CAN-SPAM Act: A Compliance Guide for Business [PDF]

Do you use email in your business? The CAN-SPAM Act, a law that sets the rules for commercial email, establishes requirements for commercial messages, gives recipients the right to have you stop emailing them, and spells out tough penalties for violations.

Despite its name, the CAN-SPAM Act doesn't apply just to bulk email. It covers all commercial messages, which the law defines as "any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service," including email that promotes content on commercial websites. The law makes no exception for business-to-business email. That means all email – for example, a message to former customers announcing a new product line – must comply with the law.

Each separate email in violation of the CAN-SPAM Act is subject to penalties of up to $16,000, so non-compliance can be costly. But following the law isn't complicated. Here's a rundown of CAN-SPAM's main requirements:

1. **Don't use false or misleading header information.** Your "From," "To," "Reply-To," and routing information – including the originating domain name and email address – must be accurate and identify the person or business who initiated the message.
2. **Don't use deceptive subject lines.** The subject line must accurately reflect the content of the message.
3. **Identify the message as an ad.** The law gives you a lot of leeway in how to do this, but you must disclose clearly and conspicuously that your message is an advertisement.
4. **Tell recipients where you're located.** Your message must include your valid physical postal address. This can be your current street address, a post office box you've registered with the U.S. Postal Service, or a private mailbox you've registered with a commercial mail receiving agency established under Postal Service regulations.
5. **Tell recipients how to opt out of receiving future email from you.** Your message must include a clear and conspicuous explanation of how the recipient can opt out of getting email from you in the future. Craft the notice in a way that's easy for an ordinary person to recognize, read, and understand. Creative use of type size, color, and location can improve clarity. Give a return email address or another easy Internet-based way to allow people to communicate their choice to you. You may create a menu to allow a recipient to opt out of certain types of messages, but you must include the option to stop all commercial messages from you. Make sure your spam filter doesn't block these opt-out requests.
6. **Honor opt-out requests promptly.** Any opt-out mechanism you offer must be able to process opt-out requests for at least 30 days after you send your message. You must honor a recipient's opt-out request within 10 business days. You can't charge a fee, require the recipient to give you any personally identifying information beyond an email address, or make the recipient take any step other than sending a reply email or visiting a single page on an Internet website as a condition for honoring an opt-out request. Once people have told you they don't want to receive more messages from you, you can't sell or transfer their email addresses, even in the form of a mailing list. The only exception is that you may transfer the addresses to a company you've hired to help you comply with the CAN-SPAM Act.
7. **Monitor what others are doing on your behalf.** The law makes clear that even if you hire another company to handle your email marketing, you can't contract away your legal responsibility to comply with the law. Both the company whose product is promoted in the message and the company that actually sends the message may be held legally responsible.

Need more information?

Here are the answers to some questions businesses have had about complying with the CAN-SPAM Act.

Q. How do I know if the CAN-SPAM Act covers email my business is sending?

A. What matters is the "primary purpose" of the message. To determine the primary purpose, remember that an email can contain three different types of information:

- *Commercial content – which advertises or promotes a commercial product or service, including content on a website operated for a commercial purpose;*
- *Transactional or relationship content – which facilitates an already agreed-upon transaction or updates a customer about an ongoing transaction; and*
- *Other content – which is neither commercial nor transactional or relationship.*

If the message contains only commercial content, its primary purpose is commercial and it must comply with the requirements of CAM-SPAM. If it contains only transactional or relationship content, its primary purpose is transactional or relationship. In that case, it may not contain false or misleading routing information, but is otherwise exempt from most provisions of the CAN-SPAM Act.

Q. How do I know if what I'm sending is a transactional or relationship message?

A. The primary purpose of an email is transactional or relationship if it consists only of content that:

1. *facilitates or confirms a commercial transaction that the recipient already has agreed to;*
2. *gives warranty, recall, safety, or security information about a product or service;*
3. *gives information about a change in terms or features or account balance information regarding a membership, subscription, account, loan or other ongoing commercial relationship;*
4. *provides information about an employment relationship or employee benefits; or*
5. *delivers goods or services as part of a transaction that the recipient already has agreed to.*

Q. What if the message combines commercial content and transactional or relationship content?

A. It's common for email sent by businesses to mix commercial content and transactional or relationship content. When an email contains both kinds of content, the primary purpose of the message is the deciding factor. Here's how to make that determination: If a recipient reasonably interpreting the subject line would likely conclude that the message contains an advertisement or promotion for a commercial product or service or if the message's transactional or relationship content does not appear mainly at the beginning of the message, the primary purpose of the message is commercial. So, when a message contains both kinds of content – commercial and transactional or relationship – if the subject line would lead the recipient to think it's a commercial message, it's a commercial message for CAN-SPAM purposes. Similarly, if the bulk of the transactional or relationship part of the message doesn't appear at the beginning, it's a commercial message under the CAN-SPAM Act.

