. *Submission of Applications by Hand Delivery.* States may submit their application (*i.e.,* the CD or DVD, the signed original of Sections III and IV of the application, and the copy of that original) by hand delivery (including via a courier service). We must receive the applications on or before the application deadline date, at the following address: U.S. Department of Education, Application Control Center, *Attention:* (CFDA Number 84.395A) 550 12th Street, SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8:00 a.m. and 4:30:00 p.m., Washington, DC time, except Saturdays, Sundays, and Federal holidays. If we receive an application after the application deadline, we will not consider that application.

d. *Envelope requirements and receipt:* When an applicant submits its application, whether by mail or hand delivery—

(1) It must indicate on the envelope that the CFDA number of the competition under which it is submitting its application is 84.395A; and

(2) The Application Control Center will mail to the applicant a notification of receipt of the grant application. If the applicant does not receive this notification, it should call the U.S. Department of Education Application Control Center at (202) 245–6288.

In accordance with EDGAR § 75.216(b) and (c), an application will not be evaluated for funding if the applicant does not comply with all of the procedural rules that govern the submission of the application or the application does not contain the information required under the program.

V. Application Review Information

Selection Criteria: The selection criteria and scoring rubric for this competition are from the notice of final priorities, requirements, definitions, and selection criteria, published elsewhere in this issue of the **Federal Register.** The reviewers will utilize the scoring rubric (which can also be found in Appendix B of this notice) in applying the following selection criteria:

A. State Success Factors

(A)(1) *Articulating State's education reform agenda and LEAs' participation in it:* The extent to which—

(i) The State has set forth a comprehensive and coherent reform agenda that clearly articulates its goals for implementing reforms in the four education areas described in the ARRA and improving student outcomes statewide, establishes a clear and credible path to achieving these goals, and is consistent with the specific reform plans that the State has proposed throughout its application;

(ii) The participating LEAs (as defined in this notice) are strongly committed to the State's plans and to effective implementation of reform in the four education areas, as evidenced by Memoranda of Understanding (MOUs) (as set forth in Appendix D) [3] or other binding agreements between the State and its participating LEAs (as defined in this notice) that include—

(a) Terms and conditions that reflect strong commitment by the participating LEAs (as defined in this notice) to the State's plans;

(b) Scope-of-work descriptions that require participating LEAs (as defined in this notice) to implement all or significant portions of the State's Race to the Top plans; and

(c) Signatures from as many as possible of the LEA superintendent (or equivalent), the president of the local school board (or equivalent, if applicable), and the local teachers' union leader (if applicable) (one signature of which must be from an authorized LEA representative) demonstrating the extent of leadership support within participating LEAs (as defined in this notice); and

(iii) The LEAs that are participating in the State's Race to the Top plans (including considerations of the numbers and percentages of participating LEAs, schools, K–12 students, and students in poverty) will translate into broad statewide impact, allowing the State to reach its ambitious

[3] *See* Appendix D for more on participating LEA MOUs and for a model MOU.

yet achievable goals, overall and by student subgroup, for—

(a) Increasing student achievement in (at a minimum) reading/language arts and mathematics, as reported by the NAEP and the assessments required under the ESEA;

(b) Decreasing achievement gaps between subgroups in reading/language arts and mathematics, as reported by the NAEP and the assessments required under the ESEA;

(c) Increasing high school graduation rates (as defined in this notice); and

(d) Increasing college enrollment (as defined in this notice) and increasing the number of students who complete at least a year's worth of college credit that is applicable to a degree within two years of enrollment in an institution of higher education.

(A)(2) *Building strong statewide capacity to implement, scale up, and sustain proposed plans:* The extent to which the State has a high-quality overall plan to—

(i) Ensure that it has the capacity required to implement its proposed plans by—

(a) Providing strong leadership and dedicated teams to implement the statewide education reform plans the State has proposed;

(b) Supporting participating LEAs (as defined in this notice) in successfully implementing the education reform plans the State has proposed, through such activities as identifying promising practices, evaluating these practices' effectiveness, ceasing ineffective practices, widely disseminating and replicating the effective practices statewide, holding participating LEAs (as defined in this notice) accountable for progress and performance, and intervening where necessary;

(c) Providing effective and efficient operations and processes for implementing its Race to the Top grant in such areas as grant administration and oversight, budget reporting and monitoring, performance measure tracking and reporting, and fund disbursement;

(d) Using the funds for this grant, as described in the State's budget and accompanying budget narrative, to accomplish the State's plans and meet its targets, including, where feasible, by coordinating, reallocating, or repurposing education funds from other Federal, State, and local sources so that they align with the State's Race to the Top goals; and

(e) Using the fiscal, political, and human capital resources of the State to continue, after the period of funding has ended, those reforms funded under the grant for which there is evidence of success; and

(ii) Use support from a broad group of stakeholders to better implement its plans, as evidenced by the strength of statements or actions of support from—

(a) The State's teachers and principals, which include the State's teachers' unions or statewide teacher associations; and

(b) Other critical stakeholders, such as the State's legislative leadership; charter school authorizers and State charter school membership associations (if applicable); other State and local leaders (*e.g.,* business, community, civil rights, and education association leaders); Tribal schools; parent, student, and community organizations (*e.g.,* parent-teacher associations, nonprofit organizations, local education foundations, and community-based organizations); and institutions of higher education.

(A)(3) *Demonstrating significant progress in raising achievement and closing gaps:* The extent to which the State has demonstrated its ability to—

(i) Make progress over the past several years in each of the four education reform areas, and used its ARRA and other Federal and State funding to pursue such reforms;

(ii) Improve student outcomes overall and by student subgroup since at least 2003, and explain the connections between the data and the actions that have contributed to—

(a) Increasing student achievement in reading/language arts and mathematics, both on the NAEP and on the assessments required under the ESEA;

(b) Decreasing achievement gaps between subgroups in reading/language arts and mathematics, both on the NAEP and on the assessments required under the ESEA; and

(c) Increasing high school graduation rates.

B. Standards and Assessments

State Reform Conditions Criteria

(B)(1) *Developing and adopting common standards:* The extent to which the State has demonstrated its commitment to adopting a common set of high-quality standards, evidenced by (as set forth in Appendix B)—

(i) The State's participation in a consortium of States that—

(a) Is working toward jointly developing and adopting a common set of K–12 standards (as defined in this notice) that are supported by evidence that they are internationally benchmarked and build toward college and career readiness by the time of high school graduation; and

(b) Includes a significant number of States; and

(ii)(a) For Phase 1 applications, the State's high-quality plan demonstrating its commitment to and progress toward adopting a common set of K–12 standards (as defined in this notice) by August 2, 2010, or, at a minimum, by a later date in 2010 specified by the State, and to implementing the standards thereafter in a well-planned way; or

(b) For Phase 2 applications, the State's adoption of a common set of K–12 standards (as defined in this notice) by August 2, 2010, or, at a minimum, by a later date in 2010 specified by the State in a high-quality plan toward which the State has made significant progress, and its commitment to implementing the standards thereafter in a well-planned way.[4]

(B)(2) *Developing and implementing common, high-quality assessments:* The extent to which the State has demonstrated its commitment to improving the quality of its assessments, evidenced by (as set forth in Appendix B) the State's participation in a consortium of States that—

(i) Is working toward jointly developing and implementing common, high-quality assessments (as defined in this notice) aligned with the consortium's common set of K–12 standards (as defined in this notice); and

(ii) Includes a significant number of States.

Reform Plan Criteria

(B)(3) *Supporting the transition to enhanced standards and high-quality assessments:* The extent to which the State, in collaboration with its participating LEAs (as defined in this notice), has a high-quality plan for supporting a statewide transition to and implementation of internationally benchmarked K–12 standards that build toward college and career readiness by the time of high school graduation, and high-quality assessments (as defined in this notice) tied to these standards. State or LEA activities might, for example, include: Developing a rollout plan for the standards together with all of their supporting components; in cooperation with the State's institutions of higher education, aligning high school exit criteria and college entrance requirements with the new standards and assessments; developing or acquiring, disseminating, and implementing high-quality instructional

[4] Phase 2 applicants addressing selection criterion (B)(1)(ii) may amend their June 1, 2010 application submission through August 2, 2010 by submitting evidence of adopting common standards after June 1, 2010.

materials and assessments (including, for example, formative and interim assessments (both as defined in this notice)); developing or acquiring and delivering high-quality professional development to support the transition to new standards and assessments; and engaging in other strategies that translate the standards and information from assessments into classroom practice for all students, including high-need students (as defined in this notice).

C. Data Systems To Support Instruction

State Reform Conditions Criteria

(C)(1) *Fully implementing a statewide longitudinal data system:* The extent to which the State has a statewide longitudinal data system that includes all of the America COMPETES Act elements (as defined in this notice).

Reform Plan Criteria

(C)(2) *Accessing and using State data:* The extent to which the State has a high-quality plan to ensure that data from the State's statewide longitudinal data system are accessible to, and used to inform and engage, as appropriate, key stakeholders (*e.g.,* parents, students, teachers, principals, LEA leaders, community members, unions, researchers, and policymakers); and that the data support decision-makers in the continuous improvement of efforts in such areas as policy, instruction, operations, management, resource allocation, and overall effectiveness.[5]

(C)(3) *Using data to improve instruction:* The extent to which the State, in collaboration with its participating LEAs (as defined in this notice), has a high-quality plan to—

(i) Increase the acquisition, adoption, and use of local instructional improvement systems (as defined in this notice) that provide teachers, principals, and administrators with the information and resources they need to inform and improve their instructional practices, decision-making, and overall effectiveness;

(ii) Support participating LEAs (as defined in this notice) and schools that are using instructional improvement systems (as defined in this notice) in providing effective professional development to teachers, principals, and administrators on how to use these systems and the resulting data to support continuous instructional improvement; and

(iii) Make the data from instructional improvement systems (as defined in this notice), together with statewide longitudinal data system data, available and accessible to researchers so that they have detailed information with which to evaluate the effectiveness of instructional materials, strategies, and approaches for educating different types of students (*e.g.,* students with disabilities, English language learners, students whose achievement is well below or above grade level).

D. Great Teachers and Leaders

State Reform Conditions Criteria

(D)(1) *Providing high-quality pathways for aspiring teachers and principals:* The extent to which the State has—

(i) Legal, statutory, or regulatory provisions that allow alternative routes to certification (as defined in this notice) for teachers and principals, particularly routes that allow for providers in addition to institutions of higher education;

(ii) Alternative routes to certification (as defined in this notice) that are in use; and

(iii) A process for monitoring, evaluating, and identifying areas of teacher and principal shortage and for preparing teachers and principals to fill these areas of shortage.

Reform Plan Criteria

(D)(2) *Improving teacher and principal effectiveness based on performance:* The extent to which the State, in collaboration with its participating LEAs (as defined in this notice), has a high-quality plan and ambitious yet achievable annual targets to ensure that participating LEAs (as defined in this notice)—

(i) Establish clear approaches to measuring student growth (as defined in this notice) and measure it for each individual student;

(ii) Design and implement rigorous, transparent, and fair evaluation systems for teachers and principals that (a) differentiate effectiveness using multiple rating categories that take into account data on student growth (as defined in this notice) as a significant factor, and (b) are designed and developed with teacher and principal involvement;

(iii) Conduct annual evaluations of teachers and principals that include timely and constructive feedback; as part of such evaluations, provide teachers and principals with data on student growth for their students, classes, and schools; and

(iv) Use these evaluations, at a minimum, to inform decisions regarding—

(a) Developing teachers and principals, including by providing relevant coaching, induction support, and/or professional development;

(b) Compensating, promoting, and retaining teachers and principals, including by providing opportunities for highly effective teachers and principals (both as defined in this notice) to obtain additional compensation and be given additional responsibilities;

(c) Whether to grant tenure and/or full certification (where applicable) to teachers and principals using rigorous standards and streamlined, transparent, and fair procedures; and

(d) Removing ineffective tenured and untenured teachers and principals after they have had ample opportunities to improve, and ensuring that such decisions are made using rigorous standards and streamlined, transparent, and fair procedures.

(D)(3) *Ensuring equitable distribution of effective teachers and principals:* The extent to which the State, in collaboration with its participating LEAs (as defined in this notice), has a high-quality plan and ambitious yet achievable annual targets to—

(i) Ensure the equitable distribution of teachers and principals by developing a plan, informed by reviews of prior actions and data, to ensure that students in high-poverty and/or high-minority schools (both as defined in this notice) have equitable access to highly effective teachers and principals (both as defined in this notice) and are not served by ineffective teachers and principals at higher rates than other students; and

(ii) Increase the number and percentage of effective teachers (as defined in this notice) teaching hard-to-staff subjects and specialty areas including mathematics, science, and special education; teaching in language instruction educational programs (as defined under Title III of the ESEA); and teaching in other areas as identified by the State or LEA.

Plans for (i) and (ii) may include, but are not limited to, the implementation of incentives and strategies in such areas as recruitment, compensation, teaching and learning environments, professional development, and human resources practices and processes.

(D)(4) *Improving the effectiveness of teacher and principal preparation programs:* The extent to which the State has a high-quality plan and ambitious yet achievable annual targets to—

(i) Link student achievement and student growth (both as defined in this notice) data to the students' teachers

[5] Successful applicants that receive Race to the Top grant awards will need to comply with the Family Educational Rights and Privacy Act (FERPA), including 34 CFR Part 99, as well as State and local requirements regarding privacy.

and principals, to link this information to the in-State programs where those teachers and principals were prepared for credentialing, and to publicly report the data for each credentialing program in the State; and

(ii) Expand preparation and credentialing options and programs that are successful at producing effective teachers and principals (both as defined in this notice).

(D)(5) *Providing effective support to teachers and principals:* The extent to which the State, in collaboration with its participating LEAs (as defined in this notice), has a high-quality plan for its participating LEAs (as defined in this notice) to—

(i) Provide effective, data-informed professional development, coaching, induction, and common planning and collaboration time to teachers and principals that are, where appropriate, ongoing and job-embedded. Such support might focus on, for example, gathering, analyzing, and using data; designing instructional strategies for improvement; differentiating instruction; creating school environments supportive of data-informed decisions; designing instruction to meet the specific needs of high-need students (as defined in this notice); and aligning systems and removing barriers to effective implementation of practices designed to improve student learning outcomes; and

(ii) Measure, evaluate, and continuously improve the effectiveness of those supports in order to improve student achievement (as defined in this notice).

E. Turning Around the Lowest-Achieving Schools

State Reform Conditions Criteria

(E)(1) *Intervening in the lowest-achieving schools and LEAs:* The extent to which the State has the legal, statutory, or regulatory authority to intervene directly in the State's persistently lowest-achieving schools (as defined in this notice) and in LEAs that are in improvement or corrective action status.

Reform Plan Criteria

(E)(2) *Turning around the lowest-achieving schools:* The extent to which the State has a high-quality plan and ambitious yet achievable annual targets to—

(i) Identify the persistently lowest-achieving schools (as defined in this notice) and, at its discretion, any non-Title I eligible secondary schools that would be considered persistently lowest-achieving schools (as defined in this notice) if they were eligible to receive Title I funds; and

(ii) Support its LEAs in turning around these schools by implementing one of the four school intervention models (as described in Appendix C): Turnaround model, restart model, school closure, or transformation model (provided that an LEA with more than nine persistently lowest-achieving schools may not use the transformation model for more than 50 percent of its schools).

F. General

State Reform Conditions Criteria

(F)(1) *Making education funding a priority:* The extent to which—

(i) The percentage of the total revenues available to the State (as defined in this notice) that were used to support elementary, secondary, and public higher education for FY 2009 was greater than or equal to the percentage of the total revenues available to the State (as defined in this notice) that were used to support elementary, secondary, and public higher education for FY 2008; and

(ii) The State's policies lead to equitable funding (a) between high-need LEAs (as defined in this notice) and other LEAs, and (b) within LEAs, between high-poverty schools (as defined in this notice) and other schools.

(F)(2) *Ensuring successful conditions for high-performing charter schools and other innovative schools:* The extent to which—

(i) The State has a charter school law that does not prohibit or effectively inhibit increasing the number of high-performing charter schools (as defined in this notice) in the State, measured (as set forth in Appendix B) by the percentage of total schools in the State that are allowed to be charter schools or otherwise restrict student enrollment in charter schools;

(ii) The State has laws, statutes, regulations, or guidelines regarding how charter school authorizers approve, monitor, hold accountable, reauthorize, and close charter schools; in particular, whether authorizers require that student achievement (as defined in this notice) be one significant factor, among others, in authorization or renewal; encourage charter schools that serve student populations that are similar to local district student populations, especially relative to high-need students (as defined in this notice); and have closed or not renewed ineffective charter schools;

(iii) The State's charter schools receive (as set forth in Appendix B) equitable funding, compared to traditional public schools, and a commensurate share of local, State, and Federal revenues;

(iv) The State provides charter schools with funding for facilities (for leasing facilities, purchasing facilities, or making tenant improvements), assistance with facilities acquisition, access to public facilities, the ability to share in bonds and mill levies, or other supports; and the extent to which the State does not impose any facility-related requirements on charter schools that are stricter than those applied to traditional public schools; and

(v) The State enables LEAs to operate innovative, autonomous public schools (as defined in this notice) other than charter schools.

(F)(3) *Demonstrating other significant reform conditions:* The extent to which the State, in addition to information provided under other State Reform Conditions Criteria, has created, through law, regulation, or policy, other conditions favorable to education reform or innovation that have increased student achievement or graduation rates, narrowed achievement gaps, or resulted in other important outcomes.

2. *Review and Selection Process:* The Department will screen applications that are received, as described in this notice, by the designated deadline, and will determine which States are eligible based on whether they have met eligibility requirement (b); the Department will not consider further those applicants deemed ineligible under eligibility requirement (b). As discussed below, States will be screened for eligibility under eligibility requirement (a) at the end of the selection process, before they would be granted awards.

The Department intends to use a two-tiered review process to judge the eligible applications. In the initial tier, the reviewers would consider only the written applications; in the finalist tier, reviewers would consider both the written applications and in-person presentations. In both tiers, the Department would use independent reviewers who have been chosen from a pool of qualified educators, scholars, and other individuals knowledgeable in education reform. The Department will thoroughly screen all reviewers for conflicts of interest to ensure a fair and competitive review process.

In the initial tier, reviewers will read, comment on, and score their assigned applications, using the selection criteria and scoring rubric included in this notice (see Appendix B). The Department will select the finalists after

considering the reviewers' scores. The finalists will move on to the finalist tier of the competition. Applicants who do not move on to the finalist tier will receive their reviewers' comments and scores as soon as possible.

The Department intends to ask each finalist to send a team to Washington, DC to present the State's proposal to a panel of reviewers. The panel will take this opportunity to ask the State's team further questions in order to gain a more comprehensive picture of the State's application proposal, including its plans and its capabilities to implement them. (Exact timing will be announced when the finalists are selected.) A State's presentation team may include up to five individuals; because the panel of reviewers is interested primarily in hearing from, and asking questions of, State leaders who would be responsible for implementing the State's Race to the Top plan, only those individuals who would have significant ongoing roles in and responsibilities in executing the State's plan should present, and in no case could presentation teams include consultants. At the conclusion of the presentation process, reviewers will finalize their scoring of the applications based on the selection criteria and scoring rubric in this notice.

After the review process is complete, the Secretary will select, consistent with 34 CFR 75.217, the grantees after considering the rank order of applications, each applicant's status with respect to the Absolute Priority and eligibility requirement (a), and any other relevant information. All applicants will receive their reviewers' comments and scores.

After awards are made for each phase of the competition, all of the submitted applications (both successful and unsuccessful) will be posted on the Department's Web site, together with the final scores each received. The Department also intends to post on its Web site a transcript and/or video of each finalist's presentation of its proposal.

States that apply in Phase 1 but are not awarded grants may reapply for funding in Phase 2 (together with those States that are applying for the first time in Phase 2). Phase 1 winners receive full-sized awards, and so do not apply for additional funding in Phase 2.

VI. Award Administration Information

1. *Award Notices:* If an application is successful, the Department will notify the States' U.S. Representatives and U.S. Senators and send the applicant a Grant Award Notification (GAN). We may notify the State informally, as well.

If an application is not evaluated or not selected for funding, the Department will notify the State.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates the approved application as part of the binding commitments under the grant.

3. *Reporting:* The following requirements are from the notice of final priorities, requirements, definitions, and selection criteria, published elsewhere in this issue of the **Federal Register**.

A State receiving Race to the Top funds must submit to the Department an annual report which must include, in addition to the standard elements, a description of the State's and its LEAs' progress to date on their goals, timelines, and budgets, as well as actual performance compared to the annual targets the State established in its application with respect to each performance measure. Further, a State receiving funds under this program and its participating LEAs are accountable for meeting the goals, timelines, budget, and annual targets established in the application; adhering to an annual fund drawdown schedule that is tied to meeting these goals, timelines, budget, and annual targets; and fulfilling and maintaining all other conditions for the conduct of the project. The Department will monitor a State's and its participating LEAs' progress in meeting the State's goals, timelines, budget, and annual targets and in fulfilling other applicable requirements. In addition, the Department may collect additional data as part of a State's annual reporting requirements.

To support a collaborative process between the State and the Department, the Department may require that applicants who are selected to receive an award enter into a written performance or cooperative agreement with the Department. If the Department determines that a State is not meeting its goals, timelines, budget, or annual targets or is not fulfilling other applicable requirements, the Department will take appropriate action, which could include a collaborative process between the Department and the State, or enforcement measures with respect to this grant, such as placing the State in high-risk status, putting the State on reimbursement payment status, or delaying or withholding funds.

A State that receives Race to the Top funds must also meet the reporting requirements that apply to all ARRA-funded programs. Specifically, the State must submit reports, within 10 days after the end of each calendar quarter, that contain the information required under section 1512(c) of the ARRA in accordance with any guidance issued by the Office of Management and Budget or the Department (ARRA Division A, Section 1512(c)).

In addition, for each year of the program, the State will submit a report to the Secretary, at such time and in such manner as the Secretary may require, that describes:

- The uses of funds within the State;
- How the State distributed the funds it received;
- The number of jobs that the Governor estimates were saved or created with the funds;
- The State's progress in reducing inequities in the distribution of highly qualified teachers, implementing a State longitudinal data system, and developing and implementing valid and reliable assessments for English language learners and students with disabilities; and
- If applicable, a description of each modernization, renovation, or repair project approved in the State application and funded, including the amounts awarded and project costs (ARRA Division A, Section 14008).

4. *Evidence and Performance Measures:* Appendix A to this notice contains a listing of the evidence and performance measures.

VII. Agency Contact

FOR FURTHER INFORMATION CONTACT: James Butler, U.S. Department of Education, 400 Maryland Ave., SW., room 3E108, Washington, DC 20202–6400. *Telephone:* 202–205–3775 or by *e-mail: racetothetop@ed.gov.*

If a TDD is needed, call the Federal Relay Service, toll free, at 1–800–877–8339.