Here's an example:

MESSAGE A:

***TO:** Jane Smith*

***FR:** XYZ Distributing*

***RE:** Your Account Statement*

We shipped your order of 25,000 deluxe widgets to your Springfield warehouse on June 1st. We hope you received them in good working order. Please call our Customer Service Office at (877) 555-7726 if any widgets were damaged in transit. Per our contract, we must receive your payment of $1,000 by June 30th. If not, we will impose a 10% surcharge for late payment. If you have any questions, please contact our Accounts Receivable Department.

Visit our website for our exciting new line of mini-widgets!

***MESSAGE A** is most likely a **transactional or relationship message** subject only to CAN-SPAM's requirement of truthful routing information. One important factor is that information about the customer's account is at the beginning of the message and the brief commercial portion of the message is at the end.*

MESSAGE B:

***TO:** Jane Smith*

***FR:** XYZ Distributing*

***RE:** Your Account Statement*

We offer a wide variety of widgets in the most popular designer colors and styles – all at low, low discount prices. Visit our website for our exciting new line of mini-widgets!

Sizzling Summer Special: Order by June 30th and all waterproof commercial-grade super-widgets are 20%

off. Show us a bid from one of our competitors and we'll match it. XYZ Distributing will not be undersold.

Your order has been filled and will be delivered on Friday, June 1st.

*MESSAGE **MESSAGE B** is most likely a **commercial message** subject to all CAN-SPAM's requirements. Although the subject line is "Your Account Statement" – generally a sign of a transactional or relationship message – the information at the beginning of the message is commercial in nature and the brief transactional or relationship portion of the message is at the end.*

Q. What if the message combines elements of both a commercial message and a message with content defined as "other"?

A. In that case, the primary purpose of the message is commercial and the provisions of the CAN-SPAM Act apply if:

- *A recipient reasonably interpreting the subject line would likely conclude that the message advertises or promotes a commercial product or service; and*
- *A recipient reasonably interpreting the body of the message would likely conclude that the primary purpose of the message is to advertise or promote a product or service.*

Factors relevant to that interpretation include the location of the commercial content (for example, is it at the beginning of the message?); how much of the message is dedicated to commercial content; and how color, graphics, type size, style, etc., are used to highlight the commercial content.

Q. What if the email includes information from more than one company? Who is the "sender" responsible for CAN-SPAM compliance?

A. If an email advertises or promotes the goods, services, or websites of more than one marketer, there's a straightforward method for determining who's responsible for the duties the CAN-SPAM Act imposes on "senders" of commercial email. Marketers whose goods, services, or websites are advertised or promoted in a message can designate one of the marketers as the "sender" for purposes of CAN-SPAM compliance as long as the designated sender:

- *meets the CAN-SPAM Act's definition of "sender," meaning that they initiate a commercial message advertising or promoting their own goods, services, or website;*
- *is specifically identified in the "from" line of the message; and*
- *complies with the "initiator" provisions of the Act – for example, making sure the email does not contain deceptive transmission information or a deceptive subject heading, and ensuring that the email includes a valid postal address, a working opt-out link, and proper identification of the message's commercial or sexually explicit nature.*

If the designated sender doesn't comply with the responsibilities the law gives to initiators, all marketers in the message may be held liable as senders.

Q. My company sends email with a link so that recipients can forward the message to others. Who is responsible for CAN-SPAM compliance for these "Forward to a Friend" messages?

A. Whether a seller or forwarder is a "sender" or "initiator" depends on the facts. So deciding if the CAN-SPAM Act applies to a commercial "forward-to-a-friend" message often depends on whether the seller has offered to pay the forwarder or give the forwarder some other benefit. For example, if the seller offers money, coupons, discounts, awards, additional entries in a sweepstakes, or the like in exchange for forwarding a message, the seller may be responsible for compliance. Or if a seller pays or give a benefit to someone in exchange for generating traffic to a website or for any form of referral, the seller is likely to have compliance obligations under the CAN-SPAM Act.

Q. What are the penalties for violating the CAN-SPAM Act?

A. Each separate email in violation of the law is subject to penalties of up to $16,000, and more than one person may be held responsible for violations. For example, both the company whose product is promoted in the message and the company that originated the message may be legally responsible. Email that makes misleading claims about products or services also may be subject to laws outlawing deceptive advertising, like Section 5 of the FTC Act. The CAN-SPAM Act has certain aggravated violations that may give rise to additional fines. The law provides for criminal penalties – including imprisonment – for:

- *accessing someone else's computer to send spam without permission,*

- *using false information to register for multiple email accounts or domain names,*
- *relaying or retransmitting multiple spam messages through a computer to mislead others about the origin of the message,*
- *harvesting email addresses or generating them through a dictionary attack (the practice of sending email to addresses made up of random letters and numbers in the hope of reaching valid ones), and*
- *taking advantage of open relays or open proxies without permission.*

Q. Are there separate rules that apply to sexually explicit email?

A. Yes, and the FTC has issued a rule under the CAN-SPAM Act that governs these messages. Messages with sexually oriented material must include the warning "SEXUALLY-EXPLICIT:" at the beginning of the subject line. In addition, the rule requires the electronic equivalent of a "brown paper wrapper" in the body of the message. When a recipient opens the message, the only things that may be viewable on the recipient's screen are:

1. *the words "SEXUALLY-EXPLICIT:"; and*
2. *the same information required in any other commercial email: a disclosure that the message is an ad, the sender's physical postal address, and the procedure for how recipients can opt out of receiving messages from this sender in the future.*

No graphics are allowed on the "brown paper wrapper." This provision makes sure that recipients cannot view sexually explicit content without an affirmative act on their part – for example, scrolling down or clicking on a link. However, this requirement does not apply if the person receiving the message has already given affirmative consent to receive the sender's sexually oriented messages.

Q. How can I comment about the effect of the CAN-SPAM Act on my business?

A. The National Small Business Ombudsman collects comments from small businesses about federal compliance and enforcement activities. To comment, call 1-888-REG-FAIR (1-888-734-3247) or visit www.sba.gov/ombudsman.

For More Information

The FTC works for the consumer to prevent fraudulent, deceptive, and unfair business practices in the marketplace and to provide information to help consumers spot, stop, and avoid them. To file a complaint or to get free information on consumer issues, visit ftc.gov or call toll-free, 1-877-FTC-HELP (1-877-382-4357); TTY: 1-866-653-4261. The FTC enters consumer complaints into the Consumer Sentinel Network, a secure online database and investigative tool used by hundreds of civil and criminal law enforcement agencies in the U.S. and abroad.

Your Opportunity to Comment

The National Small Business Ombudsman and 10 Regional Fairness Boards collect comments from small businesses about federal compliance and enforcement activities. Each year, the Ombudsman evaluates the conduct of these activities and rates each agency's responsiveness to small businesses. Small businesses can comment to the Ombudsman without fear of reprisal. To comment, call toll-free 1-888-REGFAIR (1-888-734-3247) or go to www.sba.gov/ombudsman.

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§ 2550.404a–4 Selection of annuity providers—safe harbor for individual account plans.

(a) *Scope.* (1) This section establishes a safe harbor for satisfying the fiduciary duties under section 404(a)(1)(B) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1104–1114, in selecting an annuity provider and contract for benefit distributions from an individual account plan. For guidance concerning the selection of an annuity provider for defined benefit plans see 29 CFR 2509.95–1.

(2) This section sets forth an optional means for satisfying the fiduciary responsibilities under section 404(a)(1)(B) of ERISA with respect to the selection of an annuity provider or contract for benefit distributions. This section does not establish minimum requirements or the exclusive means for satisfying these responsibilities.

(b) *Safe harbor.* The selection of an annuity provider for benefit distributions from an individual account plan satisfies the requirements of section 404(a)(1)(B) of ERISA if the fiduciary:

(1) Engages in an objective, thorough and analytical search for the purpose of identifying and selecting providers from which to purchase annuities;

(2) Appropriately considers information sufficient to assess the ability of the annuity provider to make all future payments under the annuity contract;

(3) Appropriately considers the cost (including fees and commissions) of the annuity contract in relation to the benefits and administrative services to be provided under such contract;

(4) Appropriately concludes that, at the time of the selection, the annuity provider is financially able to make all future payments under the annuity contract and the cost of the annuity contract is reasonable in relation to the benefits and services to be provided under the contract; and

(5) If necessary, consults with an appropriate expert or experts for purposes of compliance with the provisions of this paragraph (b).

(c) *Time of selection.* For purposes of paragraph (b) of this section, the ''time of selection'' may be either:

(1) The time that the annuity provider and contract are selected for distribution of benefits to a specific participant or beneficiary; or

(2) The time that the annuity provider is selected to provide annuity contracts at future dates to participants or beneficiaries, provided that the selecting fiduciary periodically reviews the continuing appropriateness of the conclusion described in paragraph (b)(4) of this section, taking into account the factors described in paragraphs (b)(2), (3) and (5) of this section. For purposes of this paragraph (c)(2), a fiduciary is not required to review the appropriateness of this conclusion with respect to any annuity contract purchased for any specific participant or beneficiary.

[73 FR 58449, Oct. 7, 2008]

§ 2550.404a–5 Fiduciary requirements for disclosure in participant-directed individual account plans.