VIII. Other Information

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

Electronic Access to This Document: You can 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.

Dated: November 10, 2009.

Arne Duncan,

Secretary of Education.

Appendix A: Evidence and Performance Measures

A. State Success Factors

(A)(1) *Articulating State's education reform agenda and LEAs' participation in it.*

Evidence

Evidence for (A)(1)(ii):

• An example of the State's standard Participating LEA MOU, and description of variations used, if any.

• The completed summary table indicating which specific portions of the State's plan each LEA is committed to implementing, and relevant summary statistics (see Summary Table for (A)(1)(ii)(b)).

• The completed summary table indicating which LEA leadership signatures have been obtained (see Summary Table for (A)(1)(ii)(c)).

Evidence for (A)(1)(iii):

• The completed summary table indicating the numbers and percentages of participating LEAs, schools, K–12 students, and students in poverty (see Summary Table for (A)(1)(iii)).

• Tables and graphs that show the State's goals, overall and by subgroup, requested in the criterion, together with the supporting narrative. In addition, describe what the goals would look like were the State not to receive an award under this program.

Evidence for (A)(1)(ii) and (A)(1)(iii):

• The completed detailed table, by LEA, that includes the information requested in the criterion (see Detailed Table for (A)(1)).

Performance Measures

• None required.

(A)(2) *Building strong statewide capacity to implement, scale up, and sustain proposed plans.*

Evidence

Evidence for (A)(2)(i)(d):

• The State's budget, as completed in Section XI of the application. The narrative that accompanies and explains the budget and how it connects to the State's plan, as completed in Section XI of the application.

Evidence for (A)(2)(ii):

• A summary in the narrative of the statements or actions and inclusion of key statements or actions in the Appendix.

Performance Measures

• None required.

(A)(3) *Demonstrating significant progress in raising achievement and closing gaps.*

Evidence

Evidence for (A)(3)(ii): NAEP and ESEA results since at least 2003. Include in the Appendix all the data requested in the criterion as a resource for peer reviewers for each year in which a test was given or data was collected. Note that this data will be used for reference only and can be in raw format. In the narrative, provide the analysis of this data and any tables or graphs that best support the narrative.

Performance Measures

• None required.

(B) Standards and Assessments

(B)(1) *Developing and adopting common standards.*

Evidence

Evidence for (B)(1)(i):

• A copy of the Memorandum of Agreement, executed by the State, showing that it is part of a standards consortium.

• A copy of the final standards or, if the standards are not yet final, a copy of the draft standards and anticipated date for completing the standards.

• Documentation that the standards are or will be internationally benchmarked and that, when well-implemented, will help to ensure that students are prepared for college and careers.

• The number of States participating in the standards consortium and the list of these States.

Evidence for (B)(1)(ii):

For Phase 1 applicants:

• A description of the legal process in the State for adopting standards, and the State's plan, current progress, and timeframe for adoption.

For Phase 2 applicants:

• Evidence that the State has adopted the standards. Or, if the State has not yet adopted the standards, a description of the legal process in the State for adopting standards and the State's plan, current progress, and timeframe for adoption.

Performance Measures

• None required.

(B)(2) *Developing and implementing common, high-quality assessments.*

Evidence

Evidence for (B)(2):

• A copy of the Memorandum of Agreement, executed by the State, showing that it is part of a consortium that intends to develop high-quality assessments (as defined in this notice) aligned with the consortium's common set of K–12 standards; or documentation that the State's consortium has applied, or intends to apply, for a grant through the separate Race to the Top Assessment Program (to be described in a subsequent notice); or other evidence of the State's plan to develop and adopt common, high-quality assessments (as defined in this notice).

• The number of States participating in the assessment consortium and the list of these States.

Performance Measures

• None required.

(B)(3) *Supporting the transition to enhanced standards and high-quality assessments.*

Evidence

• Any supporting evidence the State believes will be helpful to peer reviewers.

Performance Measures

• Optional.

(C) Data Systems to Support Instruction

(C)(1) *Fully implementing a statewide longitudinal data system.*

Evidence

• Documentation for each of the America COMPETES Act elements (as defined in this notice) that is included in the State's statewide longitudinal data system.

Performance Measures

• None required.

(C)(2) *Accessing and using State data.*

Evidence

• Any supporting evidence the State believes will be helpful to peer reviewers.

Performance Measures

• Optional.

(C)(3) *Using data to improve instruction.*

Evidence

• Any supporting evidence the State believes will be helpful to peer reviewers.

Performance Measures

• Optional.

(D) Great Teachers and Leaders

(D)(1) *Providing high-quality pathways for aspiring teachers and principals.*

Evidence for (D)(1)(i):

- A description of the State's applicable laws, statutes, regulations, or other relevant legal documents, including information on the elements of the State's alternative routes (as described in the alternative routes to certification definition in this notice).

Evidence for (D)(1)(ii):

- A list of the alternative certification programs operating in the State under the State's alternative routes to certification (as defined in this notice), and for each:
  - The elements of the program (as described in the alternative routes to certification definition in this notice).
  - The number of teachers and principals that successfully completed each program in the previous academic year.
  - The total number of teachers and principals certified statewide in the previous academic year.

Performance Measures

- None required.

(D)(2) *Improving teacher and principal effectiveness based on performance.*

Evidence

- Any supporting evidence the State believes will be helpful to peer reviewers.

Performance Measures

General goals to be provided at time of application, including baseline data and annual targets:

- (D)(2)(i) Percentage of participating LEAs that measure student growth (as defined in this notice).
- (D)(2)(ii) Percentage of participating LEAs with qualifying evaluation systems for teachers.
- (D)(2)(ii) Percentage of participating LEAs with qualifying evaluation systems for principals.
- (D)(2)(iv) Percentage of participating LEAs with qualifying evaluation systems that are used to inform:
  - (D)(2)(iv)(a) Developing teachers and principals.
  - (D)(2)(iv)(b) Compensating teachers and principals.
  - (D)(2)(iv)(b) Promoting teachers and principals.
  - (D)(2)(iv)(b) Retaining effective teachers and principals.
  - (D)(2)(iv)(c) Granting tenure and/or full certification (where applicable) to teachers and principals.
  - (D)(2)(iv)(d) Removing ineffective tenured and untenured teachers and principals.

General data to be provided at time of application, including baseline data:

- Total number of participating LEAs.
- Total number of principals in participating LEAs.
- Total number of teachers in participating LEAs.

Data to be requested of grantees in the future:

- (D)(2)(ii) Number of teachers and principals in participating LEAs with qualifying evaluation systems.
- (D)(2)(iii) Number of teachers and principals in participating LEAs with qualifying evaluation systems who were evaluated as effective or better in the prior academic year.
- (D)(2)(iii) Number of teachers and principals in participating LEAs with qualifying evaluation systems who were evaluated as ineffective in the prior academic year.
- (D)(2)(iv)(b) Number of teachers and principals in participating LEAs with qualifying evaluation systems whose evaluations were used to inform compensation decisions in the prior academic year.
- (D)(2)(iv)(b) Number of teachers and principals in participating LEAs with qualifying evaluation systems who were evaluated as effective or better and were retained in the prior academic year.
- (D)(2)(iv)(c) Number of teachers in participating LEAs with qualifying evaluation systems who were eligible for tenure in the prior academic year.
- (D)(2)(iv)(c) Number of teachers in participating LEAs with qualifying evaluation systems whose evaluations were used to inform tenure decisions in the prior academic year.
- (D)(2)(iv)(d) Number of teachers and principals in participating LEAs who were removed for being ineffective in the prior academic year.

(D)(3) *Ensuring equitable distribution of effective teachers and principals.*

Evidence

Evidence for (D)(3)(i):

- Definitions of high-minority and low-minority schools as defined by the State for the purposes of the State's Teacher Equity Plan.

Performance Measures

Note: All information below is requested for Participating LEAs.

Performance Measures for (D)(3)(i):

General goals to be provided at time of application, including baseline data and annual targets:

- Percentage of teachers in schools that are high-poverty, high-minority, or both (as defined in this notice) who are highly effective (as defined in this notice).
- Percentage of teachers in schools that are low-poverty, low-minority, or both (as defined in this notice) who are highly effective (as defined in this notice).
- Percentage of teachers in schools that are high-poverty, high-minority, or both (as defined in this notice) who are ineffective.
- Percentage of teachers in schools that are low-poverty, low-minority, or both (as defined in this notice) who are ineffective.
- Percentage of principals leading schools that are high-poverty, high-minority, or both (as defined in this notice) who are highly effective (as defined in this notice).
- Percentage of principals leading schools that are low-poverty, low-minority, or both (as defined in this notice) who are highly effective (as defined in this notice).
- Percentage of principals leading schools that are high-poverty, high-minority, or both (as defined in this notice) who are ineffective.
- Percentage of principals leading schools that are low-poverty, low-minority, or both (as defined in this notice) who are ineffective.

General data to be provided at time of application, including baseline data:

- Total number of schools that are high-poverty, high-minority, or both (as defined in this notice).
- Total number of schools that are low-poverty, low-minority, or both (as defined in this notice).
- Total number of teachers in schools that are high-poverty, high-minority, or both (as defined in this notice).
- Total number of teachers in schools that are low-poverty, low-minority, or both (as defined in this notice).
- Total number of principals leading schools that are high-poverty, high-minority, or both (as defined in this notice).
- Total number of principals leading schools that are low-poverty, low-minority, or both (as defined in this notice).

Data to be requested of grantees in the future:

- Number of teachers and principals in schools that are high-poverty, high-minority, or both (as defined in this notice) who were evaluated as highly effective (as defined in this notice) in the prior academic year.
- Number of teachers and principals in schools that are high-poverty, high-minority, or both (as defined in this notice) who were evaluated as ineffective in the prior academic year.
- Number of teachers and principals in schools that are low-poverty, low-minority, or both (as defined in this notice) who were evaluated as highly effective (as defined in this notice) in the prior academic year.

• Number of teachers and principals in schools that are low-poverty, low-minority, or both (as defined in this notice) who were evaluated as ineffective in the prior academic year.

Performance Measures for (D)(3)(ii):

General goals to be provided at time of application, including baseline data and annual targets:

• Percentage of mathematics teachers who were evaluated as effective or better.

• Percentage of science teachers who were evaluated as effective or better.

• Percentage of special education teachers who were evaluated as effective or better.

• Percentage of teachers in language instruction educational programs who were evaluated as effective or better.

General data to be provided at time of application, including baseline data:

• Total number of mathematics teachers.

• Total number of science teachers.

• Total number of special education teachers.

• Total number of teachers in language instruction educational programs.

Data to be requested of grantees in the future:

• Number of mathematics teachers in participating LEAs who were evaluated as effective or better in the prior academic year.

• Number of science teachers in participating LEAs who were evaluated as effective or better in the prior academic year.

• Number of special education teachers in participating LEAs who were evaluated as effective or better in the prior academic year.

• Number of teachers in language instruction educational programs in participating LEAs who were evaluated as effective or better in the prior academic year.

(D)(4) *Improving the effectiveness of teacher and principal preparation programs.*

Evidence

• Any supporting evidence the State believes will be helpful to peer reviewers.

Performance measures

General goals to be provided at time of application, including baseline data and annual targets:

• Percentage of teacher preparation programs in the State for which the public can access data on the achievement and growth (as defined in this notice) of the graduates' students.

• Percentage of principal preparation programs in the State for which the public can access data on the achievement and growth (as defined in this notice) of the graduates' students.

General data to be provided at time of application, including baseline data:

• Total number of teacher credentialing programs in the State.

• Total number of principal credentialing programs in the State.

• Total number of teachers in the State.

• Total number of principals in the State.

Data to be requested of grantees in the future:

• Number of teacher credentialing programs in the State for which the information (as described in the criterion) is publicly reported.

• Number of teachers prepared by each credentialing program in the State for which the information (as described in the criterion) is publicly reported.

• Number of principal credentialing programs in the State for which the information (as described in the criterion) is publicly reported.

• Number of principals prepared by each credentialing program in the State for which the information (as described in the criterion) is publicly reported.

• Number of teachers in the State whose data are aggregated to produce publicly available reports on the State's credentialing programs.

• Number of principals in the State whose data are aggregated to produce publicly available reports on the State's credentialing programs.

(D)(5) *Providing effective support to teachers and principals.*

Evidence

• Any supporting evidence the State believes will be helpful to peer reviewers.

Performance Measures

• Optional.

(E) Turning Around the Lowest-Achieving Schools

(E)(1) *Intervening in the lowest-achieving schools and LEAs.*

Evidence

Evidence for (E)(1):

• A description of the State's applicable laws, statutes, regulations, or other relevant legal documents.

Performance Measures

• None required.

(E)(2) *Turning around the lowest-achieving schools.*

Evidence

• The State's historic performance on school turnaround, as evidenced by the total number of persistently lowest-achieving schools (as defined in this notice) that States or LEAs attempted to turn around in the last five years, the approach used, and the results and lessons learned to date.

Performance Measures

• The number of schools for which one of the four school intervention models (described in Appendix C) will be initiated each year.

(F) General

(F)(1) *Making education funding a priority.*

Evidence

Evidence for (F)(1)(i):

• Financial data to show whether and to what extent expenditures, as a percentage of the total revenues available to the State (as defined in this notice), increased, decreased, or remained the same.

Evidence for (F)(1)(ii):

• Any supporting evidence the State believes will be helpful to peer reviewers.

Performance Measures

• None required.

(F)(2) *Ensuring successful conditions for high-performing charter schools and other innovative schools.*

Evidence

Evidence for (F)(2)(i):

• A description of the State's applicable laws, statutes, regulations, or other relevant legal documents.

• The number of charter schools allowed under State law and the percentage this represents of the total number of schools in the State.

• The number and types of charter schools currently operating in the State.

Evidence for (F)(2)(ii):

• A description of the State's approach to charter school accountability and authorization, and a description of the State's applicable laws, statutes, regulations, or other relevant legal documents.

• For each of the last five years:

○ The number of charter school applications made in the State.

○ The number of charter school applications approved.

○ The number of charter school applications denied and reasons for the denials (academic, financial, low enrollment, other).

○ The number of charter schools closed (including charter schools that were not reauthorized to operate).

○ The reasons for the closures or non-renewals (academic, financial, low enrollment, other).

Evidence for (F)(2)(iii):

- A description of the State's applicable statutes, regulations, or other relevant legal documents.
- A description of the State's approach to charter school funding, the amount of funding passed through to charter schools per student, and how those amounts compare with traditional public school per-student funding allocations.

Evidence for (F)(2)(iv):

- A description of the State's applicable statutes, regulations, or other relevant legal documents.
- A description of the statewide facilities supports provided to charter schools, if any.

Evidence for (F)(2)(v):

- A description of how the State enables LEAs to operate innovative, autonomous public schools (as defined in this notice) other than charter schools.

Performance Measures

- None required.

(F)(3) *Demonstrating other significant reform conditions*

Evidence

Evidence for (F)(3):

- A description of the State's other applicable key education laws, statutes, regulations, or relevant legal documents.

Performance Measures

- None required.

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APPENDIX B. SCORING RUBRIC

I. Introduction

To help ensure inter-reviewer reliability and transparency for State Race to the Top applicants, the U.S. Department of Education has created and is publishing a rubric for scoring State applications. The pages that follow detail the rubric and allocation of point values that reviewers will be using. Race to the Top grants will be awarded on a competitive basis to States in two phases. The rubric will be used by reviewers in each phase to ensure consistency across and within review panels.

The rubric allocates points to each criterion and, in selected cases, to sub-criteria as well. In all, the Race to the Top scoring rubric includes 19 criteria and one competitive priority that collectively add up to 500 points. Several of these criteria account for a large number of points; others account for a comparatively small portion of a State's score.

It is important to emphasize that over half the points that reviewers may award to States are based on States' accomplishments prior to applying—their successes in increasing student achievement, decreasing the achievement gaps, increasing graduation rates, enlisting strong statewide support and commitment to their proposed plans, and creating legal conditions conducive to education reform and innovation. Finally, it bears underscoring that reviewers will be assessing multiple aspects of States' Race to the Top applications. States that fail to earn points or earn a low number of points on one criterion, can still win a Race to the Top award by presenting strong applications and histories of accomplishments on other criteria.

Notwithstanding the guidance being provided to reviewers, reviewers will still be required to make many thoughtful judgments about the quality of States' applications. Beyond judging a State's commitment to the four reform areas specified in the ARRA, reviewers will be assessing, based on the criteria, the comprehensiveness and feasibility of States' applications and plans. Reviewers will be asked to evaluate, for example, if States have set ambitious but achievable annual targets in their applications. Reviewers will need to make informed judgments about States' goals, the activities the State has chosen to undertake and the rationales for such activities, and the timeline and credibility of State plans.

Applicants address the absolute and competitive priorities throughout their applications. The absolute priority must be met in order for an applicant to receive funding. Applications that address the competitive priority comprehensively will earn extra points under that priority. Invitational priorities are extensions to the core reform areas; applicants are invited to address these, but are not granted additional points for doing so.

In this appendix there is information about the point values for each criterion and priority, guidance on scoring, and the rubric that will be provided to reviewers.

II. Points Overview

The chart below shows the maximum number of points that may be assigned to each criterion.

Selection Criteria	Points	Percent
A. State Success Factors	125	25%
(A)(1) Articulating State's education reform agenda and LEAs' participation in it	65	
(i) Articulating comprehensive, coherent reform agenda	*5*	
(ii) Securing LEA commitment	*45*	
(iii) Translating LEA participation into statewide impact	*15*	
(A)(2) Building strong statewide capacity to implement, scale up, and sustain proposed plans	30	
(i) Ensuring the capacity to implement	*20*	
(ii) Using broad stakeholder support	*10*	
(A)(3) Demonstrating significant progress in raising achievement and closing gaps	30	
(i) Making progress in each reform area	*5*	
(ii) Improving student outcomes	*25*	
B. Standards and Assessments	70	14%
(B)(1) Developing and adopting common standards	40	
(i) Participating in consortium developing high-quality standards	*20*	
(ii) Adopting standards	*20*	
(B)(2) Developing and implementing common, high-quality assessments	10	
(B)(3) Supporting the transition to enhanced standards and high-quality assessments	20	
C. Data Systems to Support Instruction	47	9%
(C)(1) Fully implementing a statewide longitudinal data system	24	
(C)(2) Accessing and using State data	5	
(C)(3) Using data to improve instruction	18	
D. Great Teachers and Leaders	138	28%
Eligibility Requirement (b)	eligibility	
(D)(1) Providing high-quality pathways for aspiring teachers and principals	21	
(D)(2) Improving teacher and principal effectiveness based on performance	58	
(i) Measuring student growth	*5*	
(ii) Developing evaluation systems	*15*	
(iii) Conducting annual evaluations	*10*	
(iv) Using evaluations to inform key decisions	*28*	
(D)(3) Ensuring equitable distribution of effective teachers and principals	25	
(i) Ensuring equitable distribution in high-poverty or high-minority schools	*15*	
(ii) Ensuring equitable distribution in hard-to-staff subjects and specialty areas	*10*	
(D)(4) Improving the effectiveness of teacher and principal preparation programs	14	
(D)(5) Providing effective support to teachers and principals	20	
E. Turning Around the Lowest-Achieving Schools	50	10%
(E)(1) Intervening in the lowest-achieving schools and LEAs	10	
(E)(2) Turning around the lowest-achieving schools	40	
(i) Identifying the persistently lowest-achieving schools	*5*	
(ii) Turning around the persistently lowest-achieving schools	*35*	
F. General	55	11%
Eligibility Requirement (a)	eligibility	
(F)(1) Making education funding a priority	10	
(F)(2) Ensuring successful conditions for high-performing charter schools and other innovative s	40	
(F)(3) Demonstrating other significant reform conditions	5	
Competitive Preference Priority 2: Emphasis on STEM	15	3%
TOTAL	**500**	**100%**

Subtotal: Accomplishments	260	52%
Subtotal: Plans	240	48%

III. About Scoring

About State Reform Conditions Criteria: The goal for State Reform Conditions Criteria is to ensure that, wherever possible, reviewers are provided with criterion-specific guidance that is clear and specific, making the decisions as "objective" as possible. (See application requirement (d) for the guidance provided to States concerning responding to State Reform Conditions Criteria in their applications.)

About Reform Plan Criteria: For Reform Plan Criteria, reviewers will be given general guidance on how to evaluate the information that each State submits; this guidance will be consistent with application requirement (e). Reviewers will allot points based on the quality of the State's plan and, where specified in the text of the criterion, whether the State has set ambitious yet achievable annual targets for that plan. In making these judgments, reviewers will consider the extent to which the State has:

- *A high-quality plan.* In determining the quality of a State's plan for a given Reform Plan Criterion, reviewers will evaluate the key goals, the activities to be undertaken and rationale for the activities, the timeline, the parties responsible for implementing the activities, and the credibility of the plan (as judged, in part, by the information submitted as supporting evidence). States are required to submit this information for each Reform Plan Criterion that the State addresses. States may also submit additional information that they believe will be helpful to peer reviewers.

- *Ambitious yet achievable annual targets* (only for those criteria that specify this). In determining whether a State has ambitious yet achievable annual targets for a given Reform Plan Criterion, reviewers will examine the State's targets in the context of the State's plan and the evidence submitted (if any) in support of the plan. There is no specific target that reviewers will be looking for here; nor will higher targets necessarily be rewarded above lower ones. Rather, reviewers will reward States for developing targets that – in light of the State's plan – are "ambitious yet achievable."

Note that the evidence that States submit may be relevant both to judging whether the State has a high-quality plan and whether its annual targets are ambitious yet achievable.

About Assigning Points: For each criterion, reviewers will assign points to an application. In general, the Department has specified total point values at the criterion level and in some instances, at the sub-criterion level. In the cases where the point totals have not been allocated to sub-criteria, each sub-criterion is weighted equally.

The reviewers will use the general ranges below as a guide when awarding points.

Maximum Point Value	Quality of Applicant's Response		
	Low	Medium	High
45	0 – 12	13 – 33	34 – 45
40	0 – 10	11 – 29	30 – 40
35	0 – 9	10 – 25	26 – 35
30	0 – 8	9 – 21	22 – 30
25	0 – 7	8 – 18	19 – 25

Maximum Point Value	Quality of Applicant's Response		
	Low	Medium	High
21	0 – 5	6 – 15	16 – 21
20	0 – 5	6 – 14	15 – 20
15	0 – 4	5 – 10	11 – 15
14	0 – 4	5 – 9	10 – 14
10	0 – 2	3 – 7	8 – 10
7	0 – 2	3 – 4	5 – 7
5	0 – 1	2 – 3	4 – 5

About Priorities: There are three types of priorities in the Race to the Top competition.