(a) *General.* The investment of plan assets is a fiduciary act governed by the fiduciary standards of section 404(a)(1)(A) and (B) of the Employee Retirement Income Security Act of 1974, as amended (ERISA), 29 U.S.C. 1001 *et seq.* (all section references herein are references to ERISA unless otherwise indicated). Pursuant to section 404(a)(1)(A) and (B), fiduciaries must discharge their duties with respect to the plan prudently and solely in the interest of participants and beneficiaries. When the documents and instruments governing an individual account plan, described in paragraph (b)(2) of this section, provide for the allocation of investment responsibilities to participants or beneficiaries, the plan administrator, as defined in section 3(16), must take steps to ensure, consistent with section 404(a)(1)(A) and (B), that such participants and beneficiaries, on a regular and periodic basis, are made aware of their rights and responsibilities with respect to the investment of assets held in, or contributed to, their accounts and are provided sufficient information regarding the plan, including fees and expenses, and regarding

designated investment alternatives, including fees and expenses attendant thereto, to make informed decisions with regard to the management of their individual accounts.

(b) *Satisfaction of duty to disclose.* (1) In general. The plan administrator of a covered individual account plan must comply with the disclosure requirements set forth in paragraphs (c) and (d) of this section with respect to each participant or beneficiary that, pursuant to the terms of the plan, has the right to direct the investment of assets held in, or contributed to, his or her individual account. Compliance with paragraphs (c) and (d) of this section will satisfy the duty to make the regular and periodic disclosures described in paragraph (a) of this section, provided that the information contained in such disclosures is complete and accurate. A plan administrator will not be liable for the completeness and accuracy of information used to satisfy these disclosure requirements when the plan administrator reasonably and in good faith relies on information received from or provided by a plan service provider or the issuer of a designated investment alternative.

(2) *Covered individual account plan.* For purposes of paragraph (b)(1) of this section, a ''covered individual account plan'' is any participant-directed individual account plan as defined in section 3(34) of ERISA, except that such term shall not include plans involving individual retirement accounts or individual retirement annuities described in sections 408(k) (''simplified employee pension'') or 408(p) (''simple retirement account'') of the Internal Revenue Code of 1986.

(c) *Disclosure of plan-related information.* A plan administrator (or person designated by the plan administrator to act on its behalf) shall provide to each participant or beneficiary the plan-related information described in paragraphs (c)(1) through (4) of this section, based on the latest information available to the plan.

(1) *General.* (i) On or before the date on which a participant or beneficiary can first direct his or her investments and at least annually thereafter:

(A) An explanation of the circumstances under which participants and beneficiaries may give investment instructions;

(B) An explanation of any specified limitations on such instructions under the terms of the plan, including any restrictions on transfer to or from a designated investment alternative;

(C) A description of or reference to plan provisions relating to the exercise of voting, tender and similar rights appurtenant to an investment in a designated investment alternative as well as any restrictions on such rights;

(D) An identification of any designated investment alternatives offered under the plan;

(E) An identification of any designated investment managers; and

(F) A description of any ''brokerage windows,'' ''self-directed brokerage accounts,'' or similar plan arrangements that enable participants and beneficiaries to select investments beyond those designated by the plan.

(ii) If there is a change to the information described in paragraph (c)(1)(i)(A) through (F) of this section, each participant and beneficiary must be furnished a description of such change at least 30 days, but not more than 90 days, in advance of the effective date of such change, unless the inability to provide such advance notice is due to events that were unforeseeable or circumstances beyond the control of the plan administrator, in which case notice of such change must be furnished as soon as reasonably practicable.

(2) *Administrative expenses.* (i)(A) On or before the date on which a participant or beneficiary can first direct his or her investments and at least annually thereafter, an explanation of any fees and expenses for general plan administrative services (*e.g.*, legal, accounting, recordkeeping), which may be charged against the individual accounts of participants and beneficiaries and are not reflected in the total annual operating expenses of any designated investment alternative, as well as the basis on which such charges will be allocated (*e.g.*, pro rata, per capita) to, or affect the balance of, each individual account.

(B) If there is a change to the information described in paragraph

(c)(2)(i)(A) of this section, each participant and beneficiary must be furnished a description of such change at least 30 days, but not more than 90 days, in advance of the effective date of such change, unless the inability to provide such advance notice is due to events that were unforeseeable or circumstances beyond the control of the plan administrator, in which case notice of such change must be furnished as soon as reasonably practicable.