- The absolute priority cuts across the entire application and should not be addressed separately. It will be assessed, after the proposal has been fully reviewed and evaluated, to ensure that the application has met the priority. If an application has not met the priority, it will be eliminated from the competition.
- The competitive priority also cuts across the entire application. It is worth 15 points. Applicants will earn all or none of it, making it truly a competitive preference. In those cases where there is a disparity in the reviewers' determinations on the priority, the Department will award the competitive priority points only if a majority of the reviewers on a panel determine that an application should receive the priority points.
- The invitational priorities are addressed in their own separate sections. While applicants are invited to write to the invitational priorities, these will not earn points.

In the Event of a Tie: If two or more applications have the same score and there is not sufficient funding to support all of the tied applicants, the applicants' scores on criterion (A)(1)(ii), Securing LEA Commitment, will be used to break the tie.

IV. Reviewer Guidance for Criteria

A. State Success Factors

General Reviewer Guidance for (A)(1): In judging the quality of the applicant's response to this criterion, reviewers should refer to what the criterion asks, to the evidence requested in the application and presented by the applicant (if any), and to the elements of a high-quality plan as set forth in application requirement (d).

Reviewer Guidance Specific to (A)(1)(ii):

- *The model Memorandum of Understanding (MOU), provided in Appendix D to this notice, is an example of a strong MOU.*

(A)(1) **(maximum total points: 65)** Articulating State's education reform agenda and LEAs' participation in it: The extent to which—

(i) **(maximum subpoints: 5)** The State has set forth a comprehensive and coherent reform agenda that clearly articulates its goals for implementing reforms in the four education areas described in the ARRA and improving student outcomes statewide, establishes a clear and credible path to achieving these goals, and is consistent with the specific reform plans that the State has proposed throughout its application;

(ii) **(maximum subpoints: 45)** The participating LEAs (as defined in this notice) are strongly committed to the State's plans and to effective implementation of reform in the four education areas, as evidenced by Memoranda of Understanding (MOUs) (as set forth in Appendix D) or other binding agreements between the State and its participating LEAs (as defined in this notice) that include—

(a) Terms and conditions that reflect strong commitment by the participating LEAs (as defined in this notice) to the State's plans;

(b) Scope-of-work descriptions that require participating LEAs (as defined in this notice) to implement all or significant portions of the State's Race to the Top plans; and

(c) Signatures from as many as possible of the LEA superintendent (or equivalent), the president of the local school board (or equivalent, if applicable), and the local teachers' union leader (if applicable) (one signature of which must be from an authorized LEA representative) demonstrating the extent of leadership support within participating LEAs (as defined in this notice); and

(iii) **(maximum subpoints: 15)** The LEAs that are participating in the State's Race to the Top plans (including considerations of the numbers and percentages of participating LEAs, schools, K-12 students, and students in poverty) will translate into broad statewide impact, allowing the State to reach its ambitious yet achievable goals, overall and by student subgroup, for—

(a) Increasing student achievement in (at a minimum) reading/language arts and mathematics, as reported by the NAEP and the assessments required under the ESEA;

(b) Decreasing achievement gaps between subgroups in reading/language arts and mathematics, as reported by the NAEP and the assessments required under the ESEA;

(c) Increasing high school graduation rates (as defined in this notice); and

(d) Increasing college enrollment (as defined in this notice) and increasing the number of students who complete at least a year's worth of college credit that is applicable to a degree within two years of enrollment in an institution of higher education.

General Reviewer Guidance for (A)(2): In judging the quality of the applicant's response to this criterion, reviewers should refer to what the criterion asks, to the evidence requested in the application and presented by the applicant (if any), and to the elements of a high-quality plan as set forth in application requirement (d).

(A)(2) **(maximum total points: 30)** Building strong statewide capacity to implement, scale up, and sustain proposed plans: The extent to which the State has a high-quality overall plan to—

(i) **(maximum subpoints: 20)** Ensure that it has the capacity required to implement its proposed plans by—

(a) Providing strong leadership and dedicated teams to implement the statewide education reform plans the State has proposed;

(b) Supporting participating LEAs (as defined in this notice) in successfully implementing the education reform plans the State has proposed, through such activities as identifying promising practices, evaluating these practices' effectiveness, ceasing ineffective practices, widely disseminating and replicating the effective practices statewide, holding participating LEAs (as defined in this notice) accountable for progress and performance, and intervening where necessary;

(c) Providing effective and efficient operations and processes for implementing its Race to the Top grant in such areas as grant administration and oversight, budget reporting and monitoring, performance measure tracking and reporting, and fund disbursement;

(d) Using the funds for this grant, as described in the State's budget and accompanying budget narrative, to accomplish the State's plans and meet its targets, including where feasible, by

coordinating, reallocating, or repurposing education funds from other Federal, State, and local sources so that they align with the State's Race to the Top goals;

(e) Using the fiscal, political, and human capital resources of the State to continue, after the period of funding has ended, those reforms funded under the grant for which there is evidence of success; and

(ii) **(maximum subpoints: 10)** Use support from a broad group of stakeholders to better implement its plans, as evidenced by the strength of statements or actions of support from—

(a) The State's teachers and principals, which include the State's teachers' unions or statewide teacher associations; and

(b) Other critical stakeholders, such as the State's legislative leadership; charter school authorizers and State charter school membership associations (if applicable); other State and local leaders (e.g., business, community, civil rights, and education association leaders); Tribal schools; parent, student, and community organizations (e.g., parent-teacher associations, nonprofit organizations, local education foundations, and community-based organizations); and institutions of higher education.

General Reviewer Guidance for (A)(3): In judging the quality of the applicant's response to this criterion, reviewers should refer to what the criterion asks, and to the evidence requested in the application and presented by the applicant (if any).

(A)(3) **(maximum total points: 30)** Demonstrating significant progress in raising achievement and closing gaps: The extent to which the State has demonstrated its ability to—

(i) **(maximum subpoints: 5)** Make progress over the past several years in each of the four education reform areas, and used its ARRA and other Federal and State funding to pursue such reforms;

(ii) **(maximum subpoints: 25)** Improve student outcomes overall and by student subgroup since at least 2003, and explain the connections between the data and the actions that have contributed to—

(a) Increasing student achievement in reading/language arts and mathematics, both on the NAEP and on the assessments required under the ESEA;

(b) Decreasing achievement gaps between subgroups in reading/language arts and mathematics, both on the NAEP and on the assessments required under the ESEA; and

(c) Increasing high school graduation rates.

B. Standards and Assessments

State Reform Conditions Criteria

General Reviewer Guidance for (B)(1): In judging the quality of the applicant's response to this criterion, reviewers should refer to what the criterion asks and to the evidence requested in the application and presented by the applicant (if any).

Reviewer Guidance Specific to (B)(1)(i)(b) – Significant Number of States:

- *"High" points for a significant number of States are earned if the consortium includes a majority of the States in the country.*
- *"Medium" or "low" points are earned if the consortium includes one-half of the States in the country or less.*

Reviewer Guidance Specific to (B)(1)(ii):

- *"High" points are earned for: Phase 1 applicants' commitment to and progress toward adoption by August 2, 2010; and Phase 2 applicants' adoption by August 2, 2010.*
- *No "Medium" points are assigned for this criterion.*
- *"Low" points are earned for a high-quality plan to adopt by a later specified date in 2010.*
- *No points are earned for a plan that is not high-quality or for a plan to adopt later than 2010.*

(B)(1) **(maximum total points: 40)** Developing and adopting common standards: The extent to which the State has demonstrated its commitment to adopting a common set of high-quality standards, evidenced by (as set forth in Appendix B)—

(i) **(maximum subpoints: 20)** The State's participation in a consortium of States that—

(a) Is working toward jointly developing and adopting a common set of K-12 standards (as defined in this notice) that are supported by evidence that they are internationally benchmarked and build toward college and career readiness by the time of high school graduation; and

(b) Includes a significant number of States; and

(ii) **(maximum subpoints: 20)** (a) For Phase 1 applications, the State's high-quality plan demonstrating its commitment to and progress toward adopting a common set of K-12 standards (as defined in this notice) by August 2, 2010, or, at a minimum, by a later date in 2010 specified by the State, and to implementing the standards thereafter in a well-planned way; or

(b) For Phase 2 applications, the State's adoption of a common set of K-12 standards (as defined in this notice) by August 2, 2010, or, at a minimum, by a later date in 2010 specified by the State in a high-quality plan toward which the State has made significant progress, and its commitment to implementing the standards thereafter in a well-planned way.[6]

General Reviewer Guidance for (B)(2): In judging the quality of the applicant's response to this criterion, reviewers should refer to what the criterion asks and to the evidence requested in the application and presented by the applicant (if any).

Reviewer Guidance Specific to (B)(2)(ii)– Significant Number of States:

- *"High" points for a significant number of States are earned if the consortium includes a majority of the States in the country.*
- *"Medium" or "low" points are earned if the consortium includes one-half of the States in the country or less.*

(B)(2) **(maximum total points: 10)** Developing and implementing common, high-quality assessments: The extent to which the State has demonstrated its commitment to improving the quality of its assessments, evidenced by (as set forth in Appendix B) the State's participation in a consortium of States that—

(i) Is working toward jointly developing and implementing common, high-quality assessments (as defined in this notice) aligned with the consortium's common set of K-12 standards (as defined in this notice); and

(ii) Includes a significant number of States.

[6] Phase 2 applicants addressing selection criterion (B)(1)(ii) may amend their June 1, 2010 application submission through August 2, 2010 by submitting evidence of adopting common standards after June 1, 2010.

Reform Plan Criteria

General Reviewer Guidance for (B)(3): In judging the quality of the applicant's plan and annual targets (if any) for this criterion, reviewers should refer to what the criterion asks, to the evidence requested in the application and presented by the applicant (if any), and to the elements of a high-quality plan as set forth in application requirement (d).

(B)(3) **(maximum total points: 20)** Supporting the transition to enhanced standards and high-quality assessments: The extent to which the State, in collaboration with its participating LEAs (as defined in this notice), has a high-quality plan for supporting a statewide transition to and implementation of internationally benchmarked K-12 standards that build toward college and career readiness by the time of high school graduation, and high-quality assessments (as defined in this notice) tied to these standards. State or LEA activities might, for example, include: developing a rollout plan for the standards together with all of their supporting components; in cooperation with the State's institutions of higher education, aligning high school exit criteria and college entrance requirements with the new standards and assessments; developing or acquiring, disseminating, and implementing high-quality instructional materials and assessments (including, for example, formative and interim assessments (both as defined in this notice)); developing or acquiring and delivering high-quality professional development to support the transition to new standards and assessments; and engaging in other strategies that translate the standards and information from assessments into classroom practice for all students, including high-need students (as defined in this notice).

C. Data Systems to Support Instruction

State Reform Conditions Criteria

General Reviewer Guidance for (C)(1): In judging the quality of the applicant's response to this criterion, reviewers should refer to what the criterion asks and to the evidence requested in the application and presented by the applicant (if any).

Reviewer Guidance Specific to (C)(1):

- *Applicants earn two (2) points for every element the State has, out of 12 elements possible.*

(C)(1) **(maximum total points: 24)** Fully implementing a statewide longitudinal data system: The extent to which the State has a statewide longitudinal data system that includes all of the America COMPETES Act elements (as defined in this notice).

Reform Plan Criteria

General Reviewer Guidance for (C)(2): In judging the quality of the applicant's plan and annual targets (if any) for this criterion, reviewers should refer to what the criterion asks, to the evidence requested in the application and presented by the applicant (if any), and to the elements of a high-quality plan as set forth in application requirement (d).

(C)(2) **(maximum total points: 5)** Accessing and using State data: The extent to which the State has a high-quality plan to ensure that data from the State's statewide longitudinal data system are accessible to, and used to inform and engage, as appropriate, key stakeholders (e.g.,

parents, students, teachers, principals, LEA leaders, community members, unions, researchers, and policymakers); and that the data support decision-makers in the continuous improvement of efforts in such areas as policy, instruction, operations, management, resource allocation, and overall effectiveness.[7]

General Reviewer Guidance for (C)(3): In judging the quality of the applicant's plan and annual targets (if any) for this criterion, reviewers should refer to what the criterion asks, to the evidence requested in the application and presented by the applicant (if any), and to the elements of a high-quality plan as set forth in application requirement (d).

(C)(3) **(maximum total points: 18)** Using data to improve instruction: The extent to which the State, in collaboration with its participating LEAs (as defined in this notice), has a high-quality plan to—

(i) Increase the acquisition, adoption, and use of local instructional improvement systems (as defined in this notice) that provide teachers, principals, and administrators with the information and resources they need to inform and improve their instructional practices, decision-making, and overall effectiveness;

(ii) Support participating LEAs (as defined in this notice) and schools that are using instructional improvement systems (as defined in this notice) in providing effective professional development to teachers, principals, and administrators on how to use these systems and the resulting data to support continuous instructional improvement; and

(iii) Make the data from instructional improvement systems (as defined in this notice), together with statewide longitudinal data system data, available and accessible to researchers so that they have detailed information with which to evaluate the effectiveness of instructional materials, strategies, and approaches for educating different types of students (e.g., students with disabilities, English language learners, students whose achievement is well below or above grade level).

D. Great Teachers and Leaders

State Reform Conditions Criteria

General Reviewer Guidance for (D)(1): In judging the quality of the applicant's response to this criterion, reviewers should refer to what the criterion asks and to the evidence requested in the application and presented by the applicant (if any).

Reviewer Guidance Specific to (D)(1):

- *The criterion must be judged for both teachers and principals.*

Reviewer Guidance Specific to (D)(1)(i):

- *"High" points are earned by States that have alternative routes that (a) permit providers who operate independently of institutions of higher education (IHEs), and (b) include at least 4 of the 5 elements listed in the definition of alternative routes to certification (as defined in this notice).*
- *"Medium" points are earned by States that have alternative routes that (a) permit providers who operate independently of IHEs, and (b) include at least 2 of the 5 elements listed in the definition of alternative routes to certification (as defined in this notice).*

[7] Successful applicants that receive Race to the Top grant awards will need to comply with the Family Educational Rights and Privacy Act (FERPA), including 34 CFR Part 99, as well as State and local requirements regarding privacy.

- *"Low" points are earned by States that have alternative routes that (a) do not permit providers who operate independently of IHEs, OR (b) include only 1 of the 5 elements listed in the definition of alternative routes to certification (as defined in this notice).*

(D)(1) **(maximum total points: 21)** Providing high-quality pathways for aspiring teachers and principals: The extent to which the State has—

(i) Legal, statutory, or regulatory provisions that allow alternative routes to certification (as defined in this notice) for teachers and principals, particularly routes that allow for providers in addition to institutions of higher education;

(ii) Alternative routes to certification (as defined in this notice) that are in use; and

(iii) A process for monitoring, evaluating, and identifying areas of teacher and principal shortage and for preparing teachers and principals to fill these areas of shortage.

Reform Plan Criteria

General Reviewer Guidance for (D)(2): In judging the quality of the applicant's response to this criterion and annual targets, reviewers should refer to what the criterion asks, to the evidence requested in the application and presented by the applicant (if any), and to the elements of a high-quality plan as set forth in application requirement (d).

Reviewer Guidance Specific to (D)(2):

- *The criterion must be judged for both teachers and principals.*

(D)(2) **(maximum total points: 58)** Improving teacher and principal effectiveness based on performance: The extent to which the State, in collaboration with its participating LEAs (as defined in this notice), has a high-quality plan and ambitious yet achievable annual targets to ensure that participating LEAs (as defined in this notice)—

(i) **(maximum subpoints: 5)** Establish clear approaches to measuring student growth (as defined in this notice) and measure it for each individual student;

(ii) **(maximum subpoints: 15)** Design and implement rigorous, transparent, and fair evaluation systems for teachers and principals that (a) differentiate effectiveness using multiple rating categories that take into account data on student growth (as defined in this notice) as a significant factor, and (b) are designed and developed with teacher and principal involvement;

(iii) **(maximum subpoints: 10)** Conduct annual evaluations of teachers and principals that include timely and constructive feedback; as part of such evaluations, provide teachers and principals with data on student growth for their students, classes, and schools; and

(iv) **(maximum subpoints: 28)** Use these evaluations, at a minimum, to inform decisions regarding—

(a) Developing teachers and principals, including by providing relevant coaching, induction support, and/or professional development;

(b) Compensating, promoting, and retaining teachers and principals, including by providing opportunities for highly effective teachers and principals (both as defined in this notice) to obtain additional compensation and be given additional responsibilities;

(c) Whether to grant tenure and/or full certification (where applicable) to teachers and principals using rigorous standards and streamlined, transparent, and fair procedures; and

(d) Removing ineffective tenured and untenured teachers and principals after they have had ample opportunities to improve, and ensuring that such decisions are made using rigorous standards and streamlined, transparent, and fair procedures.

General Reviewer Guidance for (D)(3): In judging the quality of the applicant's plan and annual targets for this criterion, reviewers should refer to what the criterion asks, to the evidence requested in the application and presented by the applicant (if any), and to the elements of a high-quality plan as set forth in application requirement (d).

(D)(3) **(maximum total points: 25)** Ensuring equitable distribution of effective teachers and principals: The extent to which the State, in collaboration with its participating LEAs (as defined in this notice), has a high-quality plan and ambitious yet achievable annual targets to—

(i) **(maximum subpoints: 15)** Ensure the equitable distribution of teachers and principals by developing a plan, informed by reviews of prior actions and data, to ensure that students in high-poverty and/or high-minority schools (both as defined in this notice) have equitable access to highly effective teachers and principals (both as defined in this notice) and are not served by ineffective teachers and principals at higher rates than other students; and

(ii) **(maximum subpoints: 10)** Increase the number and percentage of effective teachers (as defined in this notice) teaching hard-to-staff subjects and specialty areas including mathematics, science, and special education; teaching in language instruction educational programs (as defined under Title III of the ESEA); and teaching in other areas as identified by the State or LEA.

Plans for (i) and (ii) may include, but are not limited to, the implementation of incentives and strategies in such areas as recruitment, compensation, teaching and learning environments, professional development, and human resources practices and processes.

General Reviewer Guidance for (D)(4): In judging the quality of the applicant's plan and annual targets for this criterion, reviewers should refer to what the criterion asks, to the evidence requested in the application and presented by the applicant (if any), and to the elements of a high-quality plan as set forth in application requirement (d).

Reviewer Guidance Specific to (D)(4):

- *The criterion must be judged for both teachers and principals.*

(D)(4) **(maximum total points: 14)** Improving the effectiveness of teacher and principal preparation programs: The extent to which the State has a high-quality plan and ambitious yet achievable annual targets to—

(i) Link student achievement and student growth (both as defined in this notice) data to the students' teachers and principals, to link this information to the in-State programs where those teachers and principals were prepared for credentialing, and to publicly report the data for each credentialing program in the State; and

(ii) Expand preparation and credentialing options and programs that are successful at producing effective teachers and principals (both as defined in this notice).

General Reviewer Guidance for (D)(5): In judging the quality of the applicant's plan and annual targets (if any) for this criterion, reviewers should refer to what the criterion asks, to the evidence requested in the application and presented by the applicant (if any), and to the elements of a high-quality plan as set forth in application requirement (d).

(D)(5) **(maximum total points: 20)** Providing effective support to teachers and principals: The extent to which the State, in collaboration with its participating LEAs (as defined in this notice), has a high-quality plan for its participating LEAs (as defined in this notice) to—

(i) Provide effective, data-informed professional development, coaching, induction, and common planning and collaboration time to teachers and principals that are, where appropriate, ongoing and job-embedded. Such support might focus on, for example, gathering, analyzing, and using data; designing instructional strategies for improvement; differentiating instruction; creating school environments supportive of data-informed decisions; designing instruction to meet the specific needs of high-need students (as defined in this notice); and aligning systems and removing barriers to effective implementation of practices designed to improve student learning outcomes; and

(ii) Measure, evaluate, and continuously improve the effectiveness of those supports in order to improve student achievement (as defined in this notice).

E. Turning Around the Lowest-Achieving Schools

State Reform Conditions Criteria

General Reviewer Guidance for (E)(1): In judging the quality of the applicant's response to this criterion, reviewers should refer to what the criterion asks and to the evidence requested in the application and presented by the applicant (if any).

Reviewer Guidance Specific to (E)(1):

- *10 points are earned by States that can intervene directly in both schools and LEAs.*
- *5 points are earned by States that can intervene directly in either schools or LEAs, but not both.*
- *0 points are earned by States that cannot intervene in either schools or LEAs.*

(E)(1) **(maximum total points: 10)** Intervening in the lowest-achieving schools and LEAs: The extent to which the State has the legal, statutory, or regulatory authority to intervene directly in the State's persistently lowest-achieving schools (as defined in this notice) and in LEAs that are in improvement or corrective action status.

Reform Plan Criteria

General Reviewer Guidance for (E)(2): In judging the quality of the applicant's plan and annual targets for this criterion, reviewers should refer to what the criterion asks, to the evidence requested in the application and presented by the applicant (if any), and to the elements of a high-quality plan as set forth in application requirement (d).

(E)(2) **(maximum total points: 40)** Turning around the lowest-achieving schools: The extent to which the State has a high-quality plan and ambitious yet achievable annual targets to—

(i) **(maximum subpoints: 5)** Identify the persistently lowest-achieving schools (as defined in this notice) and, at its discretion, any non-Title I eligible secondary schools that would be considered persistently lowest-achieving schools (as defined in this notice) if they were eligible to receive Title I funds; and

(ii) **(maximum subpoints: 35)** Support its LEAs in turning around these schools by implementing one of the four school intervention models (as described in Appendix C): turnaround model, restart model, school closure, or transformation model (provided that an LEA with more than nine persistently lowest-achieving schools may not use the transformation model for more than 50 percent of its schools).

F. General

State Reform Conditions Criteria

General Reviewer Guidance for (F)(1): In judging the quality of the applicant's response to this criterion, reviewers should refer to what the criterion asks and to the evidence requested in the application and presented by the applicant (if any).

Reviewer Guidance Specific to (F)(1)(i):

- *"High" points are earned if the percentage of the total revenues available to the State that were used to support elementary, secondary, and public higher education increased from FY 2008 to FY 2009.*
- *"Medium" points are earned if the percentage of the total revenues available to the State that were used to support elementary, secondary, and public higher education were substantially unchanged from FY 2008 to FY 2009.*
- *"Low" points are earned if the percentage of the total revenues available to the State that were used to support elementary, secondary, and public higher education decreased from FY 2008 to FY 2009.*

(F)(1) **(maximum total points: 10)** Making education funding a priority: The extent to which—

(i) The percentage of the total revenues available to the State (as defined in this notice) that were used to support elementary, secondary, and public higher education for FY 2009 was greater than or equal to the percentage of the total revenues available to the State (as defined in this notice) that were used to support elementary, secondary, and public higher education for FY 2008; and

(ii) The State's policies lead to equitable funding (a) between high-need LEAs (as defined in this notice) and other LEAs, and (b) within LEAs, between high-poverty schools (as defined in this notice) and other schools.

General Reviewer Guidance for (F)(2): In judging the quality of the applicant's response to this criterion, reviewers should refer to what the criterion asks and to the evidence requested in the application and presented by the applicant (if any).

Reviewer Guidance Specific to (F)(2)(i):

- *"High" points are earned if the State either has no cap on the number of charter schools, or it has a "high" cap (defined as a cap such that, if it were filled, ≥ 10% of the total schools in the State would be charter schools); and the State does not have restrictions, such as those referenced in the "note to reviewers" below, that would be considered even mildly inhibiting.*
- *"Medium" points are earned if the State has a "medium" cap on the number of charter schools (defined as a cap such that, if it were filled, ≥ 5% and < 10% of the total schools in the State would be charter schools); or the charter school law has sufficient flexibility to allow for an increase in the number of charter schools as if it were a medium or higher cap (e.g. by allowing for the creation of multiple campuses under the same charter); and the State does not have restrictions, such as those referenced in the "note to reviewers" below, that would be considered moderately or severely inhibiting.*
- *"Low" points are earned if the State has a "low" cap on the number of charter schools (defined as a cap such that, if it were filled, < 5% of the total schools in the State would be charter schools) OR if the State has restrictions, such as those referenced in the "note to reviewers" below, that would be considered severely inhibiting.*
- *No points are earned if the State has no charter school law.*
- *Note to reviewers: Charter school laws are so complex that it is hard to write rules to capture each possible obstacle to charter school growth; therefore, this rubric is meant to guide reviewers, not to bind them. For example, if a State limits the number of charter schools by limiting the share of state-wide or district-level funding that can go to charter*

schools, rather than by explicitly limiting the number of charter schools, reviewers should convert the funding restriction into an approximately equivalent limit on the number of schools and fit that into the guidelines here. As reviewers assess the inhibitions on charter schools, they should look for restrictions such as: disallowing certain types of charter schools (e.g., startups or conversions); restricting charter schools to operate in certain geographic areas; and limiting the number, percent, or demographics of students that may enroll in charter schools. Some States have "smart caps" designed to restrict growth to high-performing charter schools; this is not a problem unless it effectively restricts any new (i.e., unproven) charter schools from starting.

Reviewer Guidance Specific to (F)(2)(iii):

- *"High" points are earned if the per-pupil funding to charter school students is ≥ 90% of that which is provided to traditional public school students.*
- *"Medium" points are earned if the per-pupil funding to charter school students is 80-89% of that which is provided to traditional public school students.*
- *"Low" points are earned if the per-pupil funding to charter school students is ≤ 79% of that which is provided to traditional public school students, or the State does not have a charter school law.*
- *No points are earned if the State has no charter school law.*

(F)(2) **(maximum total points: 40)** Ensuring successful conditions for high-performing charter schools and other innovative schools: The extent to which—

(i) The State has a charter school law that does not prohibit or effectively inhibit increasing the number of high-performing charter schools (as defined in this notice) in the State, measured (as set forth in Appendix B) by the percentage of total schools in the State that are allowed to be charter schools or otherwise restrict student enrollment in charter schools.

(ii) The State has laws, statutes, regulations, or guidelines regarding how charter school authorizers approve, monitor, hold accountable, reauthorize, and close charter schools; in particular, whether authorizers require that student achievement (as defined in this notice) be one significant factor, among others, in authorization or renewal; encourage charter schools that serve student populations that are similar to local district student populations, especially relative to high-need students (as defined in this notice); and have closed or not renewed ineffective charter schools.

(iii) The State's charter schools receive (as set forth in Appendix B) equitable funding compared to traditional public schools, and a commensurate share of local, State, and Federal revenues.

(iv) The State provides charter schools with funding for facilities (for leasing facilities, purchasing facilities, or making tenant improvements), assistance with facilities acquisition, access to public facilities, the ability to share in bonds and mill levies, or other supports; and the extent to which the State does not impose any facility-related requirements on charter schools that are stricter than those applied to traditional public schools.

(v) The State enables LEAs to operate innovative, autonomous public schools (as defined in this notice) other than charter schools.

General Reviewer Guidance for (F)(3): In judging the quality of the applicant's response to this criterion, reviewers should refer to what the criterion asks and to the evidence requested in the application and presented by the applicant (if any).

(F)(3) **(maximum total points: 5)** Demonstrating other significant reform conditions: The extent to which the State, in addition to information provided under other State Reform Conditions Criteria, has created, through law, regulation, or policy, other conditions favorable to

education reform or innovation that have increased student achievement or graduation rates, narrowed achievement gaps, or resulted in other important outcomes.

V. Reviewer Guidance for Priorities

Absolute Priority Guidance: The application will be judged to ensure that it has met the absolute priority set forth below. The absolute priority cuts across the entire application and should not be addressed separately. It is assessed, after the proposal has been fully reviewed and evaluated, to ensure that the application has met the priority. If an application has not met the priority, it will be eliminated from the competition.

Priority 1: Absolute Priority – Comprehensive Approach to Education Reform

To meet this priority, the State's application must comprehensively and coherently address all of the four education reform areas specified in the ARRA as well as the State Success Factors Criteria in order to demonstrate that the State and its participating LEAs are taking a systemic approach to education reform. The State must demonstrate in its application sufficient LEA participation and commitment to successfully implement and achieve the goals in its plans; and it must describe how the State, in collaboration with its participating LEAs, will use Race to the Top and other funds to increase student achievement, decrease the achievement gaps across student subgroups, and increase the rates at which students graduate from high school prepared for college and careers.

Competitive Priority Guidance: The application will be judged to determine whether it has met the competitive preference priority set forth below. The competitive preference priority will be evaluated in the context of the State's entire application. Therefore, a State that is responding to this priority should address it throughout the application, as appropriate, and provide a summary of its approach to addressing the priority. The reviewers will assess the priority as part of their review of a State's application and determine whether it has been met.

Priority 2: Competitive Preference Priority – Emphasis on Science, Technology, Engineering, and Mathematics (STEM). (competitive preference points: 15, all or nothing)

To meet this priority, the State's application must have a high-quality plan to address the need to (i) offer a rigorous course of study in mathematics, the sciences, technology, and engineering; (ii) cooperate with industry experts, museums, universities, research centers, or other STEM-capable community partners to prepare and assist teachers in integrating STEM content across grades and disciplines, in promoting effective and relevant instruction, and in offering applied learning opportunities for students; and (iii) prepare more students for advanced study and careers in the sciences, technology, engineering, and mathematics, including by addressing the needs of underrepresented groups and of women and girls in the areas of science, technology, engineering, and mathematics.

Invitational Priority Guidance: No points are awarded for invitational priorities.

Priority 3: Invitational Priority – Innovations for Improving Early Learning Outcomes.

The Secretary is particularly interested in applications that include practices, strategies, or programs to improve educational outcomes for high-need students who are young children (pre-kindergarten through third grade) by enhancing the quality of preschool programs. Of particular interest are proposals that support practices that (i) improve school readiness (including social, emotional, and cognitive); and (ii) improve the transition between preschool and kindergarten.

Invitational Priority Guidance: No points are awarded for invitational priorities.

Priority 4: Invitational Priority – Expansion and Adaptation of Statewide Longitudinal Data Systems.

The Secretary is particularly interested in applications in which the State plans to expand statewide longitudinal data systems to include or integrate data from special education programs, English language learner programs,[8] early childhood programs, at-risk and dropout prevention programs, and school climate and culture programs, as well as information on student mobility, human resources (i.e., information on teachers, principals, and other staff), school finance, student health, postsecondary education, and other relevant areas, with the purpose of connecting and coordinating all parts of the system to allow important questions related to policy, practice, or overall effectiveness to be asked, answered, and incorporated into effective continuous improvement practices.

The Secretary is also particularly interested in applications in which States propose working together to adapt one State's statewide longitudinal data system so that it may be used, in whole or in part, by one or more other States, rather than having each State build or continue building such systems independently.

Invitational Priority Guidance: No points are awarded for invitational priorities.

Priority 5: Invitational Priority – P-20 Coordination, Vertical and Horizontal Alignment.

The Secretary is particularly interested in applications in which the State plans to address how early childhood programs, K-12 schools, postsecondary institutions, workforce development organizations, and other State agencies and community partners (e.g., child welfare, juvenile justice, and criminal justice agencies) will coordinate to improve all parts of the education system and create a more seamless preschool-through-graduate school (P-20) route for students. Vertical alignment across P-20 is particularly critical at each point where a transition occurs (e.g., between early childhood and K-12, or between K-12 and postsecondary/careers) to ensure that students exiting one level are prepared for success, without remediation, in the next. Horizontal alignment, that is, coordination of services across schools, State agencies, and community partners, is also important in ensuring that high-need students (as defined in this notice) have access to the broad array of opportunities and services they need and that are beyond the capacity of a school itself to provide.

Invitational Priority Guidance: No points are awarded for invitational priorities.

Priority 6: Invitational Priority – School-Level Conditions for Reform, Innovation, and Learning.

The Secretary is particularly interested in applications in which the State's participating LEAs (as defined in this notice) seek to create the conditions for reform and innovation as well as the conditions for learning by providing schools with flexibility and autonomy in such areas as--

(i) Selecting staff;

(ii) Implementing new structures and formats for the school day or year that result in increased learning time (as defined in this notice);

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[8] The term English language learner, throughout this notice, is meant to include students who are limited English proficient, as defined in section 9101 of the ESEA.

(iii) Controlling the school's budget;

(iv) Awarding credit to students based on student performance instead of instructional time;

(v) Providing comprehensive services to high-need students (as defined in this notice) (e.g., by mentors and other caring adults; through local partnerships with community-based organizations, nonprofit organizations, and other providers);

(vi) Creating school climates and cultures that remove obstacles to, and actively support, student engagement and achievement; and

(vii) Implementing strategies to effectively engage families and communities in supporting the academic success of their students.

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Appendix C. School Intervention Models

There are four school intervention models referred to in Selection Criterion (E)(2): Turnaround model, restart model, school closure, or transformation model. Each is described below.

(a) *Turnaround model.* (1) A turnaround model is one in which an LEA must—

(i) Replace the principal and grant the principal sufficient operational flexibility (including in staffing, calendars/time, and budgeting) to implement fully a comprehensive approach in order to substantially improve student achievement outcomes and increase high school graduation rates;

(ii) Using locally adopted competencies to measure the effectiveness of staff who can work within the turnaround environment to meet the needs of students,

(A) Screen all existing staff and rehire no more than 50 percent; and

(B) Select new staff;

(iii) Implement such strategies as financial incentives, increased opportunities for promotion and career growth, and more flexible work conditions that are designed to recruit, place, and retain staff with the skills necessary to meet the needs of the students in the turnaround school;

(iv) Provide staff with ongoing, high-quality, job-embedded professional development that is aligned with the school's comprehensive instructional program and designed with school staff to ensure that they are equipped to facilitate effective teaching and learning and have the capacity to successfully implement school reform strategies;

(v) Adopt a new governance structure, which may include, but is not limited to, requiring the school to report to a new ''turnaround office'' in the LEA or SEA, hire a ''turnaround leader'' who reports directly to the Superintendent or Chief Academic Officer, or enter into a multi-year contract with the LEA or SEA to obtain added flexibility in exchange for greater accountability;

(vi) Use data to identify and implement an instructional program that is research-based and ''vertically aligned'' from one grade to the next as well as aligned with State academic standards;

(vii) Promote the continuous use of student data (such as from formative, interim, and summative assessments) to inform and differentiate instruction in order to meet the academic needs of individual students;

(viii) Establish schedules and implement strategies that provide increased learning time (as defined in this notice); and

(ix) Provide appropriate social-emotional and community-oriented services and supports for students.

(2) A turnaround model may also implement other strategies such as—

(i) Any of the required and permissible activities under the transformation model; or

(ii) A new school model (*e.g.,* themed, dual language academy).

(b) *Restart model.* A restart model is one in which an LEA converts a school or closes and reopens a school under a charter school operator, a charter management organization (CMO), or an education management organization (EMO) that has been selected through a rigorous review process. (A CMO is a non-profit organization that operates or manages charter schools by centralizing or sharing certain functions and resources among schools. An EMO is a for-profit or non-profit organization that provides ''whole-school operation'' services to an LEA.) A restart model must enroll, within the grades it serves, any former student who wishes to attend the school.

(c) *School closure.* School closure occurs when an LEA closes a school and enrolls the students who attended that school in other schools in the LEA that are higher achieving. These other schools should be within reasonable proximity to the closed school and may include, but are not limited to, charter schools or new schools for which achievement data are not yet available.

(d) *Transformation model.* A transformation model is one in which an LEA implements each of the following strategies:

(1) *Developing and increasing teacher and school leader effectiveness.*

(i) *Required activities.* The LEA must—

(A) Replace the principal who led the school prior to commencement of the transformation model;

(B) Use rigorous, transparent, and equitable evaluation systems for teachers and principals that—

(*1*) Take into account data on student growth (as defined in this notice) as a significant factor as well as other factors such as multiple observation-based assessments of performance and ongoing collections of professional practice reflective of student achievement and increased high-school graduations rates; and

(*2*) Are designed and developed with teacher and principal involvement;

(C) Identify and reward school leaders, teachers, and other staff who, in implementing this model, have increased student achievement and high-school graduation rates and identify and remove those who, after ample opportunities have been provided for them to improve their professional practice, have not done so;

(D) Provide staff with ongoing, high-quality, job-embedded professional development (*e.g.,* regarding subject-specific pedagogy, instruction that reflects a deeper understanding of the community served by the school, or differentiated instruction) that is aligned with the school's comprehensive instructional program and designed with school staff to ensure they are equipped to facilitate effective teaching and learning and have the capacity to successfully implement school reform strategies; and

(E) Implement such strategies as financial incentives, increased opportunities for promotion and career growth, and more flexible work conditions that are designed to recruit, place, and retain staff with the skills necessary to meet the needs of the students in a transformation school.

(ii) *Permissible activities.* An LEA may also implement other strategies to

develop teachers' and school leaders' effectiveness, such as—

(A) Providing additional compensation to attract and retain staff with the skills necessary to meet the needs of the students in a transformation school;

(B) Instituting a system for measuring changes in instructional practices resulting from professional development; or

(C) Ensuring that the school is not required to accept a teacher without the mutual consent of the teacher and principal, regardless of the teacher's seniority.

(2) *Comprehensive instructional reform strategies.*

(i) *Required activities.* The LEA must—

(A) Use data to identify and implement an instructional program that is research-based and ''vertically aligned'' from one grade to the next as well as aligned with State academic standards; and

(B) Promote the continuous use of student data (such as from formative, interim, and summative assessments) to inform and differentiate instruction in order to meet the academic needs of individual students.

(ii) *Permissible activities.* An LEA may also implement comprehensive instructional reform strategies, such as—

(A) Conducting periodic reviews to ensure that the curriculum is being implemented with fidelity, is having the intended impact on student achievement, and is modified if ineffective;

(B) Implementing a schoolwide ''response-to-intervention'' model;

(C) Providing additional supports and professional development to teachers and principals in order to implement effective strategies to support students with disabilities in the least restrictive environment and to ensure that limited English proficient students acquire language skills to master academic content;

(D) Using and integrating technology-based supports and interventions as part of the instructional program; and

(E) In secondary schools—

(*1*) Increasing rigor by offering opportunities for students to enroll in advanced coursework (such as Advanced Placement or International Baccalaureate; or science, technology, engineering, and mathematics courses, especially those that incorporate rigorous and relevant project-, inquiry-, or design-based contextual learning opportunities), early-college high schools, dual enrollment programs, or thematic learning academies that prepare students for college and careers, including by providing appropriate supports designed to ensure that low-achieving students can take advantage of these programs and coursework;

(*2*) Improving student transition from middle to high school through summer transition programs or freshman academies;

(*3*) Increasing graduation rates through, for example, credit-recovery programs, re-engagement strategies, smaller learning communities, competency-based instruction and performance-based assessments, and acceleration of basic reading and mathematics skills; or

(*4*) Establishing early-warning systems to identify students who may be at risk of failing to achieve to high standards or graduate.

(3) *Increasing learning time and creating community-oriented schools.*

(i) *Required activities.* The LEA must—

(A) Establish schedules and implement strategies that provide increased learning time (as defined in this notice); and

(B) Provide ongoing mechanisms for family and community engagement.

(ii) *Permissible activities.* An LEA may also implement other strategies that extend learning time and create community-oriented schools, such as—

(A) Partnering with parents and parent organizations, faith- and community-based organizations, health clinics, other State or local agencies, and others to create safe school environments that meet students' social, emotional, and health needs;

(B) Extending or restructuring the school day so as to add time for such strategies as advisory periods that build relationships between students, faculty, and other school staff;

(C) Implementing approaches to improve school climate and discipline, such as implementing a system of positive behavioral supports or taking steps to eliminate bullying and student harassment; or

(D) Expanding the school program to offer full-day kindergarten or pre-kindergarten.

(4) *Providing operational flexibility and sustained support.*

(i) *Required activities.* The LEA must—

(A) Give the school sufficient operational flexibility (such as staffing, calendars/time, and budgeting) to implement fully a comprehensive approach to substantially improve student achievement outcomes and increase high school graduation rates; and

(B) Ensure that the school receives ongoing, intensive technical assistance and related support from the LEA, the SEA, or a designated external lead partner organization (such as a school turnaround organization or an EMO).

(ii) *Permissible activities.* The LEA may also implement other strategies for providing operational flexibility and intensive support, such as—

(A) Allowing the school to be run under a new governance arrangement, such as a turnaround division within the LEA or SEA; or

(B) Implementing a per-pupil school-based budget formula that is weighted based on student needs.

If a school identified as a persistently lowest-achieving school has implemented, in whole or in part within the last two years, an intervention that meets the requirements of the turnaround, restart, or transformation models, the school may continue or complete the intervention being implemented.

Appendix D. Participating LEA Memorandum of Understanding

Background

Participating LEAs (as defined in this notice) in a State's Race to the Top plan are required to enter into a Memorandum of Understanding (MOU) or other binding agreement with the State that specifies the scope of the work being implemented by the participating LEA (as defined in this notice).

To support States in working efficiently with LEAs to determine which LEAs will participate in the State's Race to the Top application, the U.S. Department of Education has produced a model MOU, which is attached. This model MOU may serve as a template for States; however, States are not required to use it. They may use a different document that includes the key features noted below and in the model, and they should consult with their State and local attorneys on what is most appropriate for their State that includes, at a minimum, these key elements.

The purpose of the model MOU is to help to specify a relationship that is specific to Race to the Top and is not meant to detail all typical aspects of State/LEA grant management or administration. At a minimum, a strong MOU should include the following, each of which is described in detail below: (i) Terms and conditions; (ii) a scope of work; and, (iii) signatures.

(i) Terms and conditions: Each participating LEA (as defined in this notice) should sign a standard set of terms and conditions that includes, at a minimum, key roles and responsibilities

of the State and the LEA; State recourse for LEA non-performance; and assurances that make clear what the participating LEA (as defined in this notice) is agreeing to do.

(ii) Scope of work: MOUs should include a scope of work (included in the model MOU as Exhibit I) that is completed by each participating LEA (as defined in this notice). The scope of work must be signed and dated by an authorized LEA and State official. In the interest of time and with respect for the effort it will take for LEAs to develop detailed work plans, the scope of work submitted by LEAs and States as part of their Race to the Top applications may be preliminary. Preliminary scopes of work should include the portions of the State's proposed reform plans that the LEA is agreeing to implement. (Note that in order to participate in a State's Race to the Top application an LEA must agree to implement all or significant portions of the State's reform plans.)

If a State is awarded a Race to the Top grant, the participating LEAs (as defined in this notice) will have up to 90 days to complete final scopes of work (which could be attached to the model MOU as Exhibit II), which must contain detailed work plans that are consistent with the preliminary scope of work and with the State's grant application, and should include the participating LEA's (as defined in this notice) specific goals, activities, timelines, budgets, key personnel, and annual targets for key performance measures.

(iii) Signatures: The signatures demonstrate (a) an acknowledgement of the relationship between the LEA and the State, and (b) the strength of the participating LEA's (as defined in this notice) commitment.

- With respect to the relationship between the LEA and the State, the State's counter-signature on the MOU indicates that the LEA's commitment is consistent with the requirement that a participating LEA (as defined in this notice) implement all or significant portions of the State's plans.
- The strength of the participating LEA's (as defined in this notice) commitment will be demonstrated by the signatures of the LEA superintendent (or an equivalent authorized signatory), the president of the local school board (or equivalent, if applicable) and the local teacher's union leader (if applicable).

Please note the following with regard to the State's Race to the Top application:

- In its application, the State need only provide an example of the State's standard Participating LEA MOU; it does not have to provide copies of every MOU signed by its participating LEAs (as defined in this notice). If, however, States and LEAs have made any changes to the State's standard MOU, the State must provide a description of the changes that were made. Please note that the Department may, at any time, request copies of all MOUs between the State and its participating LEAs.
- Please see criteria (A)(1)(ii) and (A)(1)(iii), and the evidence requested in the application, for more information and ways in which States will be asked to summarize information about the LEA MOUs.

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Model Participating LEA Memorandum of Understanding

This Memorandum of Understanding ("MOU") is entered into by and between _____ ("State") and _____ ("Participating LEA"). The purpose of this agreement is to establish a framework of collaboration, as well as articulate specific roles and responsibilities in support of the State in its implementation of an approved Race to the Top grant project.

I. SCOPE OF WORK

Exhibit I, the Preliminary Scope of Work, indicates which portions of the State's proposed reform plans ("State Plan") the Participating LEA is agreeing to implement. (Note that, in order to participate, the LEA must agree to implement all or significant portions of the State Plan.)

II. PROJECT ADMINISTRATION

A. PARTICIPATING LEA RESPONSIBILITIES

In assisting the State in implementing the tasks and activities described in the State's Race to the Top application, the Participating LEA subgrantee will:

1) Implement the LEA plan as identified in Exhibits I and II of this agreement;
2) Actively participate in all relevant convenings, communities of practice, or other practice-sharing events that are organized or sponsored by the State or by the U.S. Department of Education ("ED");
3) Post to any website specified by the State or ED, in a timely manner, all non-proprietary products and lessons learned developed using funds associated with the Race to the Top grant;
4) Participate, as requested, in any evaluations of this grant conducted by the State or ED;
5) Be responsive to State or ED requests for information including on the status of the project, project implementation, outcomes, and any problems anticipated or encountered;
6) Participate in meetings and telephone conferences with the State to discuss (a) progress of the project, (b) potential dissemination of resulting non-proprietary products and lessons learned, (c) plans for subsequent years of the Race to the Top grant period, and (d) other matters related to the Race to the Top grant and associated plans.