(ii) At least quarterly, a statement that includes:

(A) The dollar amount of the fees and expenses described in paragraph (c)(2)(i)(A) of this section that are actually charged (whether by liquidating shares or deducting dollars) during the preceding quarter to the participant's or beneficiary's account for such services;

(B) A description of the services to which the charges relate (*e.g.*, plan administration, including recordkeeping, legal, accounting services); and

(C) If applicable, an explanation that, in addition to the fees and expenses disclosed pursuant to paragraph (c)(2)(ii) of this section, some of the plan's administrative expenses for the preceding quarter were paid from the total annual operating expenses of one or more of the plan's designated investment alternatives (*e.g.*, through revenue sharing arrangements, Rule 12b–1 fees, sub-transfer agent fees).

(3) *Individual expenses.* (i)(A) On or before the date on which a participant or beneficiary can first direct his or her investments and at least annually thereafter, an explanation of any fees and expenses that may be charged against the individual account of a participant or beneficiary on an individual, rather than on a plan-wide, basis (*e.g.*, fees attendant to processing plan loans or qualified domestic relations orders, fees for investment advice, fees for brokerage windows, commissions, front- or back-end loads or sales charges, redemption fees, transfer fees and similar expenses, and optional rider charges in annuity contracts) and which are not reflected in the total annual operating expenses of any designated investment alternative.

(B) If there is a change to the information described in paragraph (c)(3)(i)(A) of this section, each participant and beneficiary must be furnished a description of such change at least 30 days, but not more than 90 days, in advance of the effective date of such change, unless the inability to provide such advance notice is due to events that were unforeseeable or circumstances beyond the control of the plan administrator, in which case notice of such change must be furnished as soon as reasonably practicable.

(ii) At least quarterly, a statement that includes:

(A) The dollar amount of the fees and expenses described in paragraph (c)(3)(i)(A) of this section that are actually charged (whether by liquidating shares or deducting dollars) during the preceding quarter to the participant's or beneficiary's account for individual services; and

(B) A description of the services to which the charges relate (*e.g.*, loan processing fee).

(4) *Disclosures on or before first investment.* The requirements of paragraphs (c)(1)(i), (c)(2)(i)(A), (c)(3)(i)(A) of this section to furnish information on or before the date on which a participant or beneficiary can first direct his or her investments may be satisfied by furnishing to the participant or beneficiary the most recent annual disclosure furnished to participants and beneficiaries pursuant those paragraphs and any updates to the information furnished to participants and beneficiaries pursuant to paragraphs (c)(1)(ii), (c)(2)(i)(B) and (c)(3)(i)(B) of this section.

(d) *Disclosure of investment-related information.* The plan administrator (or person designated by the plan administrator to act on its behalf), based on the latest information available to the plan, shall:

(1) *Information to be provided automatically.* Except as provided in paragraph (i) of this section, furnish to each participant or beneficiary on or before the date on which he or she can first direct his or her investments and at least annually thereafter, the following information with respect to each designated investment alternative offered under the plan—

(i) *Identifying information.* Such information shall include:

(A) The name of each designated investment alternative; and

(B) The type or category of the investment (*e.g.*, money market fund, balanced fund (stocks and bonds), large-cap stock fund, employer stock fund, employer securities).

(ii) *Performance data.* (A) For designated investment alternatives with respect to which the return is not fixed, the average annual total return of the investment for 1-, 5-, and 10-calendar year periods (or for the life of the alternative, if shorter) ending on the date of the most recently completed calendar year; as well as a statement indicating that an investment's past performance is not necessarily an indication of how the investment will perform in the future; and

(B) For designated investment alternatives with respect to which the return is fixed or stated for the term of the investment, both the fixed or stated annual rate of return and the term of the investment. If, with respect to such a designated investment alternative, the issuer reserves the right to adjust the fixed or stated rate of return prospectively during the term of the contract or agreement, the current rate of return, the minimum rate guaranteed under the contract, if any, and a statement advising participants and beneficiaries that the issuer may adjust the rate of return prospectively and how to obtain (*e.g.*, telephone or Web site) the most recent rate of return required under this section.

(iii) *Benchmarks.* For designated investment alternatives with respect to which the return is not fixed, the name and returns of an appropriate broad-based securities market index over the 1-, 5-, and 10-calendar year periods (or for the life of the alternative, if shorter) comparable to the performance data periods provided under paragraph (d)(1)(ii)(A) of this section, and which is not administered by an affiliate of the investment issuer, its investment adviser, or a principal underwriter, unless the index is widely recognized and used.