B. STATE RESPONSIBILITIES

In assisting Participating LEAs in implementing their tasks and activities described in the State's Race to the Top application, the State grantee will:

1) Work collaboratively with, and support the Participating LEA in carrying out the LEA Plan as identified in Exhibits I and II of this agreement;
2) Timely distribute the LEA's portion of Race to the Top grant funds during the course of the project period and in accordance with the LEA Plan identified in Exhibit II;
3) Provide feedback on the LEA's status updates, annual reports, any interim reports, and project plans and products; and
4) Identify sources of technical assistance for the project.

C. JOINT RESPONSIBILITIES

1) The State and the Participating LEA will each appoint a key contact person for the Race to the Top grant.
2) These key contacts from the State and the Participating LEA will maintain frequent communication to facilitate cooperation under this MOU.
3) State and Participating LEA grant personnel will work together to determine appropriate timelines for project updates and status reports throughout the whole grant period.
4) State and Participating LEA grant personnel will negotiate in good faith to continue to achieve the overall goals of the State's Race to the Top grant, even when the State Plan requires modifications that affect the Participating LEA, or when the LEA Plan requires modifications.

D. STATE RECOURSE FOR LEA NON-PERFORMANCE

If the State determines that the LEA is not meeting its goals, timelines, budget, or annual targets or is not fulfilling other applicable requirements, the State grantee will take appropriate enforcement action, which could include a collaborative process between the State and the LEA, or any of the enforcement measures that are detailed in 34 CFR section 80.43 including putting the LEA on reimbursement payment status, temporarily withholding funds, or disallowing costs.

III. ASSURANCES

The Participating LEA hereby certifies and represents that it:
1) Has all requisite power and authority to execute this MOU;
2) Is familiar with the State's Race to the Top grant application and is supportive of and committed to working on all or significant portions of the State Plan;
3) Agrees to be a Participating LEA and will implement those portions of the State Plan indicated in Exhibit I, if the State application is funded,
4) Will provide a Final Scope of Work to be attached to this MOU as Exhibit II only if the State's application is funded; will do so in a timely fashion but no later than 90 days after a grant is awarded; and will describe in Exhibit II the LEA's specific goals, activities, timelines, budgets, key personnel, and annual targets for key performance measures ("LEA Plan ") in a manner that is consistent with the Preliminary Scope of Work (Exhibit I) and with the State Plan; and
5) Will comply with all of the terms of the Grant, the State's subgrant, and all applicable Federal and State laws and regulations, including laws and regulations applicable to the Program, and the applicable provisions of EDGAR (34 CFR Parts 75, 77, 79, 80, 82, 84, 85, 86, 97, 98 and 99).

IV. MODIFICATIONS

This Memorandum of Understanding may be amended only by written agreement signed by each of the parties involved, and in consultation with ED.

V. DURATION/TERMINATION

This Memorandum of Understanding shall be effective, beginning with the date of the last signature hereon and, if a grant is received, ending upon the expiration of the grant project period, or upon mutual agreement of the parties, whichever occurs first.

VI. SIGNATURES

LEA Superintendent (or equivalent authorized signatory) - required:

_____

Signature/Date

_____

Print Name/Title

President of Local School Board (or equivalent, if applicable):

_____

Signature/Date

_____

Print Name/Title

Local Teachers' Union Leader (if applicable):

_____

Signature/Date

_____

Print Name/Title

Authorized State Official - required:
By its signature below, the State hereby accepts the LEA as a Participating LEA.

_____

Signature/Date

_____

Print Name/Title

A. EXHIBIT I – PRELIMINARY SCOPE OF WORK

LEA hereby agrees to participate in implementing the State Plan in each of the areas identified below.

Elements of State Reform Plans	LEA Participation (Y/N)	Comments from LEA (optional)
B. Standards and Assessments		
(B)(3) Supporting the transition to enhanced standards and high-quality assessments		
C. Data Systems to Support Instruction		
(C)(3) Using data to improve instruction:		
(i) Use of local instructional improvement systems		
(ii) Professional development on use of data		
(iii) Availability and accessibility of data to researchers		
D. Great Teachers and Leaders		
(D)(2) Improving teacher and principal effectiveness based on performance:		
(i) Measure student growth		
(ii) Design and implement evaluation systems		
(iii) Conduct annual evaluations		
(iv)(a) Use evaluations to inform professional development		
(iv)(b) Use evaluations to inform compensation, promotion, and retention		
(iv)(c) Use evaluations to inform tenure and/or full certification		
(iv)(d) Use evaluations to inform removal		
(D)(3) Ensuring equitable distribution of effective teachers and principals:		
(i) High-poverty and/or high-minority schools		
(ii) Hard-to-staff subjects and specialty areas		
(D)(5) Providing effective support to teachers and principals:		
(i) Quality professional development		
(ii) Measure effectiveness of professional development		
E. Turning Around the Lowest-Achieving Schools		
(E)(2) Turning around the lowest-achieving schools		

For the Participating LEA

_____

Authorized Signature/Date

_____

Print Name/Title

For the State

_____

Authorized Signature/Date

_____

Print Name/Title

[FR Doc. E9–27427 Filed 11–17–09; 8:45 am]

BILLING CODE 4000–01–C

Federal Register

Wednesday,
November 18, 2009

Part V

Department of Homeland Security

Transportation Security Administration

49 CFR Parts 1520 and 1554

Aircraft Repair Station Security; Proposed Rule

DEPARTMENT OF HOMELAND SECURITY

Transportation Security Administration

49 CFR Parts 1520 and 1554

[Docket No. TSA–2004–17131]

RIN 1652–AA38

Aircraft Repair Station Security

AGENCY: Transportation Security Administration (TSA), DHS.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: TSA is proposing to issue regulations to improve the security of domestic and foreign aircraft repair stations as required by the Vision 100–Century of Aviation Reauthorization Act. The proposed regulations establish requirements for repair stations that are certificated by the Federal Aviation Administration (FAA) under 14 CFR part 145 to adopt and implement a standard security program and to comply with security directives issued by TSA. This rule proposes to codify the scope of TSA's existing inspection program and to require regulated parties to allow TSA and Department of Homeland Security (DHS) officials to enter, inspect, and test property, facilities, and records relevant to repair stations. The proposed regulations also provide procedures for TSA to notify repair stations of any deficiencies in their security programs, and to determine whether a particular repair station presents an immediate risk to security. The proposal includes a process whereby a repair station may seek review of a determination by TSA that the station has not adequately addressed security deficiencies or that the repair station poses an immediate risk to security.

DATES: Submit comments by January 19, 2010.

ADDRESSES: You may submit comments, identified by Docket No. TSA–2004–17131, to the Federal Docket Management System (FDMS), a government-wide, electronic docket management system, using any one of the following methods:

Electronically: You may submit comments through the Federal eRulemaking portal at *http://www.regulations.gov.* Follow the online instructions for submitting comments.

Mail, Fax, or In Person: Address, hand-deliver, or fax your written comments to the Docket Management System, U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001; Fax: 202–493–2251. The Department of Transportation (DOT), which maintains and processes TSA's official regulatory dockets, will scan the submission and post it to FDMS.

See **SUPPLEMENTARY INFORMATION** for format and other information about comment submissions.

FOR FURTHER INFORMATION CONTACT: Celio Young, Office of Security Operations, TSA–29, Transportation Security Administration, 601 South 12th Street, Arlington, VA 20598–6029; telephone (571) 227–3580; facsimile (571) 227–1905; e-mail *celio.young@dhs.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

TSA invites interested persons to participate in this rulemaking by submitting written comments, data, or views. We also invite comments relating to the economic, environmental, energy, recordkeeping, or federalism impacts that might result from adopting the proposals in this document. See **ADDRESSES** above for information on where to submit comments.

With each comment, please identify the docket number at the beginning of your comments. TSA encourages commenters to provide their names and addresses. The most helpful comments reference a specific portion of the rulemaking, explain the reason for any recommended change, and include supporting data. You may submit comments and material electronically, in person, or by mail as provided under **ADDRESSES**, but please submit your comments and material by only one means. If you submit comments by mail or delivery, submit them in two copies, in an unbound format, no larger than 8.5 by 11 inches, suitable for copying and electronic filing.

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

TSA will file in the public docket address, as well as items sent to the address or email under **FOR FURTHER INFORMATION CONTACT**, in the public docket, except for comments containing confidential information and sensitive security information (SSI).[1] Should you wish your personally identifiable information redacted prior to filing in the docket, please so state. TSA will consider all comments that are in the docket on or before the closing date for comments and will consider comments filed late to the extent practicable. The docket is available for public inspection before and after the closing date.

Handling of Confidential or Proprietary Information and Sensitive Security Information (SSI) Submitted in Public Comments

Do not submit comments that include trade secrets, confidential commercial or financial information, or SSI to the public regulatory docket. Please submit such comments separately from other comments on the rulemaking. Comments containing this type of information should be appropriately marked as containing such information and submitted by mail to the address listed in **FOR FURTHER INFORMATION CONTACT** section.

TSA will not place comments containing SSI in the public docket and will handle them in accordance with applicable safeguards and restrictions on access. TSA will hold documents containing SSI, confidential business information, or trade secrets in a separate file to which the public does not have access, and place a note in the public docket explaining that commenters have submitted such documents. TSA may include a redacted version of the comment in the public docket. If an individual requests to examine or copy information that is not in the public docket, TSA will treat it as any other request under the Freedom of Information Act (FOIA) (5 U.S.C. 552) and the Department of Homeland Security's (DHS') FOIA regulation found in 6 CFR part 5.

Reviewing Comments in the Docket

Please be aware that anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comments, if submitted on behalf of an association, business, labor union, *etc.*). You may review the applicable Privacy Act statement published in the **Federal Register** on April 11, 2000 (65 FR 19477) and modified on January 17, 2008 (73 FR 3316).

You may review TSA's electronic public docket on the Internet at *http://www.regulations.gov.* In addition, DOT's Docket Management Facility provides a physical facility, staff, equipment, and

[1] ''Sensitive Security Information'' or ''SSI'' is information obtained or developed in the conduct of security activities, the disclosure of which would constitute an unwarranted invasion of privacy, reveal trade secrets or privileged or confidential information, or be detrimental to the security of transportation. The protection of SSI is governed by 49 CFR part 1520.

assistance to the public. To obtain assistance or to review comments in TSA's public docket, you may visit this facility between 9 a.m. to 5 p.m., Monday through Friday, excluding legal holidays, or call (202) 366–9826. This docket operations facility is located in the West Building Ground Floor, Room W12–140 at 1200 New Jersey Avenue, SE., Washington, DC 20590.

Availability of Rulemaking Document

You may obtain an electronic copy using the Internet by

(1) Searching the Federal Docket Management System (FDMS) Web page at *http://www.regulations.gov;*

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

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

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

Outline of the Notice of Proposed Rulemaking

I. Background
A. Introduction
B. Statutory Requirements
C. Summary of Proposed Rule
D. FAA Safety Regulations
E. Public Listening Session and Comments
F. Repair Station Site Visits
II. Summary of the Proposed Rule
A. Repair Station Standard Security Program
B. Repair Station Profile
C. Security Inspections
D. Immediate Risk to Security
III. Section-by-Section Analysis
IV. Rulemaking Analyses and Notices
A. Paperwork Reduction Act
B. International Compatibility
C. Regulatory Impact Analyses
1. Regulatory Evaluation Summary
2. Executive Order 12866 Assessment
3. Initial Regulatory Flexibility Analysis (IRFA)
4. International Trade Impact Assessment
5. Unfunded Mandates Reform Act Assessment
D. Executive Order 13132, Federalism
E. Environmental Analysis
F. Energy Impact Analysis

I. Background

A. Introduction

Civil aviation remains a target of terrorist activity worldwide. Terrorists continue to seek opportunities to destroy public confidence in the safety and security of travel, deny the ability of the public to move and travel freely, and damage international economic security.

TSA is proposing to issue regulations to provide for the security of maintenance and repair work conducted on aircraft and aircraft components at domestic and foreign repair stations, of the aircraft and aircraft components located at these repair stations, and of the repair station facilities as required by Vision 100—Century of Aviation Reauthorization Act, codified at 49 U.S.C. 44924 (Vision 100).

For purposes of this rulemaking, ''repair stations'' are those facilities certificated by the FAA to perform maintenance, repair, overhaul, or alterations on U.S. aircraft or aircraft components, including engines, hydraulics, avionics, safety equipment, airframes, and interiors. According to the FAA, there are 4,227 domestic repair stations located in the United States and 694 foreign repair stations located outside the United States that have an FAA certificate under part 145 of the FAA's rules.[2]

In addition, for purposes of this rulemaking, the term ''component'' includes any article, airframe, aircraft engine, propeller, appliance, or part that is under repair. The term is used broadly to encompass both articles and appliances as defined by the FAA.[3]

Aircraft repair stations vary widely in size, type of repair work performed, number of employees, and proximity to an airport. The FAA issues ratings to certificated repair stations for the work that can be performed at the repair station.[4] These include airframe ratings, power plant ratings, propeller ratings, radio ratings, instrument ratings, and accessory ratings. Within each rating there are different classes for particular aircraft and equipment. The FAA also issues limited ratings for certificated repair stations that only work on a particular type of airframe or equipment or performs only specialized maintenance operations.[5] The FAA certificates repair stations with few employees located in industrial parks and in residences that may work on small components, such as aircraft radios or seat cushions, as well as repair stations with many employees that perform major aircraft overhauls located in close proximity to an airport runway.[6] Because repair station characteristics vary widely, TSA believes that existing security measures, as well as the corresponding security threat, also vary widely.

Repair stations are closely regulated and monitored by the FAA and both the FAA and the air carriers inspect work done at repair stations. FAA performance standards for foreign and domestic repair stations are the same. While the FAA has implemented extensive safety requirements for both foreign and domestic repair stations, supplementing those requirements with specific security measures for both foreign and domestic repair stations would further reduce the likelihood that terrorists would be able to gain access to aircraft under repair at a repair station. As terrorist organizations continue to seek new and creative means of using aircraft to undermine the security and safety of the traveling public, the importance of requiring all aircraft repair stations to have measures in place to prevent persons from commandeering, tampering, or sabotaging aircraft has increased as well. Enhancement of repair station security will mitigate the potential threat that an aircraft could be used as a weapon or that an aircraft could be destroyed.

This rulemaking sets forth proposed regulations to require all FAA certificated repair stations to adopt and carry out a standard security program. The proposed regulations list performance standards for security measures that would be included in the standard security program. The proposed regulations also would require repair stations to carry out Security Directives issued by TSA in the event of a specific threat.

In addition, the proposed regulations codify the scope of TSA's authority to conduct inspections of both domestic and foreign repair stations. The proposed regulations also provide procedures for TSA to notify repair stations of deficiencies in their security program and to determine whether a particular repair station represents an immediate risk to security. Finally, the proposal contains a process whereby a repair station may seek review of a determination by TSA that security deficiencies have not been addressed or that the repair station poses an immediate risk to security.

B. Statutory Requirements

Vision 100 requires DHS to promulgate security regulations for domestic and foreign aircraft repair

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[2] FAA Fact Sheet, ''FAA Oversight of Repair Stations,'' March 29, 2007. See ''FAA Certificated Repair Stations Directory,'' Advisory Circular (AC) 140–7R, for a list of FAA certificated repair stations.

[3] See 14 CFR 1.1 and 145.3(b).

[4] 14 CFR 145.59.

[5] 14 CFR 145.61.

[6] Approximately 2,803 domestic repair stations have fifteen or fewer employees and 1,407 have five or fewer employees. Approximately 3,000 certificated domestic repair stations are not located on an airport.

stations.[7] The statute includes the following additional requirements regarding security audits of foreign repair stations:

- TSA must complete a security review and audit of foreign repair stations certificated by the FAA no later than six months after regulations are issued.[8] When conducting the audit, TSA must give priority to those repair stations that pose a significant risk to security. If security audits are not completed within six months from the date regulations are issued, the FAA is barred from certificating any new foreign repair stations until the security audits are completed for existing repair stations.
- TSA must notify the FAA of any security issues or vulnerabilities identified during the audit and require foreign repair stations to address any such issues or vulnerabilities within 90 days. If, after 90 days, TSA determines that the foreign repair station does not maintain and carry out effective security measures, TSA must notify the FAA and the FAA must suspend the repair station's certificate until such time as TSA determines that the repair station does maintain and carry out effective security measures.
- TSA must notify the FAA if TSA determines that a foreign repair station poses an immediate risk to security and the FAA must revoke the repair station's certificate. TSA must establish an appeal procedure to be used when a certificate is revoked.

C. Summary of Proposed Rule

TSA is proposing regulations to:

- Codify TSA's inspection authority.
- Require foreign and domestic repair stations certificated by the FAA under part 145 of the FAA's rules to allow TSA and DHS officials to enter, inspect, audit, and test property, facilities, and records relevant to repair stations.
- Require foreign and domestic repair stations certificated by the FAA to adopt and carry out a standard security program issued by TSA to safeguard the security of the repair station, the repair work conducted at the repair station, and all aircraft and aircraft components at the repair station.
- Require each security program to describe the specific measures the repair station has implemented to identify individuals authorized access to the repair station, aircraft, and aircraft components; control access to the repair station, aircraft, and aircraft components; challenge individuals who are not authorized access and use escort measures for authorized visitors; provide security awareness training to all employees; verify employee background information; designate a security coordinator; and establish a contingency plan.
- Require each repair station to comply with Security Directives issued by TSA.
- Establish a process to notify the FAA to suspend a certificate upon written notification by TSA that a repair station has not corrected security deficiencies identified during a security audit within 90 days and to permit appeal of a certificate suspension.
- Establish a process to notify the FAA to revoke a certificate upon written notification by TSA that a repair station is an immediate risk to security and to permit appeal of a certificate revocation.

In developing these proposals, TSA has consulted with FAA officials responsible for repair station safety matters.

D. FAA Safety Regulations

The security regulations proposed in this NPRM are designed to build upon the extensive certification and safety requirements for repair stations instituted by the FAA. The FAA certificates repair stations, as well as repairmen who work in repair stations.[9] The FAA requires that in order to receive certification, repair stations must establish and maintain a quality control system acceptable to the FAA that ensures the airworthiness of the articles on which the repair station or any of its contractors performs maintenance, preventive maintenance, or alterations.[10] The quality control system must describe the procedures the repair station uses to inspect incoming raw materials, perform preliminary inspection of all articles that are maintained at the repair station, qualify and monitor noncertificated persons who perform maintenance, preventive maintenance, or alterations for repair stations, and conduct final inspections of maintained articles. In addition, the FAA requires that a certificated repair station inspect each article upon which it has performed maintenance, preventive maintenance, or alterations before approving that article for return to service.[11] The FAA conducts safety inspections of both foreign and domestic repair stations.

While these quality control measures provide a significant layer of protection and oversight of the components and aircraft under repair, the proposed regulations would supplement those measures by requiring that FAA certificated repair stations also adopt and carry out a security program that would include procedures to control access to the repair station itself, the components and aircraft under repair, and the work being performed; verify the identity of repair station employees; and establish a security coordinator to serve as the point of contact for security-related matters.

E. Public Listening Session and Comments

On February 27, 2004, TSA held a public listening session to receive input from stakeholders and other interested parties on repair station security issues. TSA also invited written comments to be submitted by March 29, 2004.[12] TSA requested specific comments on the following issues:

- Security measures that are currently deployed.
- Existing security vulnerabilities.
- Standards that should be in place to prevent unauthorized access, tampering, and any other security breaches.
- Current security system costs.
- Whether security requirements should be tailored to the type of authorization the repair station holds, number of employees, proximity to an airport, number of repairs completed, or other characteristics.
- Whether aircraft operators should play a role in ensuring that repair stations maintain a secure workplace.
- Whether any repair station operator has experienced a breach in security.

Twelve parties, representing air carriers, repair station operators and employees, manufacturers, and unions, spoke during the public meeting.[13] While several parties questioned the need for security regulations, most

[7] This section of Vision 100 is codified at 49 U.S.C. 44924. The requirement to promulgate regulations is described in 49 U.S.C. 44924(f). The statute also requires that the Under Secretary for Border and Transportation Security issue the final regulations. The Under Secretary delegated authority for issuing such regulations to TSA on September 16, 2005. TSA sent a Report to Congress on August 24, 2004, as required at 49 U.S.C. 44924(g).

[8] In the Implementing Recommendations of the 9/11 Commission Act of 2007 (Pub. L. 110–53, 121 Stat. 266, Aug. 3, 2007), the original 18-month deadline for completing security inspections of foreign repair stations was reduced to 6 months.

[9] See 14 CFR part 145 and 14 CFR part 65. While the FAA only certificates certain repair station personnel who work in the United States, it does require that those repair station personnel located outside the United States have practical experience or training in the work being performed. Supervisors in repair stations located outside the United States must understand, read, and write English. 14 CFR 145.153.

[10] 14 CFR 145.211.

[11] 14 CFR 145.211.

[12] 69 FR 8357 (Feb. 24, 2004).

[13] A transcript of the public meeting and copies of all filed comments are available in docket number TSA–2004–17131 at *http://regulations.gov/search*.

recognized the importance of protecting the security of the aircraft, the maintenance work that repair stations perform on aircraft and aircraft components, and the facility itself, noting that TSA is required by statute to develop such regulations. Most parties also agreed that the regulations should be tailored to reflect security measures that may already be in place, as well as other factors, such as those listed by TSA in its request for comments. Concerns were expressed regarding the expedited timing of the regulations and the security audits, the potential financial burdens resulting from the imposition of new regulations, particularly on small repair stations, and the appeal process. Several parties recommended that the regulations define what constitutes an ''immediate risk to security,'' as well as ''existing repair stations.'' Other parties discussed security initiatives that had been employed at their facilities since September 11, 2001.

TSA also received 21 written comments, representing the views of repair station operators and employees, unions, air carriers, aircraft owners, and manufacturers regarding potential security regulations. The majority of those submitting written comments also supported the need for security regulations, and agreed that the regulations should be tailored to reflect the particular characteristics of a repair station. Some commenters suggested that TSA include general security criteria for domestic and foreign repair stations and others offered recommendations regarding specific provisions that should be included in the regulations, such as access controls, personnel identification, employee background checks, and security awareness training. The comments provide valuable input as to how repair station security issues should be addressed and the proposal reflects many of the issues, as well as the recommendations, contained in these initial comments. TSA looks forward to receiving further comments on the proposed regulations.

F. Repair Station Site Visits

In addition to the information gathered during the public listening session and through written comments, TSA visited repair stations to conduct research on the physical characteristics of repair stations, the type of repair work performed, and the extent of security measures that had been implemented. The following site visits were conducted:

- June 2005—1 repair station in Hamburg, Germany, and 1 repair station in Amsterdam, the Netherlands.
- August 2005—5 repair stations in Singapore.
- November 2006—9 repair stations in the state of Arizona.
- December 2006—3 repair stations in Naples, Italy.
- January 2007—3 repair stations in the state of Georgia.
- May 2007—1 repair station in Singapore and 1 repair station in Guangzhou, China.
- July 2007—1 repair station in Teterboro, New Jersey.
- May 2008—3 repair stations in Bogota, Colombia.

These repair station site visits provided valuable insight into the different types of facilities certificated by the FAA, the different types of repair work conducted at the facilities, and the different types of security measures deployed by the various facilities. All of the stations visited had some security measures in place. For example, one foreign repair station had over 10,000 employees with many buildings and its own airport. This facility had perimeter fencing, security guards, and surveillance cameras to control access to the facility. Its employees were required to display identification media. Another foreign repair station had only seven employees and was located at an industrial park. That facility was planning to install surveillance cameras to be monitored by a private security company. In two countries the government had mandated security requirements for certain repair stations.

In the United States, one domestic repair station facility with 40 employees relied on personal recognition to identify individuals authorized entry into the facility, while another domestic repair station with fifteen employees used identification media and surveillance cameras. By conducting these site visits, TSA was able to study security measures already deployed and develop a proposal that reflects repair station diversity.

II. Summary of the Proposed Rule

TSA proposes to add a new part 1554 to its regulations, entitled ''Aircraft Repair Station Security.'' The new part would require aircraft repair stations that are certificated by the FAA under 14 CFR part 145, both domestic and foreign, to adopt and carry out a standard security program. The regulations would require repair stations to safeguard the security of the aircraft and components located at the station, the maintenance and repair work performed there, as well as the repair station's facilities as required by 49 U.S.C. 44924. For a more detailed discussion of the proposed regulations, see the Section-by-Section Analysis portion of this preamble.

TSA is also proposing changes to its regulations regarding the protection of sensitive security information (SSI) to specify that a repair station security program is categorized as SSI and that the repair station operator or owner is subject to the SSI requirements described in 49 CFR part 1520.[14]

A. Repair Station Standard Security Program

FAA certificated repair stations, whether located at airports that have a TSA security program,[15] at general aviation airports, or at off airport properties, could be a target of terrorist activity and TSA is proposing that each FAA certificated repair station implement and carry out a standard security program issued by TSA to mitigate that risk. If the repair station is already incorporated within an airport's security program and uses the airport's access control measures, TSA will consider the repair station to be in compliance with the security measures proposed in these regulations.

The proposed regulations list the general security requirements that each repair station would be required to carry out in the standard security program. The standard security program would require each repair station to include (1) a description of access controls for the facility as well as for the aircraft and/or aircraft components; (2) a description of the measures used to identify employees and others who are authorized to access aircraft and/or aircraft components; (3) a description of the procedures to challenge unauthorized individuals; (4) a description of security awareness training for employees; (5) the name of the designated security coordinator; (6) a contingency plan; and (7) a description of the means used to verify employee background information. The complete security program contents are discussed in the Section by Section analysis.

These requirements are consistent with the recommendations included in the written comments received by TSA,

[14] ''Sensitive Security Information'' or ''SSI'' is information obtained or developed in the conduct of security activities, the disclosure of which would constitute an unwarranted invasion of privacy, reveal trade secrets or privileged or confidential information, or be detrimental to the security of transportation. The protection of SSI is governed by 49 CFR part 1520.

[15] See 49 CFR part 1542 for a description of airport security program requirements. Aircraft repair stations located at a commercial airport may be included within the airport security program.

as well as with established security procedures for aircraft operators, air carriers, and airports.[16]

Recognizing that a ''one size fits all'' approach would not appropriately address the diversity in repair station characteristics, TSA believes that repair stations should have some flexibility regarding the particular equipment, facilities, and measures that would be listed in the standard security program and used to comply with the proposed regulations. While TSA would provide a standard security program which would contain the majority of security measures that a repair station must adopt to comply with the proposed regulations, certain measures in the standard security program that the repair station must adopt may differ depending upon risk factors considered by TSA.

TSA would not require repair stations that are not located on or adjacent to an airport to implement the same physical security measures in the standard security program as those repair stations that are located on or adjacent to an airport. In adopting this approach, TSA considered the security risks of repair station operations to determine whether there were any factors that could increase the security risks of a repair station. The factors TSA considered were (1) size and type of aircraft to which employees had access; (2) the type of repair work permitted by the FAA certificate; (3) whether the repair station was located on an airport and the type of airport; and (4) the number of employees at the repair station.

Based on the information acquired during the repair stations site visits, an examination of FAA safety requirements, and discussions with FAA safety inspectors, TSA determined that while all of the characteristics examined had some effect on security risks, repair stations that are located on or adjacent to an airport could pose a higher security risk. TSA found that at airport locations, there was greater accessibility to aircraft and proximity to a runway, thereby increasing the possibility that an aircraft could be commandeered and used as a weapon or sabotaged. At off-airport locations, TSA found that repair station employees had little, if any, access to operational aircraft or runways. Repair station employees at off airport locations typically are not the last individuals with access to aircraft prior to the reintroduction of the aircraft into service. TSA believes that it would be difficult for an individual to damage an aircraft at a repair station location that is only rated to repair aircraft components if the individual does not have access to aircraft. FAA safety regulations require inspection of the repair work and the component before it is installed in an aircraft and before the aircraft is deemed to be airworthy. Thus, TSA believes it is less likely that a terrorist would attempt to target an aircraft by sabotaging a component at an off airport location.

This assessment of the greater risk posed by repair stations located on or adjacent to an airport was also supported by several commenters. One commenter noted that repair stations located within an airport posed the greatest risk to security because of the larger number of entry points in such a location. Another explained that repair facilities located off airport generally only work on aircraft components and that the multiple layers of testing and oversight already conducted by the FAA serves as an important security function as well. Another commenter agreed, stating that repair stations that do not have access to aircraft do not pose a security risk because the airworthiness of the components are tested before they are released into service.

Based on this risk assessment, TSA would specify particular security measures in the standard security program that would apply to repair stations on or adjacent to an airport, but that would not be required for other repair stations. TSA believes that this approach would be consistent with its efforts to strengthen security measures at the non public areas of the airport.

In addition, TSA would not require repair stations on or adjacent to airports that only serve aircraft with a maximum certificated take-off weight (MTOW) of 12,500 pounds or less to include the same security measures in the standard security program as repair stations located on or adjacent to airports that serve larger aircraft. TSA has long recognized that aircraft with a MTOW over 12,500 pounds pose a greater risk to security because such aircraft are of sufficient size and weight to inflict significant damage and loss of lives.[17] Smaller aircraft may be a less attractive target for terrorists. Therefore, the security program would not include the same requirements for repair stations that are located on or adjacent to an airport that serves small aircraft. While the proposed regulations apply to all FAA certificated repair stations, TSA requests comment on whether it should exempt certain repair stations after it conducts security reviews and audits. For instance, TSA may consider whether to exempt repair stations that only perform maintenance on aircraft that are 12,500 MTOW or less. TSA also requests comments on whether there are other considerations that could be used to determine potential exemptions.

TSA is aware that the FAA may certificate repair stations operating on a Federal government facility, such as a U.S. military base. TSA believes that the security at such a facility would likely meet and exceed the security requirements proposed herein. Therefore, TSA would not apply its requirements to any FAA certificated repair station at which the Federal government has assumed responsibility for security measures.

The issue of requiring drug and alcohol testing of repair station employees was raised during the public listening session. TSA is not proposing to include drug and alcohol testing as part of its security program requirements. TSA notes that the FAA has instituted alcohol and drug testing as part of its safety regulations.[18] TSA believes that such testing should remain under the purview of the FAA.

TSA believes that the standard security program would be useful to repair stations that have not developed or implemented a security program, particularly small repair stations that may lack the resources to create their own security program. Further, the standard security program would provide consistency in format and content for the thousands of security programs that would be implemented under this proposal. TSA anticipates requesting comment from repair stations on the standard security program before a final rule is adopted and will make a draft of the standard security program available for review and comment by the repair stations subject to the regulations either electronically, through meetings, or both.[19]

B. Repair Station Profile

To assess the security risks of a repair station and to establish the priority by which repair stations must be inspected, TSA would require each repair station to provide a brief profile, to include general information as to location, such as whether the repair station is located

[16] See, generally, TSA security regulations at 49 CFR parts 1540, 1542, 1544, and 1546.

[17] See 49 CFR 1544.101(d) and 1550.7.

[18] See 14 CFR part 121 at Appendix I and Appendix J. The FAA requires part 145 certificate holders and non-certificated repair stations that perform safety sensitive functions for air carriers and commercial operators under 14 CFR parts 121 and 135 to implement an FAA Antidrug Program.

[19] Security programs will be sensitive security information and will not be available to the general public. See Section-by-Section analysis for § 1520.3 in this preamble.

on or adjacent to an airport,[20] the total number of employees, and the number of employees with access to large aircraft. The type of information is discussed in the Section by Section analysis. We note that while the FAA holds some of this information, it does not have all of it. We invite comments on the burdens associated with TSA collecting this profile. As explained above, TSA has determined that repair stations located on or adjacent to an airport pose a higher security risk than those that are not located on or adjacent to an airport. In addition, TSA has determined that repair stations on airports that perform work on aircraft over 12,500 MTOW pose a higher security risk. Identifying these higher risk repair stations will enable TSA to make certain that they are given a higher priority when scheduling inspections.

Further, the profile will assist TSA in determining which measures included in the standard security program must be implemented to address the higher risk posture of repair stations that are located on or adjacent to an airport.

C. Security Inspections

The proposed regulations would codify TSA's inspection authority and would require repair stations to permit TSA and DHS officials to enter, inspect, and test property, facilities, and records relevant to repair stations. The purpose of the inspection would be to assess threats to aviation security, enforce TSA security regulations, directives, and requirements, evaluate all aspects of the repair station security program, verify whether the security program is being implemented and whether it is effective, as well as to identify and correct security deficiencies. Such oversight is also necessary to monitor continuing compliance with the security requirements. Since the inspection program is critical to the enforcement of the security program requirement, TSA's inspection authority would extend to all repair stations. TSA would initiate foreign repair station inspections by giving priority to those foreign repair stations that pose the greatest risk to aviation security as required by Vision 100, and that have identified themselves through the profile as being located on or adjacent to an airport and as performing repair work on large aircraft.

Pursuant to the inspection process and consistent with Vision 100, TSA is proposing to notify the repair station and the FAA of any deficiencies in a security program and to permit the repair station 90 days to correct such deficiencies. If the deficiencies are not corrected within 90 days, TSA would notify the FAA that it must suspend the repair station's certificate until such time as TSA determines that the deficiencies are resolved. The proposed regulations also contain a process whereby a repair station may request further review of TSA's determination regarding security deficiencies.

D. Immediate Risk to Security

The proposed regulation contains a specific process whereby a repair station that poses an immediate risk to security is identified and the FAA is notified of such a determination. The FAA must revoke the certificate of a station that TSA determines poses an immediate risk to security. Whether the threat is immediate would be evaluated on a case by case basis considering existing and potential circumstances as information is received and analyzed. The proposal provides a repair station with the opportunity to obtain the releasable materials upon which the determination was made and to seek review of such a determination.

III. Section-by-Section Analysis

Part 1520—Protection of Sensitive Security Information

Section 1520.5—Sensitive Security Information

Protection of Sensitive Security Information (SSI), as codified at 49 CFR part 1520, would apply to each repair station required to adopt and carry out a security program. Airport and aircraft operator security programs and plans, amendments, security directives and information circulars, technical specifications of security screening and detection systems and devices, among other types of information, all constitute SSI under current § 1520.5 and are prohibited from public disclosure. TSA is proposing to amend its part 1520 rules to include a repair station security program as SSI. This change would prevent the public disclosure of the security measures implemented and utilized by a repair station covered under the new rules because such disclosure would pose a threat to transportation security. It would also ensure that the repair station standard security program is protected just as other TSA required security programs are protected.

Section 1520.7—Covered Persons

TSA proposes to amend § 1520.7 to include repair station operators as covered persons subject to its SSI requirements. This change would require that repair station operators adhere to the SSI rules and protect SSI from public dissemination. Access to SSI is strictly limited to those persons with a need to know, as defined in 49 CFR 1520.11. In general, a person has a need to know specific SSI when he or she requires access to the information in order to carry out transportation security activities that are government-approved, -accepted, -funded, -recommended, or -directed, including for purposes of training on, and supervision of, such activities or to provide legal or technical advice regarding security-related requirements. Accordingly, the protection of SSI would apply to each repair station standard security program pursuant to part 1554.

Part 1554—Aircraft Repair Station Security (New)

Section 1554.1—Scope and Purpose

Section 1554.1 of the proposed regulation sets forth the scope and purpose of new part 1554. The proposed regulations would apply to all repair stations, both domestic and foreign, that are certificated by the FAA pursuant to 14 CFR part 145. The purpose of the proposed regulations would be to safeguard the security of domestic and foreign aircraft repair stations as required by 49 U.S.C. 44924. The requirements would not apply to any FAA certificated repair station at which the U.S. government has assumed responsibility for security measures.

Section 1554.3—Terms Used in This Part

Section 1554.3 of the proposed rule sets forth the definitions of certain terms used in this part. The term ''repair station'' is defined as any maintenance facility that is certificated by FAA pursuant to 14 CFR part 145 to perform maintenance, preventive maintenance, repair, overhaul, or alterations of an aircraft, airframe, aircraft engine, propeller, appliance, or component part.[21] Since the proposed regulations apply to both foreign and domestic repair stations, the section defines ''domestic repair station'' as any FAA-certificated repair station located within the fifty States, the District of Columbia, or the territories and possessions of the United States. A ''foreign repair station'' is defined as any FAA-certificated repair station located outside of the fifty States, the District of Columbia, or the

[20] If located on an airport, whether the repair station participates in the airport security program will impact the need for the repair station to comply with the proposed security regulations.

[21] The proposed definition is consistent with the description of the applicability of the FAA's repair station regulations at 14 CFR 145.1.

territories and possessions of the United States.

Section 1554.5—TSA Inspection Authority

Section 1554.5 would codify TSA's authority to inspect repair stations and would require repair stations to permit TSA and DHS officials to enter, inspect, and test property, facilities, and records relevant to repair stations. This section would allow TSA to assess threats, enforce regulations, security directives, and requirements, inspect all facilities and equipment, test the adequacy of security measures, verify the implementation of security measures, review security programs and other records, and perform such other duties as appropriate. This section also would allow TSA to request evidence of compliance, including copies of records in English.

The proposed regulatory language is consistent with the inspection authority currently codified at 49 CFR 1542.5 and 1546.3, which apply to certain U.S. airports and foreign air carriers. TSA has established protocols and procedures on conducting inspections outside the United States through its Foreign Airport and Foreign Air Carrier Assessment Programs. These established procedures require advance notice to the facility to be inspected and coordination with the U.S. Department of State and the appropriate foreign government authorities. TSA inspectors are required to have TSA identification media and credentials with them when inspecting facilities and must display them when requested to do so. TSA will use these established procedures when conducting inspections of foreign repair stations.

TSA is also amenable to working with the U.S. Department of State and foreign government authorities to facilitate inspections of U.S. repair stations that are certificated by a foreign government authority. TSA currently permits such inspections of U.S. airports and air carriers by foreign government authorities consistent with ICAO Annex 17, Section 2.1.

TSA has kept ICAO apprised of the rulemaking and will continue its efforts to harmonize its regulations with those of other countries through its participation in ICAO.

Section 1554.101—Adoption and Implementation

Section 1554.101 would require each repair station to adopt and carry out a security program designed to safeguard aircraft and aircraft components located within the repair station, the maintenance and repair work performed there, and the facility itself. Repair stations would be required to use the TSA standard security program unless otherwise authorized by TSA.

This section would also require a repair station to submit a profile. The purpose of the profile would be to provide basic information regarding repair station operations to assist TSA in determining what measures the repair station must include in its security program to meet the security requirements. The profile would also assist TSA in prioritizing repair stations for purposes of conducting inspections. TSA would make the profile template available to all repair stations either through the TSA web site, by mail, or both. The profile would request the following types of information:

- Identification of the repair stations, such as FAA certificate number, repair station name as it appears on the FAA certificate, and repair station address.
- Description of location (on or adjacent to an airport, off airport in a business location, off airport private residence).
- Security coordinator who will serve as the TSA point of contact.
- If on an airport, the name and three letter designator of the airport.
- Total number of employees.
- Number of employees authorized unescorted access to aircraft over 12,500 MTOW.

The name and location of each repair station would assist TSA in identifying the repair station and determining its proximity to an airport since, as explained above, TSA would consider such repair stations to be a higher risk than those that are not located on or adjacent to an airport. The profile information would also help TSA to prioritize its inspections. Repair stations would also be required to update their profile information within 30 calendar days if a change in the information submitted occurs. This requirement would enable TSA to maintain current information on each regulated repair station and make certain that it is appraised of changes that could impact the security posture of a repair station. Repair stations would not be required to alert TSA to changes in total number of employees or number of employees who work on large aircraft to prevent the submission of a new profile every time an employee is hired or terminated.

Section 1554.103—Security Program Content, Availability, and Amendment

Section 1554.103 would describe the general requirements describing the measures that each repair station must adopt in the standard security program. The standard security program must include:

(1) A description of the measures used to identify individuals who are authorized to enter the repair station to prevent unauthorized individuals from entering the repair station;

(2) a description of the measures used to control access to the repair station and to detect and prevent the entry, presence, and movement of unauthorized individuals and vehicles into or within the repair station;

(3) a description of the measures used to control access to the aircraft and/or aircraft components to allow only authorized individuals to have such access;

(4) a description of the measures used to challenge any individual entering the repair station to ascertain the authority of the individual to enter or be present in the repair station and measures to escort an individual who does not have unescorted authority while within the repair station;

(5) a description of the measures to train all individuals with authorized access to aircraft and components on the provisions of this part and the security program;

(6) a description of the measures used to verify employee background information through confirmation of prior employment and any other means as appropriate to validate employee information;

(7) the name, 24-hour contact information, duties, and training requirements of the designated security coordinator who will serve as the primary and immediate contact for security-related activities and communications with TSA;

(8) a contingency plan;

(9) a diagram with dimensions detailing boundaries and pertinent physical features of the repair station;

(10) a list and description of all entry points; and

(11) an emergency response contact list.

The regulations also would require that the security program be in writing, and signed by the repair station operator, owner, or other authorized person. Each repair station would not have to submit the security program to TSA, but would have to make it available to TSA upon request or during an inspection.

The individual standard security program requirements are discussed below.

(1) Identification of Authorized Individuals

The proposed regulations would require the repair station to adopt and

describe measures to identify individuals to prevent unauthorized individuals from entering the repair station. The specific requirements for a personnel identification media system would be included in the standard security program. Personal recognition may be sufficient at certain repair station locations. During the inspection process, TSA would use the following factors to evaluate whether the personnel identification media system must be implemented and what type of features the system must use:

- Number of employees and number of shifts.
- Physical size of the repair station.
- Number of visitors.
- Proximity of other businesses or operations.
- Type of work, size of aircraft, and length of runway.
- Number of entry points into the repair station.
- Airport security features.
- Other factors that increase ability of unauthorized individuals or vehicles to access the repair station.

For example, a repair station with 50 employees who work multiple shifts at a repair station, located adjacent to an airport with many access points, might be required to adopt and carry out the personnel identification media system. Such a repair station would be considered to be a higher risk because of its proximity to an airport. Further, the large number of employees working multiple shifts would make it difficult for employees to rely solely on personal recognition as workers from different shifts may not be able to recognize each other. A repair station located in a residence with a single employee would not be required to adopt the personnel identification media system in the security program. TSA would not anticipate requiring a repair station located at an airport to adopt a personnel identification media system if employees were required to obtain and display airport identification media.

(2) Repair Station Access Control Measures

The standard security program would specify the access control security requirements for all repair stations. Such requirements would include measures to control access to the facility and to the aircraft and components within the repair station, to challenge any individuals to determine if they are authorized to enter or be present in the facility, and to respond if unauthorized individuals or vehicles are discovered.

Acceptable access control measures would be specified in the security program. Such measures would cover a broad spectrum, including standard locks with key control, card swipe access locks, cipher locks, locks with coded keys, biometric access cards, fencing, security guards, surveillance cameras, and motion detectors.

As part of the standard security program, the repair station would be required to describe all of the entry points to the facility and the specific access control measures used for each. During the inspection process, TSA would determine whether the access control measures deployed at the entry point are appropriate. A repair station located on or adjacent to an airport that performs substantial maintenance on large aircraft would be required to have more stringent access controls. Such controls could include such measures as card swipe access locks, security guards, electronically monitored access or motion detectors, fencing or a combination of such controls. A repair station located in a private residence or in a small component shop in an industrial park would be required to have less sophisticated controls, such as standard locks with key control and an inventory system to track the number of keys. A repair station would be able to select the above or other measures that would provide a appropriate level of security.

Access controls would also be required to restrict unauthorized access to components located within the facility, such as locked storage containers and inventory control of keys.

(3) Aircraft Access Control Measures

In addition, the security program would include measures to control access to aircraft, such as requiring repair stations located on or adjacent to an airport to secure large aircraft by locking or disabling the aircraft, keeping the aircraft in a secure hangar during non-operational hours, fencing, surveillance cameras, lighting, and security guards.

(4) Challenge Procedures

The security program would describe the procedures to be followed when challenging individuals who cannot be readily identified. Only those individuals who are designated and trained in escort procedures would be permitted to escort visitors to the repair station. The responsibilities of the escort would be specified in the security program. At a small facility with few employees, the ability to observe individuals present within the facility may be sufficient to ensure that access to repair work and/or components is controlled. At large repair station facilities, such as those that use a personnel identification media system, employees may have to escort individuals as part of their responsibilities.

(5) Security Training Measures

The security program would include measures to conduct initial and recurrent security training programs, such as providing guidance to repair station personnel on how to implement and maintain the security measures included in the security program. The security program would also specify that the training curriculum be updated to reflect current security requirements. The repair station would be required to maintain records of initial and recurrent security training for each employee. The standard security program would include a model curriculum that the repair station could modify based on the specific security requirements applicable to that repair station.

(6) Employee Background Verification

The security program would include the measures by which the repair station verifies the employment history of its employees and conducts background checks, to the extent permitted by the laws of the country in which the repair station is located. The employment history, length of employment, and measures used to verify the individual's employment would be listed in the security program.

(7) Security Coordinator

Each repair station would be required to designate a security coordinator who would serve as the immediate and primary point of contact for security-related activities and communications with TSA. Each repair station would include the name, responsibilities, and contact information of the security coordinator in the security program and would also specify the training curriculum required for the security coordinator. The security coordinator would not necessarily need to be on-site at the repair station, but they must be able to coordinate incident management at any time.