(iv) *Fee and expense information.* (A) For designated investment alternatives with respect to which the return is not fixed:

(1) The amount and a description of each shareholder-type fee (fees charged directly against a participant's or beneficiary's investment, such as commissions, sales loads, sales charges, deferred sales charges, redemption fees, surrender charges, exchange fees, account fees, and purchase fees, which are not included in the total annual operating expenses of any designated investment alternative) and a description of any restriction or limitation that may be applicable to a purchase, transfer, or withdrawal of the investment in whole or in part (such as round trip, equity wash, or other restrictions);

(2) The total annual operating expenses of the investment expressed as a percentage (*i.e.*, expense ratio), calculated in accordance with paragraph (h)(5) of this section;

(3) The total annual operating expenses of the investment for a one-year period expressed as a dollar amount for a $1,000 investment (assuming no returns and based on the percentage described in paragraph (d)(1)(iv)(A)(*2*) of this section);

(4) A statement indicating that fees and expenses are only one of several factors that participants and beneficiaries should consider when making investment decisions; and

(5) A statement that the cumulative effect of fees and expenses can substantially reduce the growth of a participant's or beneficiary's retirement account and that participants and beneficiaries can visit the Employee Benefit Security Administration's Web site for an example demonstrating the long-term effect of fees and expenses.

(B) For designated investment alternatives with respect to which the return is fixed for the term of the investment, the amount and a description of any shareholder-type fees and a description of any restriction or limitation that may be applicable to a purchase, transfer or withdrawal of the investment in whole or in part.

(v) *Internet Web site address.* An Internet Web site address that is sufficiently specific to provide participants and beneficiaries access to the following information regarding the designated investment alternative:

(A) The name of the alternative's issuer;

(B) The alternative's objectives or goals in a manner consistent with Securities and Exchange Commission Form N–1A or N–3, as appropriate;

(C) The alternative's principal strategies (including a general description of the types of assets held by the investment) and principal risks in a manner consistent with Securities and Exchange Commission Form N–1A or N–3, as appropriate;

(D) The alternative's portfolio turnover rate in a manner consistent with Securities and Exchange Commission Form N–1A or N–3, as appropriate;

(E) The alternative's performance data described in paragraph (d)(1)(ii) of this section updated on at least a quarterly basis, or more frequently if required by other applicable law; and

(F) The alternative's fee and expense information described in paragraph (d)(1)(iv) of this section.

(vi) *Glossary.* A general glossary of terms to assist participants and beneficiaries in understanding the designated investment alternatives, or an Internet Web site address that is sufficiently specific to provide access to such a glossary along with a general explanation of the purpose of the address.

(vii) *Annuity options.* If a designated investment alternative is part of a contract, fund or product that permits participants or beneficiaries to allocate contributions toward the future purchase of a stream of retirement income payments guaranteed by an insurance company, the information set forth in paragraph (i)(2)(i) through (i)(2)(vii) of this section with respect to the annuity option, to the extent such information is not otherwise included in investment-related fees and expenses described in paragraph (d)(1)(iv).

(viii) *Disclosures on or before first investment.* The requirement in paragraph (d)(1) of this section to provide information to a participant or beneficiary on or before the date on which the participant or beneficiary can first direct his or her investments may be satisfied by furnishing to the participant or beneficiary the most recent annual disclosure furnished to participants and beneficiaries pursuant to paragraph (d)(1) of this section.

(2) *Comparative format.* (i) Furnish the information described in paragraph (d)(1) and, if applicable, paragraph (i) of this section in a chart or similar format that is designed to facilitate a comparison of such information for each designated investment alternative available under the plan and prominently displays the date, and that includes:

(A) A statement indicating the name, address, and telephone number of the plan administrator (or a person or persons designated by the plan administrator to act on its behalf) to contact for the provision of the information required by paragraph (d)(4) of this section;

(B) A statement that additional investment-related information (including more current performance information) is available at the listed Internet Web site addresses (*see* paragraph (d)(1)(v) of this section); and

(C) A statement explaining how to request and obtain, free of charge, paper copies of the information required to be made available on a Web site pursuant to paragraph (d)(1)(v), paragraph (i)(2)(vi), relating to annuity options, or paragraph (i)(3), relating to fixed-return investments, of this section.

(ii) Nothing in this section shall preclude a plan administrator from including additional information that the plan administrator determines appropriate for such comparisons, provided such information is not inaccurate or misleading.

(3) *Information to be provided subsequent to investment.* Furnish to each investing participant or beneficiary, subsequent to an investment in a designated investment alternative, any materials provided to the plan relating to the exercise of voting, tender and similar rights appurtenant to the investment, to the extent that such rights are passed through to such participant or beneficiary under the terms of the plan.

(4) *Information to be provided upon request.* Furnish to each participant or

beneficiary, either at the times specified in paragraph (d)(1), or upon request, the following information relating to designated investment alternatives—

(i) Copies of prospectuses (or, alternatively, any short-form or summary prospectus, the form of which has been approved by the Securities and Exchange Commission) for the disclosure of information to investors by entities registered under either the Securities Act of 1933 or the Investment Company Act of 1940, or similar documents relating to designated investment alternatives that are provided by entities that are not registered under either of these Acts;

(ii) Copies of any financial statements or reports, such as statements of additional information and shareholder reports, and of any other similar materials relating to the plan's designated investment alternatives, to the extent such materials are provided to the plan;

(iii) A statement of the value of a share or unit of each designated investment alternative as well as the date of the valuation; and

(iv) A list of the assets comprising the portfolio of each designated investment alternative which constitute plan assets within the meaning of 29 CFR 2510.3–101 and the value of each such asset (or the proportion of the investment which it comprises).