(8) Contingency Plan

The security program would include a contingency plan to include the specific measures that would be taken to address security-related incidents. The security program would include such items as the names of the repair station employees designated to perform specific tasks, the name and contact information for any contingency response organizations that would assist the repair station, a description of the

DHS threat advisory levels and the additional security measures that would be implemented based on the threat level, and set forth the responsibilities of all personnel involved. The plan would also provide for training and regular practices, if appropriate.

Other Security Program Requirements

The proposed regulations would also require that each security program include a diagram of the repair station detailing the boundaries and describing the physical features of the repair station. The security program would also include a list and description of all entry points into the repair station that would be supplied by the repair station operator. These requirements would assist TSA in assessing the security vulnerability of the repair station and determining whether security measures are appropriate. The security program would also include emergency response contact information.

Section 1554.103(b) would require that the security program be in writing, and hand-signed by the repair station operator, owner, or other authorized person. The security program would be required to be accessible to employees at the repair station facility and be written in English and in the official language of the repair station's country. The security program could be accessible electronically so long as it meets all of the requirements. This section would also include a requirement that repair stations must restrict the distribution, disclosure, and availability of sensitive security information as described in 49 CFR part 1520.

Section 1554.103(c) would require a repair station to notify TSA of any amendment to the standard security program and would require that the repair station acknowledge receipt and adopt an emergency amendment issued by TSA within the time prescribed in the emergency amendment. If the repair station cannot implement the emergency amendment, the repair station must immediately notify TSA to obtain approval of alternative measures. They may contact their TSA inspector or the TSA Repair Stations Office at TSA headquarters.

Section 1554.105—Security Directives

This section would require a repair station to comply with any Security Directive issued by TSA mandating security measures. Security Directives may be issued when TSA determines that additional or specific security measures are necessary to respond to a threat assessment or a specific threat against aviation. Upon receipt of a Security Directive, the repair station would be required to comply with the measures in the time prescribed or immediately notify TSA if it is unable to implement the specified security measures so that the repair station can obtain approval of alternative measures. The repair station would also be required to restrict the availability of a Security Directive to only those individuals with an operational need to know.

Section 1554.201—Notification of Security Deficiencies; Suspension of Certificate

Proposed § 1554.201 implements the requirements of 49 U.S.C. 44924(c)(1) regarding the suspension of a repair station certificate. Vision 100 requires audits to be conducted of foreign repair stations within a specified timeframe.[22] TSA would comply with that requirement and intends to perform ongoing audits and inspections of all repair stations covered by the proposed regulation in order to check for compliance with the final regulations.

The proposed regulation would provide that TSA would notify the repair station and the FAA in writing of any security deficiencies identified by TSA during an audit. Repair stations would be required to respond within 90 days of receipt of the written notification that the deficiency has been corrected and include a written explanation of the efforts, methods, and procedures used to correct the deficiency. TSA may re-audit the repair station to verify that the deficiencies have been corrected. The proposal specifies that TSA would provide written notification to the FAA if the repair station failed to respond and/or to correct the deficiencies within the 90-day period and that, consistent with the statute, FAA would suspend the repair station certificate. The suspension would remain in effect until TSA makes a determination that the deficiencies had been corrected; TSA would then notify the FAA requesting that the suspension be lifted.[23] This section also provides that a repair station may seek review of a TSA determination that deficiencies have not been corrected and includes the redress procedures.

Section 1554.203—Immediate Risk to Security; Revocation of Certificate and Review Process

Proposed § 1554.203 implements 49 U.S.C. 44924(c)(2) and requires that if TSA makes an initial determination that a repair station poses an immediate risk to security, TSA would notify the repair station and the FAA that the station's certificate must be revoked. The repair station may seek review of TSA's determination that the station poses an immediate risk to security; however, the revocation would remain in effect unless and until the review is complete and a determination is made that the repair station does not pose an immediate risk to security.

Proposed § 1554.203(b) would allow the repair station to request the releasable materials upon which the determination is based. Proposed § 1554.203(c) would permit the repair station to request a review and to provide a response to TSA. The response may include any information that the repair station deems relevant to a final decision. TSA would conduct an initial review of the basis for the determination and the response and, if the determination is upheld, a final review by the TSA Assistant Secretary. TSA would notify the FAA of its final determination.

Section 1554.205—Nondisclosure of Certain Information

This section preserves TSA's authority not to disclose classified information or other information protected by law or regulation.

IV. Rulemaking Analyses and Notices

A. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*) requires that TSA consider the impact of paperwork and other information collection burdens imposed on the public and, under the provisions of PRA section 3507(d), obtain approval from the Office of Management and Budget (OMB) for each collection of information it conducts, sponsors, or requires through regulations. This proposed rule contains new information collection activities subject to the PRA. Accordingly, TSA has submitted the following information requirements to OMB for its review.

Title: Aircraft Repair Station Security.

Summary: This proposal would require all aircraft and aircraft component repair stations certificated by the FAA under 14 CFR part 145 to adopt and maintain a security program that meets general security requirements as required by 49 U.S.C. 44924(f). The

[22] In the Implementing Recommendations of the 9/11 Commission Act of 2007 (Pub. L 110–53, 121 Stat. 266, Aug. 3, 2007), the 18-month deadline for completing security inspections of foreign repair stations was reduced to 6 months.

[23] If the repair station certificate covered more than one facility, but not all the facilities were found to have security deficiencies, TSA would specify that only the facility that was found to be deficient be suspended.

proposed regulations also authorize TSA to conduct security audits, assessments, and inspections of repair stations. Repair stations will be required to implement a TSA standard security program which must include the specific security measures used by the repair station to comply with the regulation. In addition to the actual security measures, the security program must also contain any amendments to the security program, a contingency plan, a diagram of the facility with dimensions detailing boundaries and physical features, the name and contact information for the person responsible for security-related activities and communications with TSA, a list and description of all entry points and an emergency response contact list. The security program may be kept electronically or in hard copy format. It does not have to be submitted to TSA, but must be made available for review when TSA conducts a security audit or inspection. Other records that must also be made available during the audit or inspection would include employee training records, employee background information, and any security directives issued by TSA.

Use of: This proposal would support the information needs of TSA in order to ensure the security of maintenance and repair work conducted on air carrier aircraft and aircraft components at repair stations, as well as the security of the aircraft and the facility.

Respondents (including number of): The likely respondents to this proposed information requirement are the owners and/or operators of repair stations certificated by the FAA under 14 CFR part 145, which is estimated to number approximately 5,460 over the next ten years.

Frequency: Each of the respondents initially would submit a repair station profile and develop and carry out a standard security program provided by TSA.

Annual Burden Estimate: Annualized over the next three years, the average yearly burden to create security programs is estimated to be 12,620 hours for all respondents. Thus, the total annual time burden estimate is approximately 13,817 hours. The estimated annual costs beyond the time burden is approximately $45,200 for all respondents when annualized over the next three years.

TSA is soliciting comments to—

(1) Evaluate whether the proposed information requirement is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden;

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

(4) Minimize the burden of the collection of information on those who are to respond, including using appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Individuals and organizations may submit comments on the information collection requirements by January 19, 2010. Direct the comments to the address listed in the **ADDRESSES** section of this document, and fax a copy of them to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: DHS–TSA Desk Officer, at (202) 395–5806. A comment to OMB is most effective if OMB receives it within 30 days of publication. TSA will publish the OMB control number for this information collection in the **Federal Register** after OMB approves it.

As protection provided by the Paperwork Reduction Act, as amended, 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.

B. International Compatibility

In keeping with U.S. obligations under the Convention on International Civil Aviation, it is TSA policy to comply with ICAO Standards and Recommended Practices where possible. TSA has determined that these proposed regulations are consistent with ICAO Standards and Recommended Practices for security of airports and facilities contained in Annex 17 of the Convention, the ICAO Security Manual and the ICAO Security Audit Reference Manual.

C. Regulatory Impact Analyses

1. Regulatory Evaluation Summary

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

TSA has prepared a separate detailed analysis document, which is available to the public in the docket.[24] With respect to these four analyses, TSA provides the following conclusions, supported by additional summary information.

a. This proposed rule is not an economically ''significant regulatory action'' as defined in the Executive Order. However, this rulemaking may be considered significant because of Congressional and stakeholder interest in security since the events of September 11, 2001.

b. The Initial Regulatory Flexibility Analysis (IRFA) shows that there may be a significant impact on a substantial number of small entities.

c. This proposed rule imposes no significant barriers to international trade.

d. This proposed rule does not impose an unfunded mandate on State, local, or tribal governments, or on the private sector in excess of $100 million (adjusted for inflation) in any one year.

2. Executive Order 12866 Assessment

This summary highlights the costs and benefits of the proposed rule to amend the transportation security regulations to further enhance and improve the security of repair stations. TSA has determined that this is not a major rule within the definition of Executive Order (EO) 12866, as annual costs to all parties do not pass the $100 million threshold in any year. The Initial Regulatory Flexibility Analysis (IRFA) shows that there may be a significant impact on a substantial number of small entities. There are no significant economic impacts for the required analyses of international trade

[24] See information on viewing the Docket under ''Reviewing Comments in the Docket'' above. The Regulatory Evaluation is categorized as ''Supporting and Related Materials.''

or unfunded mandates. Both in this summary and the economic evaluation, descriptive language is used to try to relate the consequences of the regulation. The tables are numbered as they appear in the economic evaluation. Although the regulatory evaluation attempts to mirror the terms and wording of the regulation, no attempt is made to precisely replicate the regulatory language and readers are cautioned that the actual regulatory text, not the text of the evaluation, is binding.

Comparison of Costs and Hypothetical Benefits

Comparison of the total undiscounted domestic costs of the proposed rule with potential benefits from the proposed aircraft repair station security program relies on a breakeven comparison based on the extent to which the program must reduce the underlying baseline risk of specific attack impact scenarios in order for the program benefits to be greater than the expected costs. Such a comparison is presented in Table 2 following the ''Benefits'' section below. This comparison is discussed briefly above and in greater depth in the body of the analysis.

Benefits

A major line of defense against an aviation-related terrorist act is the prevention of explosives, weapons, and/or incendiary devices from getting on board a plane. To date, efforts have been primarily related to inspection of baggage, passengers, and cargo, and security measures at airports that serve air carriers. With this rule, attention is given to aircraft that are located at repair stations, and to aircraft parts that are at repair stations, themselves to reduce the likelihood of an attack against aviation and the country. Since repair station personnel have direct access to all parts of an aircraft, the potential exists for a terrorist to seek to commandeer or compromise an aircraft when the aircraft is at one of these facilities. Moreover, as TSA tightens security in other areas of aviation, repair stations increasingly may become attractive targets for terrorist organizations attempting to evade aviation security protections currently in place.

To better inform the comparison of the costs of the repair station security program in the proposed rule with the benefits to homeland security it might afford due to reduced risk of successful terror attack involving an aircraft, a breakeven analysis was performed. In this analysis, the annualized costs of the program, discounted at seven percent, are compared to the expected benefits of avoiding or preventing three attack scenarios of varying consequence. For each scenario, the required extent of annual risk reduction due to the proposed program, expressed as the frequency with which attacks must be averted, is reported in the final column of the break-even analysis (Table 2) below.

TABLE 2—FREQUENCY OF ATTACKS AVERTED FOR AIRCRAFT REPAIR STATION SECURITY COSTS TO EQUAL EXPECTED BENEFITS, BY ATTACK SCENARIO

[Annualized at 7 percent]

Attack scenario	Lives lost	Value of a statistical life (VSL) at $5.8M ($ million)	Moderate injuries	Valuation of moderate injuries at 1.55% of VSL ($ million)	Severe injuries	Valuation of serious injuries at 18.75% of VSL ($ million)	Estimated aircraft market value ($ million)	Total impact ($ million)	Attacks averted by repair station security required to break even
	A	B = A × 5.8	C	D = C × .0899	E	F = E × 1.0875	G	H = B+D+F+G	= H ÷ $24.5M*
1 Minimal	3	$17.4	10	$0.9		$0.0	$9.3	$27.6	one every 1.1 years.
2 Aircraft Target	132	765.6		0.0		0.0	21.8	787.4	one every 32.1 years.
3 Moderate	250	1,450.0		0.0	750	815.6	9.3	2,274.9	one every 92.7 years.

*The total cost of the rule annualized at 7 percent.

Costs

As required, alternatives to the primary rule requirements were analyzed. Table 31 that follows provides the 10-year cost of the preferred alternative and two other alternatives, undiscounted and at three and seven percent discount rates.

TABLE 31—TOTAL 10-YEAR COSTS BY SCENARIO AND DISCOUNT RATE

[2006$ millions]

Total by scenario	Undiscounted	3% Discount	7% Discount
Primary Scenario	$344.4	$293.3	$241.0
Security Threat Assessments	347.0	295.7	243.1
Vulnerability Assessments	347.1	295.8	243.3

Using a seven percent discount rate, TSA estimated the 10-year cost impacts for the primary scenario of this proposed rule would total $241.0 million. This total is distributed among domestic repair stations, which would incur total costs of $118.6 million; foreign repair stations, which would incur costs of $68.7 million; and TSA-projected Federal Government costs, which would be $53.7 million.

3. Initial Regulatory Flexibility Analysis (IRFA)

The Regulatory Flexibility Act of 1980 (RFA) establishes ''as a principle of regulatory issuance that agencies shall endeavor, consistent with the objective of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the business, organizations, and governmental jurisdictions subject to regulation.'' To achieve that principle, the RFA requires agencies to solicit and consider flexible regulatory proposals and to explain the rationale for their actions. The RFA covers a wide range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions.

Agencies must perform a review to determine whether a proposed or final rule will have a significant economic

impact on a substantial number of small entities. If the determination is that it will, the agency must prepare a regulatory flexibility analysis as described in the RFA. However, if an agency determines that a proposed or final rule is not expected to have a significant economic impact on a substantial number of small entities, section 605(b) of the 1980 RFA, as amended, provides that the head of the agency may so certify and a regulatory flexibility analysis is not required. The certification must include a statement providing the factual basis for this determination, and the reasoning should be clear.

As part of implementing this NPRM, TSA expects security to be integrated into actions the same way safety has and to become an integral component of doing business rather than adding layers or extra program costs. The primary cost to repair stations resulting from this NPRM would be additional hours for personnel to perform the duties of the repair station security coordinator. For many stations this may constitute an insignificant impact, while for others the costs to comply with the proposed rule may prove significant. TSA has conducted an initial regulatory flexibility analysis and believes the proposed requirements may result in a significant economic impact on a substantial number of small entities. TSA requests comments, particularly those supported by data, on this preliminary conclusion.

Reason for the Proposed Rule

In 2003, Congress enacted Vision 100—Century of Aviation Reauthorization Act (Vision 100), Public Law 108–176, (117 Stat. 2490, December 12, 2003). Vision 100, which was signed into law by President George W. Bush on December 12, 2003, expands TSA's authority to address the security of the civil aviation system by requiring TSA to issue final regulations to ensure the security of both domestic and foreign aircraft repair stations.

Objectives of the Proposed Rule

The requirements proposed in this NPRM are designed to increase overall civil aviation security by bolstering the level of security at domestic and foreign aircraft repair stations.

Descriptions and Estimates of the Number of Small Entities

Aircraft repair stations are classified by the U.S. Census Bureau as falling primarily within the North American Industry Classification System (NAICS), code 488190 Other Support Activities for Air Transportation. In its account of the industry, the U.S. Census Bureau describes firms in this market as ''providing specialized services for air transportation (except air traffic control and other airport operations).'' [25] The Small Business Administration defines a small business within this NAICS code as one having annual revenues of $7.0 million or less.[26] More details about the industry can be obtained by reading the ''Discussion of the Industry and Status Quo'' section of the Regulatory Evaluation.

To estimate the number of small businesses in the aircraft repair station industry affected by this NPRM, TSA accessed information maintained by Dun & Bradstreet, a provider of international and U.S. business data. The data obtained for this effort did not identify the type of maintenance the repair stations are certificated to perform or their location. This made it difficult for TSA to determine compliance costs for the identified small businesses (this is discussed more below).

Through its research, TSA obtained Dun & Bradstreet revenue and employment records for 2,276 domestic aircraft repair stations. Of this total, 2,123 reflected small businesses, as defined by SBA, and 153 did not. TSA was unable to find data on the remaining domestic repair stations. For the purposes of this analysis, and to remain conservative in its estimates, TSA assumed that the remaining domestic repair stations are also small. TSA thus estimated that 4,115 of 4,268 domestic aircraft repair stations are small businesses, as defined by SBA.

Description and Estimate of Compliance Requirements

In order to address the need for security measures at aircraft repair stations and to fulfill the obligations set forth by Congress, TSA is proposing to add a new part 1554 to its regulations, entitled ''Aircraft Repair Station Security.'' The new part would require all aircraft repair stations that are certificated by the FAA under 14 CFR part 145, both domestic and foreign, to adopt and carry out a security program that includes specific security requirements. The regulations would require repair stations to safeguard aircraft and components located at the station, the maintenance and repair work conducted there, as well as the repair station's facilities, as required by 49 U.S.C. 44924.

TSA is also proposing changes to its regulations regarding the protection of sensitive security information (SSI) to specify that a repair station security program is categorized as SSI and that the repair station operator or owner is subject to the SSI requirements.

The proposed rule would require repair stations to establish security programs. TSA would provide a standard security program that would include the following: Access controls, a personnel identification system, security awareness training, the designation of a security coordinator, employee background verification, and a contingency plan. While repair stations would have some flexibility regarding the particular equipment, facilities, and measures used to comply with the general security requirements, their security methods would need to address each of these requirements in a manner commensurate with the station's security risk. For example, small repair stations may meet the requirement for a personal identification system through employee recognition and challenge procedures, while TSA would require stations located on or adjacent to an airport and having 50 or more employees to implement a formal badging system.

The proposed rule would require each repair station to complete and return to TSA a brief profile form. The profile would identify information, such as whether the repair station is located at an airport,[27] the total number of employees, and the number of employees with unescorted access to aircraft with a maximum certificated takeoff weight (MTOW) exceeding 12,500 pounds. These indicators would assist TSA in conducting a risk-based analysis of the repair station in order to determine what measures would be needed to meet the security requirements proposed in the regulations.

The proposed regulations also would establish TSA's authority to conduct security audits, assessments, and inspections in order to ascertain the adequacy of the measures employed by the repair stations to implement and maintain the security requirements. The proposed inspections and appeals processes are described in detail in the NPRM.

[25] U.S. Census Bureau, ''2002 NAICS Definitions.'' Retrieved from *http://www.census.gov/epcd/naics02/def/ND488190.HTM#N488190* on January 31, 2007.

[26] U.S. Small Business Administration, ''Table of Small Business Size Standards Matched to North American Industry Classification System Codes.'' *http://www.sba.gov/idc/groups/public/documents/sba_homepage/serv_sstd_tablepdf.pdf.*

[27] If located on an airport, whether the repair station participates in the airport security program will impact the repair station's compliance with the proposed security regulations.

In its effort to fulfill the requirements of the RFA, TSA attempted to estimate all costs of complying with the above described requirements for each firm for which it had Dun & Bradstreet data and to calculate those costs as a percent of the repair station's reported revenues. TSA determined that this methodology would best conclude whether the proposed rule would represent a considerable economic burden to a large number of small businesses. After completing this preliminary analysis (described below), TSA has tentatively concluded that the proposed rule may impose a significant economic impact on a substantial number of small entities. The agency seeks comment on this preliminary conclusion.

Compliance costs for the proposed rule would vary across firms. A small business with one employee who only services one component of a particular aircraft may incur very low compliance costs. Such a business is likely to be operated from a small shop or even a private residence. Conversely, a larger repair station that works on more complex systems or even entire aircraft may incur higher costs as a result of this NPRM. These types of facilities may be located at an airport, in an industrial park, or may be part of an aircraft manufacturing facility. For example, in the ''Cost of Compliance'' section above, TSA estimated repair stations located on or adjacent to an airport would require 8 hours on average to complete their security programs whereas repair stations located off-airport would require only 4. Unfortunately, TSA was unable to pair the data from Dun & Bradstreet with repair station data provided by the FAA. As a result, TSA could not estimate compliance costs particular to repair station characteristics such as whether it is located on an airport or performs substantial maintenance on commercial aircraft.

Therefore, in order to characterize compliance costs as a percentage of repair station revenues, TSA estimated unit compliance costs based on weighted averages so as not to underestimate the costs of the rule. As a result, these estimates likely overstate the costs to some small businesses while understating them for others. TSA welcomes comments that will assist it in more accurately estimating compliance costs for small businesses.

Using the assumptions and methods described above, TSA estimated the average compliance costs to be about $3,013 for a business with one employee to $4,216 for a business with 45 employees. Of this total, $2,733 represents costs for security coordinators, and $253 represents costs for development and implementation of security programs. The remainder is comprised of employee training costs.

These totals exclude costs for repair stations located on or adjacent to an airport and having 50 or more employees to implement a badging system. TSA assumed that firms with 100 or more employees likely already have a badging system. Based on the Dun and Bradstreet data, TSA estimated the average compliance cost for firms reported as having between 50 and 99 employees would be approximately $4,728 before adding costs to implement a badging system. These firms employ an average of 64 individuals. Using the estimate of $25 per badge cited in the Regulatory Evaluation, badges would add an average of nearly $1,600 to these repair stations' compliance costs, resulting in a total cost of $6,328. Firms having between 50 and 99 employees in the Dun and Bradstreet sample reported average revenue of nearly $6 million. The estimated compliance costs would therefore constitute less than one percent of their annual revenues. Since the proposed ID requirement would affect a subset of these repair stations—only those which are located on or adjacent to an airport—TSA does not believe the proposed ID requirement would result in a significant impact on affected repair stations.

Table 32 below shows the distribution of compliance costs, excluding ID costs, as a percent of repair station revenues.

TABLE 32—SMALL REPAIR STATION BUSINESS DISTRIBUTION OF COMPLIANCE COST-REVENUE RATIOS

Compliance costs as a percentage of revenue	Number of small businesses	Cumulative percentage of small businesses
≤1.0	692	32.6
≤2.0	1,015	47.8
≤3.0	1,527	71.9
≤4.0	1,712	80.6
≤5.0	1,759	82.9
≤10.0	2,100	98.9
Total	2,123	100.0

The table uses rounded percentages to show that TSA's initial assessment is that the NPRM may have a significant impact on a substantial number of small businesses. TSA believes that for 47.8 percent of the small businesses, the compliance costs will result in an economic impact of two percent of annual revenue or less, and for 71.9 percent of the small businesses, the compliance costs will be less than three percent of annual revenue. TSA requests comment on these estimates.

Significant Alternatives Considered

During the course of drafting this NPRM, TSA considered regulatory alternatives. These alternatives included requiring security threat assessments for certain repair station employees and requiring each repair station to complete a vulnerability self-assessment. Both of these alternatives would have increased the burden on repair stations and thus on small entities. A description of these alternatives and the reasons they were not adopted can be found in the section of the Regulatory Evaluation titled, ''Alternatives Considered.''

Additionally, as noted above, TSA requests comment on whether it should exempt certain repair stations after it conducts security reviews and audits. For instance, TSA may consider whether to exempt repair stations that only perform maintenance on small aircraft (aircraft having a maximum certificated takeoff weight of 12,500 pounds or less). To help the agency evaluate the impact of this alternative, TSA requests comments, supported by data, on the number of repair stations that work exclusively on such aircraft and their compliance costs under the proposed rule.

Identification of Duplication, Overlap and Conflict With Other Federal Rules

TSA has no knowledge of any duplicative, overlapping, or conflicting Federal rules.

Preliminary Conclusion

Based on this preliminary analysis, TSA believes the proposed requirements may result in a significant economic impact on a substantial number of small entities. However, TSA holds a final assessment in abeyance until such time as information becomes available to facilitate the development of a Final Regulatory Flexibility Analysis (FRFA). TSA requests comments, particularly those supported by data, to inform this process.

4. International Trade Impact Assessment

The Trade Agreement Act of 1979 prohibits Federal agencies from engaging in any standards or related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as security, are not considered unnecessary obstacles. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards. In addition, it is the policy of TSA to remove or diminish, to the extent feasible, barriers to international trade, including both barriers affecting the export of American goods and services to foreign countries and barriers affecting the import of foreign goods and services into the U.S.

In keeping with U.S. obligations under the Convention on International Civil Aviation, it is TSA's policy to comply with International Civil Aviation Organization (ICAO) Standards and Recommended Practices where possible. TSA has determined that there are no ICAO Standards and Recommended Practices that correspond to the regulatory standards established by this notice of proposed rulemaking (NPRM). TSA has assessed the potential effect of this NPRM and has determined that it is unlikely it would create barriers to international trade. The full evaluation provides an analysis of a number of issues directly related to international trade that were considered with this proposed rule.

5. Unfunded Mandates Reform Act Assessment

The Unfunded Mandates Reform Act of 1995 is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments. Title II of the Act requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in a $100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector; such a mandate is deemed to be a ''significant regulatory action.'' This rulemaking does not contain such a mandate. The requirements of Title II of the Act, therefore, do not apply.

D. Executive Order 13132, Federalism

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

E. Environmental Analysis

TSA has reviewed this action under DHS Management Directive 5100.1, Environmental Planning Program (effective April 19, 2006) which guides TSA compliance with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4347). TSA has determined that this proposal is covered by the following categorical exclusions (CATEX) listed in the DHS directive: Number A3(a) (administrative and regulatory activities involving the promulgation of rules and the development of policies); paragraph A4 (information gathering and data analysis); paragraph A7(d) (conducting audits, surveys, and data collection of a minimally intrusive nature, to include vulnerability, risk, and structural integrity assessments of infrastructures); paragraph B3 (proposed activities and operations to be conducted in existing structures that are compatible with ongoing functions); paragraph B11 (routine monitoring and surveillance activities that support homeland security, such as patrols, investigations, and intelligence gathering), and H1 (approval or disapproval of security plans required under legislative mandates where such plans do not have a significant effect on the environment). In addition, TSA has determined that this proposal meets the three conditions required for a CATEX to apply, as described in paragraph 3.2, (Conditions and Extraordinary Circumstances).

F. Energy Impact Analysis

The energy impact of this NPRM has been assessed in accordance with the Energy Policy and Conservation Act (EPCA) Public Law 94–163, as amended (42 U.S.C. 6362). TSA has determined that this rulemaking is not a major regulatory action under the provisions of the EPCA. TSA has also analyzed this proposed rule under E.O. 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' 66 FR 28355 (May 18, 2001). TSA has determined that this is not a ''significant energy action'' under that order.

List of Subjects

49 CFR Part 1520

Air carriers, Aircraft, Aircraft repair stations, Airports, Maritime carriers, Rail hazardous materials receivers, Rail hazardous materials shippers, Rail transit systems, Railroad carriers, Railroad safety, Railroads, Reporting and recordkeeping requirements, Security measures, Vessels.

49 CFR Part 1554

Aircraft, Aircraft repair stations, Aviation safety, Reporting and recordkeeping requirements, Security measures.

The Proposed Amendment

In consideration of the foregoing, the Transportation Security Administration proposes to amend Chapter XII of Title 49, Code of Federal Regulations, to read as follows:

Subchapter B—Security Rules for All Modes of Transportation

PART 1520—PROTECTION OF SENSITIVE SECURITY INFORMATION

1. The authority citation for part 1520 continues to read as follows:

Authority: 46 U.S.C. 70102–70106, 70117; 49 U.S.C. 114, 40113, 44901–44907, 44913–44914, 44916–44918, 44935–44936, 44942, 46105.

2. In § 1520.5, revise paragraph (b)(1)(i) to read as follows:

§ 1520.5 Sensitive security information.

* * * * *

(b) * * *;

(1) * * *;

(i) Any aircraft operator, airport operator, fixed base operator, repair station, or air cargo security program, or security contingency plan under this chapter;

* * * * *

3. In § 1520.7, add paragraph (o) to read as follows:

§ 1520.7 Covered persons.

* * * * *

(o) Each operator or owner of an aircraft repair station required to have a security program under part 1554 of this chapter.

Subchapter C—Civil Aviation Security

PART 1554—AIRCRAFT REPAIR STATION SECURITY

Subpart A—General

Sec.
1554.1 Scope and purpose.
1554.3 Terms used in this part.
1554.5 TSA inspection authority.

Subpart B—Security Program

1554.101 Adoption and implementation.
1554.103 Security Program content, availability, and amendment.
1554.105 Security Directives.

Subpart C—Compliance and Enforcement

1554.201 Notification of security deficiencies; suspension of certificate.
1554.203 Immediate risk to security; revocation of certificate and review process.
1554.205 Nondisclosure of certain information.

Authority: 49 U.S.C. 114, 40113, 44903, 44924.

Subpart A—General

§ 1554.1 Scope and purpose.

This part applies to domestic and foreign repair stations that are certificated by the Federal Aviation Administration pursuant to 14 CFR part 145 except for a repair station certificated by the Federal Aviation Administration at which the U.S. Government has assumed responsibility for security. The purpose of this part is to provide for the security of maintenance and repair work conducted on aircraft and aircraft components at domestic and foreign repair stations, of the aircraft and aircraft components located at the repair stations, and of the repair station facilities, as required in 49 U.S.C. 44924.

§ 1554.3 Terms used in this part.

In addition to the terms in §§ 1500.3 and 1540.5 of this chapter, the following terms apply in this part:

Repair station means a domestic or foreign facility certificated by the Federal Aviation Administration pursuant to 14 CFR part 145 that is authorized to perform maintenance, preventive maintenance, or alterations of an aircraft, airframe, aircraft engine, propeller, appliance, or component part.

(1) *Domestic repair station* means a repair station located within the fifty States, the District of Columbia, or the territories and possessions of the United States.

(2) *Foreign repair station* means a repair station located outside the fifty States, the District of Columbia, or the territories and possessions of the United States.

§ 1554.5 TSA inspection authority.

(a) *General.* Each repair station must allow TSA and other authorized DHS officials, at any time and in a reasonable manner, without advance notice, to enter, conduct any audits, assessments, tests, or inspections of any property, facilities, equipment, and operations; and to view, inspect, and copy records as necessary to carry out TSA's security-related statutory or regulatory authorities, including its authority to—

(1) Assess threats to transportation security;

(2) Enforce security-related regulations, directives, and requirements;

(3) Inspect, maintain, and test security facilities, equipment, and systems;

(4) Ensure the adequacy of security measures;

(5) Verify the implementation of security measures;

(6) Review security programs; and,

(7) Carry out such other duties, and exercise such other powers, relating to transportation security as the Assistant Secretary of Homeland Security for the TSA considers appropriate, to the extent authorized by law.

(b) *Evidence of compliance.* At the request of TSA, each repair station operator must provide evidence of compliance with its security program and with this part, including copies of records.

(1) All records required under this part must be available in English.

(2) All responses and submissions provided to TSA or its designee, pursuant to this part, must be in English, unless otherwise requested by TSA.

(c) *Access to repair station.* (1) TSA and DHS officials working with TSA may enter, without advance notice, and be present within any area without access media or identification media issued or approved by the repair station in order to inspect, test, or perform any other such duties as TSA may direct.

(2) Repair stations may request TSA inspectors and DHS officials working with TSA to present their credentials for examination, but the credentials may not be photocopied or otherwise reproduced.

Subpart B—Security Program

§ 1554.101 Adoption and implementation.

(a) *General.* Each repair station must adopt and carry out a security program to safeguard aircraft and aircraft components located within the repair station and its facilities, the repair and maintenance work conducted at the repair station, and the repair station facility itself.

(b) *Repair station profile.* No later than 30 calendar days after final rules are published in the **Federal Register** or no later than 30 calendar days after FAA certification, each repair station must submit a profile in a manner prescribed by TSA. Each repair station must report changes in profile information as specified by TSA within 30 calendar days of the date of the change.

(c) *Repair station security program.* Unless otherwise authorized by TSA, each repair station must use the TSA standard repair station security program.

§ 1554.103 Security program content, availability, and amendment.

(a) *Content of security program.* Each security program must—

(1) Include measures to identify all individuals who are authorized to enter the repair station to prevent unauthorized individuals from entering the repair station.

(2) Include measures to control access to the repair station. Such measures must be designed to prevent, detect and resolve any unauthorized entry, presence, and movement of individuals and vehicles into or within the repair station.

(3) Include measures to control access to the aircraft and aircraft components to allow only authorized individuals to have access to the aircraft and aircraft components within the repair station.

(4) Include measures to challenge any individual entering the repair station or who is present in the repair station to ascertain the authority of that individual to enter or be present in the area and measures to escort an unauthorized individual while within the repair station.

(5) Include measures to conduct initial and recurrent security training of all individuals with authorized access to aircraft and components on the provisions of this part and the security program and to maintain a record of training completed by each employee.

(6) Include measures to verify employee background information through confirmation of prior employment and any other means as appropriate to validate employee information.

(7) Include the name, means of contact on a 24 hour basis, duties, and training requirements of the security coordinator(s) who will serve as the primary and immediate contact for security-related activities and communications with TSA.

(8) Include a contingency plan.

(9) Include a diagram with dimensions detailing boundaries and physical features of the repair station.

(10) Include a list and description of all repair station entry points.

(11) Include an emergency response contact list.

(12) Be in writing and signed by the operator, owner, or any person delegated authority in this matter.

(b) *Availability.* (1) The repair station security program must—

(i) Be written both in English and in the official language of the repair station's country.

(ii) Be accessible at each facility.

(2) Each repair station must restrict the distribution, disclosure, and availability of sensitive security information (SSI) as defined in part 1520 of this chapter to persons with a need to know and refer all requests for SSI by other persons to TSA.

(c) *Amendment.* (1) A repair station must notify TSA of any amendment to the standard security program.

(2) If TSA finds that there is a situation requiring immediate action to respond to a security threat, TSA may issue an emergency amendment to the standard security program. TSA will provide an explanation of the reason for the amendment. Each repair station must acknowledge receipt and adopt the emergency amendment within the time prescribed. If a repair station is unable to implement the emergency amendment, the repair station immediately must notify TSA to obtain approval of alternative measures.

§ 1554.105 Security Directives.

(a) *General.* When TSA determines that additional security measures are necessary to respond to a threat assessment or to a specific threat against civil aviation, TSA issues a Security Directive setting forth mandatory measures.

(b) *Compliance.* Each repair station required to have a security program must comply with each Security Directive TSA issues to the repair station within the time prescribed. Each repair station that receives a Security Directive must—

(1) Verbally acknowledge receipt of the Security Directive.

(2) Specify the method by which security measures have been or will be implemented to meet the effective date.

(3) Notify TSA to obtain approval of alternative measures, if the repair station is unable to implement the measures in the Security Directive.

(c) *Availability.* Each repair station that receives a Security Directive and each person who receives information from a Security Directive must—

(1) Restrict the availability of the Security Directive and the information contained in the document to persons who have an operational need to know.

(2) Refuse to release the Security Directive or the information contained in the document to persons other than those who have an operational need to know without the prior written consent of TSA.

Subpart C—Compliance and Enforcement

§ 1554.201 Notification of security deficiencies; suspension of certificate.

(a) *General.* Each repair station that does not establish and carry out a security program, as specified in this part, may be subject to suspension of its FAA certificate, as provided by 49 U.S.C. 44924(c)(1).

(b) *Notice of security deficiencies.* TSA provides written notification to a repair station and to the FAA of any security deficiency identified by TSA.

(c) *Response.* A repair station must provide TSA with a written explanation in English of all efforts, methods, and procedures used to correct the security deficiencies identified by TSA within 45 days of receipt of the written notification described in paragraph (b) of this section.

(d) *Suspension of certificate.* If the repair station does not correct security deficiencies within 90 days of the repair station's receipt of the written notice of security deficiencies, or if TSA determines that the security deficiencies have not been addressed sufficiently to comply with this section, TSA provides written notification to the repair station and to the FAA that the station's certificate shall be suspended. The notification includes an explanation of the basis for the suspension. The suspension remains in place until such time as TSA determines that the security deficiencies have been corrected.

(e) *Reply.* No later than 20 calendar days after the date of receipt of the notification of suspension, the repair station may serve upon TSA a written request for review of the basis for the determination that the security deficiencies have not been addressed sufficiently. The request must be in English and may include any information that the repair station believes TSA should consider regarding its determination. The suspension remains in effect until the review is complete.

(f) *TSA Review.* Not later than 30 calendar days, or such longer period as TSA may determine for good cause, after TSA receives the repair station's request for review, TSA reviews its initial determination and issue a Final Determination on the repair station and the FAA in accordance with this paragraph.

(1) TSA considers the initial notification, the repair station's reply, and any other relevant materials before issuing the Final Determination.

(2) If TSA determines that security deficiencies exist and have not been addressed, TSA serves upon the repair station and the FAA a Final Determination. The Final Determination shall include a statement that TSA has reviewed all of the relevant information available and has determined that the repair station is not in compliance with this section.

(3) If TSA determines that security deficiencies do not exist or have been corrected in a manner consistent with the requirements of this part, TSA notifies the repair station and the FAA that the repair station's certification may be reinstated.

§ 1554.203 Immediate risk to security; revocation of certificate and review process.

(a) *Notice.* TSA determines whether any repair station poses an immediate risk to security. If such a determination is made, TSA provides written notification of its determination to the repair station and to the FAA that the certificate must be revoked. The notification includes an explanation of the basis for the revocation. TSA does not include classified information or other information described in paragraph (e) of this section.

(b) *Request for review.* Not later than 30 days after receipt of the notice, a repair station may file a request for review of the determination that the repair station poses an immediate risk to security. The revocation remains in effect until the review is complete. The request must be made in writing, in English, signed by the repair station operator or owner, and include—

(1) A statement that a review is requested; and

(2) A response to the determination of immediate risk to security, including any information TSA should consider in reviewing the basis for the determination.

(c) *TSA Review.* Not later than 30 calendar days, or such longer period as TSA may determine for good cause, after TSA receives the repair station's request for review, TSA examines the basis for the determination that the repair station poses an immediate risk to security, the repair station's response, and any other relevant materials.

(d) *Final determination.* If TSA determines that the repair station poses an immediate risk to security, the TSA Assistant Secretary or his or her

designee reviews the notification, the materials upon which the notification was based, the repair station's response and any other available information. If the TSA Assistant Secretary or his or her designee determines that the repair station continues to pose an immediate risk to security, the TSA Assistant Secretary or his or her designee submits to the repair station and to the FAA a Final Determination. The Final Determination includes a statement that the TSA Assistant Secretary or his or her designee personally has reviewed all of the relevant information available and has determined that the repair station poses an immediate risk to security. If TSA determines that the repair station does not pose an immediate risk to security, TSA notifies the repair station and the FAA. A Final Determination constitutes a final agency action for purposes of 49 U.S.C. 46111.

§ 1554.205 Nondisclosure of certain information.

In connection with the procedures under this subpart, TSA does not disclose classified information, as defined in Executive Order 12968 section 1.1(d), and TSA reserves the right not to disclose any other information or material not warranting disclosure or protected from disclosure under law or regulation.

Issued in Arlington, Virginia, on November 12, 2009.

Gale Rossides,

Acting Administrator.

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Federal Register

Vol. 74, No. 221

Wednesday, November 18, 2009

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FEDERAL REGISTER PAGES AND DATE, NOVEMBER

56521–56692 2
56693–57056 3
57057–57238 4
57239–57400 5
57401–57558 6
57559–57882 9
57883–58188 10
58189–58532 12
58533–58842 13
58843–59032 16
59033–59472 17
59473–59890 18

CFR PARTS AFFECTED DURING NOVEMBER

At the end of each month, the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

2 CFR

382 58189

3 CFR

Proclamations:
8444 57225
8445 57227
8446 57229
8447 57231
8448 57233
8449 57235
8450 57237
8451 58529
8452 58531
8453 59473
Executive Orders:
13183 (amended by 13517) 57239
13462 (amended by 13516) 57241
13494 (amended by 13517) 57239
13516 ..... 56521, 57241
13517 57239
13518 58533
Administrative Orders:
Memorandums:
Memo. of Nov. 5, 2009 57881
Notices:
Notice of Nov. 6, 2009 58187
Notice of November 12, 2009 58841

5 CFR

Proposed Rules:
731 56747
1604 57125
1651 57125
1653 57125
1690 57125

7 CFR

11 57401
301 57243
319 56523
354 57057
966 57057
983 ..... 56526, 565231
984 56693
987 56697
1710 56542
Proposed Rules:
457 59108
920 58216
1710 56569

9 CFR

78 57245

10 CFR

Proposed Rules:
430 ..... 56928, 58915
431 57738

12 CFR

205 59033
229 58537
327 59056
360 59066

13 CFR

126 56699

14 CFR

23 57060
25 ..... 56702, 56706
39 ..... 56710, 56713, 56717, 57402, 57405, 57408, 57411, 57559, 57561, 57564, 57567, 57571, 57574, 57577, 57578, 58191, 58195, 58539
71 ..... 57246, 59475
97 ..... 58200, 58202
1245 59476
Proposed Rules:
1 58918
23 58918
39 ..... 56748, 57264, 57266, 57268, 57271, 57273, 57277, 58919, 59480, 59483, 59488
71 ..... 57616, 57617, 57618, 57620, 57621, 58569, 58570, 58571, 58573, 59491, 59492

15 CFR

744 57061
774 57581
Proposed Rules:
922 58923

16 CFR

Proposed Rules:
305 57950

17 CFR

4 57585
211 57062
248 58204

18 CFR

375 57246

19 CFR

Proposed Rules:
113 57125
191 57125

20 CFR

655 59069
1910 57883
Proposed Rules:
404 ..... 57970, 57971, 57972

21 CFR

73.....57248, 58843
528.....58205
529.....59073
Proposed Rules:
4.....57973
1308.....59108

26 CFR

1 .....57251, 57252, 59074, 59087
602.....57252
Proposed Rules:
1.....58574
53.....58574

28 CFR

2.....58540

29 CFR

2550.....59092
4001.....59093
4022.....58544, 59093
Proposed Rules:
1202.....56750, 57427
1206.....56750, 57427
1910.....57278, 57976
1915.....57278
1926.....57278

31 CFR

103.....59096
285.....56719
501.....57593
Proposed Rules:
103.....58926

32 CFR

239.....58846
311.....58205
806b.....57414
Proposed Rules:
806b.....57427

33 CFR

117 .....57884, 58209, 58210, 59476, 59477
165 .....57070, 57415, 57886, 57888, 58211, 58545, 59098
334.....58846, 58848
Proposed Rules:
117 .....57975, 58931, 58933
161.....58223
165.....57427, 58223

34 CFR

Ch. 11.....58436, 59688

38 CFR

3.....57072, 58232
9.....59478
200.....57608

39 CFR

20.....57890
111.....57899
3001.....57252
3004.....57252
3020.....56544
Proposed Rules:
111.....59494
3050.....57280

40 CFR

3.....59104
51.....56721
52 .....56721, 57048, 57051, 57074, 57612, 57904, 57907, 58553
81.....58687
112.....58783
141.....57908
180 .....57076, 57078, 57081, 59608
261.....57418
300.....57085, 58554
721.....57424
Proposed Rules:
51.....57126
52 .....56754, 57049, 57055, 57126, 57622, 57978, 59496
60.....58574
61.....58574
63.....58574
70.....57126
71.....57126
271.....59497
300.....58575
721.....57430
1515.....58576

42 CFR

34.....56547
52.....57918
409.....58078
424.....58078
484.....58078
Proposed Rules:
84.....59501
410.....57127
413.....57127
414.....57127

44 CFR

65.....57921
67 .....57923, 57928, 57944
206.....58849
Proposed Rules:
67.....57979

45 CFR

82.....58189

46 CFR

10.....59354
11.....59354
12.....59354
15.....59354
Proposed Rules:
10.....59502
11.....59502
12.....59502
15.....59502
540.....56756

47 CFR

2.....57092
25.....57092
73 .....56726, 56727, 57103, 57104, 57260, 58851
Proposed Rules:
36.....57982
54.....57982
73 .....57281, 57282, 57283, 58936

48 CFR

3009.....58851
3052.....58851
Proposed Rules:
3.....58584
52.....58584

49 CFR

234.....58560
564.....58213
571.....58213, 58562
Proposed Rules:
234.....58589
571.....57623
580.....59503
633.....57986
1520.....59874
1554.....59874

50 CFR

17.....56978, 59444
20.....57615
229.....58859
300.....57105
622.....57261, 58902
648.....56562, 58567
660.....57117, 57425
679 .....56728, 56734, 57262, 57949, 59106, 59479
Proposed Rules:
17 .....56757, 56770, 57804, 57987
222.....59508
223.....57436
224.....57436
635.....57128
648.....57134, 58234

LIST OF PUBLIC LAWS

This is a continuing list of public bills from the current session of Congress which have become Federal laws. It may be used in conjunction with ''P L U S'' (Public Laws Update Service) on 202–741–6043. This list is also available online at *http://www.archives.gov/federal-register/laws.html*.

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S. 475/P.L. 111–97
Military Spouses Residency Relief Act (Nov. 11, 2009; 123 Stat. 3007)

S. 509/P.L. 111–98
To authorize a major medical facility project at the Department of Veterans Affairs Medical Center, Walla Walla, Washington, and for other purposes. (Nov. 11, 2009; 123 Stat. 3010)

Last List November 10, 2009

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