(e) *Form of disclosure.* (1) The information required to be disclosed pursuant to paragraphs (c)(1)(i), (c)(2)(i)(A), and (c)(3)(i)(A) of this section may be provided as part of the plan's summary plan description furnished pursuant to ERISA section 102 or as part of a pension benefit statement furnished pursuant to ERISA section 105(a)(1)(A)(i), if such summary plan description or pension benefit statement is furnished at a frequency that comports with paragraph (c)(1)(i) of this section.

(2) The information required to be disclosed pursuant to paragraphs (c)(2)(ii) and (c)(3)(ii) of this section may be included as part of a pension benefit statement furnished pursuant to ERISA section 105(a)(1)(A)(i).

(3) A plan administrator that uses and accurately completes the model in the Appendix, taking into account each designated investment alternative offered under the plan, will be deemed to have satisfied the requirements of paragraph (d)(2) of this section.

(4) Except as otherwise explicitly required herein, fees and expenses may be expressed in terms of a monetary amount, formula, percentage of assets, or per capita charge.

(5) The information required to be prepared by the plan administrator for disclosure under this section shall be written in a manner calculated to be understood by the average plan participant.

(f) *Selection and monitoring.* Nothing herein is intended to relieve a fiduciary from its duty to prudently select and monitor providers of services to the plan or designated investment alternatives offered under the plan.

(g) *Manner of furnishing. Reserved.*

(h) *Definitions.* For purposes of this section, the term—

(1) *At least annually thereafter* means at least once in any 12-month period, without regard to whether the plan operates on a calendar or fiscal year basis.

(2) *At least quarterly* means at least once in any 3-month period, without regard to whether the plan operates on a calendar or fiscal year basis.

(3) *Average annual total return* means the average annual compounded rate of return that would equate an initial investment in a designated investment alternative to the ending redeemable value of that investment calculated with the before tax methods of computation prescribed in Securities and Exchange Commission Form N–1A, N–3, or N–4, as appropriate, except that such method of computation may exclude any front-end, deferred or other sales loads that are waived for the participants and beneficiaries of the covered individual account plan.

(4) *Designated investment alternative* means any investment alternative designated by the plan into which participants and beneficiaries may direct the investment of assets held in, or contributed to, their individual accounts. The term ''designated investment alternative'' shall not include ''brokerage windows,'' ''self-directed brokerage accounts,'' or similar plan arrangements that enable participants and

beneficiaries to select investments beyond those designated by the plan.

(5) *Total annual operating expenses* means:

(i) In the case of a designated investment alternative that is registered under the Investment Company Act of 1940, the annual operating expenses and other asset-based charges before waivers and reimbursements (*e.g.*, investment management fees, distribution fees, service fees, administrative expenses, separate account expenses, mortality and expense risk fees) that reduce the alternative's rate of return, expressed as a percentage, calculated in accordance with the required Securities and Exchange Commission form, *e.g.*, Form N–1A (open-end management investment companies) or Form N–3 or N–4 (separate accounts offering variable annuity contracts); or

(ii) In the case of a designated investment alternative that is not registered under the Investment Company Act of 1940, the sum of the fees and expenses described in paragraphs (h)(5)(ii)(A) through (C) of this section before waivers and reimbursements, for the alternative's most recently completed fiscal year, expressed as a percentage of the alternative's average net asset value for that year—

(A) Management fees as described in the Securities and Exchange Commission Form N–1A that reduce the alternative's rate of return,

(B) Distribution and/or servicing fees as described in the Securities and Exchange Commission Form N–1A that reduce the alternative's rate of return, and

(C) Any other fees or expenses not included in paragraphs (h)(5)(ii)(A) or (B) of this section that reduce the alternative's rate of return (*e.g.*, externally negotiated fees, custodial expenses, legal expenses, accounting expenses, transfer agent expenses, recordkeeping fees, administrative fees, separate account expenses, mortality and expense risk fees), excluding brokerage costs described in Item 21 of Securities and Exchange Commission Form N–1A.

(i) *Special rules.* The rules set forth in this paragraph apply solely for purposes of paragraph (d)(1) of this section.

(1) *Qualifying employer securities.* In the case of designated investment alternatives designed to invest in, or primarily in, qualifying employer securities, within the meaning of section 407 of ERISA, the following rules shall apply—

(i) In lieu of the requirements of paragraph (d)(1)(v)(C) of this section (relating to principal strategies and principal risks), provide an explanation of the importance of a well-balanced and diversified investment portfolio.

(ii) The requirements of paragraph (d)(1)(v)(D) of this section (relating to portfolio turnover rate) do not apply to such designated investment alternatives.

(iii) The requirements of paragraph (d)(1)(v)(F) of this section (relating to fee and expense information) do not apply to such designated investment alternatives, unless the designated investment alternative is a fund with respect to which participants or beneficiaries acquire units of participation, rather than actual shares, in exchange for their investment.

(iv) The requirements of paragraph (d)(1)(iv)(A)(*2*) of this section (relating to total annual operating expenses expressed as a percentage) do not apply to such designated investment alternatives, unless the designated investment alternative is a fund with respect to which participants or beneficiaries acquire units of participation, rather than actual shares, in exchange for their investment.

(v) The requirements of paragraph (d)(1)(iv)(A)(*3*) of this section (relating to total annual operating expenses expressed as a dollar amount per $1,000 invested) do not apply to such designated investment alternatives, unless the designated investment alternative is a fund with respect to which participants or beneficiaries acquire units of participation, rather than actual shares, in exchange for their investment.

(vi)(A) With respect to the requirement in paragraph (d)(1)(ii)(A) of this section (relating to performance data for 1-, 5-, and 10-year periods), the definition of ''average annual total return'' as defined in paragraph (i)(1)(vi)(B) of this section shall apply to such designated investment alternatives in lieu

of the definition in paragraph (h)(3) of this section if the qualifying employer securities are publicly traded on a national exchange or generally recognized market and the designated investment alternative is not a fund with respect to which participants or beneficiaries acquire units of participation, rather than actual shares, in exchange for their investment.

(B) The term ''average annual total return'' means the change in value of an investment in one share of stock on an annualized basis over a specified period, calculated by taking the sum of the dividends paid during the measurement period, assuming reinvestment, plus the difference between the stock price (consistent with ERISA section 3(18)) at the end and at the beginning of the measurement period, and dividing by the stock price at the beginning of the measurement period; reinvestment of dividends is assumed to be in stock at market prices at approximately the same time actual dividends are paid.

(C) The definition of ''average annual total return'' in paragraph (i)(1)(vi)(B) of this section shall apply to such designated investment alternatives consisting of employer securities that are not publicly traded on a national exchange or generally recognized market, unless the designated investment alternative is a fund with respect to which participants or beneficiaries acquire units of participation, rather than actual shares, in exchange for their investment. Changes in value shall be calculated using principles similar to those set forth in paragraph (i)(1)(vi)(B) of this section.

(2) *Annuity options.* In the case of a designated investment alternative that is a contract, fund or product that permits participants or beneficiaries to allocate contributions toward the current purchase of a stream of retirement income payments guaranteed by an insurance company, the plan administrator shall, in lieu of the information required by paragraphs (d)(1)(i) through (d)(1)(v), provide each participant or beneficiary the following information with respect to each such option:

(i) The name of the contract, fund or product;

(ii) The option's objectives or goals (*e.g.*, to provide a stream of fixed retirement income payments for life);

(iii) The benefits and factors that determine the price (*e.g.*, age, interest rates, form of distribution) of the guaranteed income payments;

(iv) Any limitations on the ability of a participant or beneficiary to withdraw or transfer amounts allocated to the option (*e.g.*, lock-ups) and any fees or charges applicable to such withdrawals or transfers;

(v) Any fees that will reduce the value of amounts allocated by participants or beneficiaries to the option, such as surrender charges, market value adjustments, and administrative fees;

(vi) A statement that guarantees of an insurance company are subject to its long-term financial strength and claims-paying ability; and

(vii) An Internet Web site address that is sufficiently specific to provide participants and beneficiaries access to the following information—

(A) The name of the option's issuer and of the contract, fund or product;

(B) Description of the option's objectives or goals;

(C) Description of the option's distribution alternatives/guaranteed income payments (*e.g.*, payments for life, payments for a specified term, joint and survivor payments, optional rider payments), including any limitations on the right of a participant or beneficiary to receive such payments;

(D) Description of costs and/or factors taken into account in determining the price of benefits under an option's distribution alternatives/guaranteed income payments (*e.g.*, age, interest rates, other annuitization assumptions);

(E) Description of any limitations on the right of a participant or beneficiary to withdraw or transfer amounts allocated to the option and any fees or charges applicable to a withdrawal or transfer; and

(F) Description of any fees that will reduce the value of amounts allocated by participants or beneficiaries to the option (*e.g.*, surrender charges, market value adjustments, administrative fees).

(3) *Fixed-return investments.* In the case of a designated investment alternative with respect to which the return is fixed for the term of the investment, the plan administrator shall, in lieu of complying with the requirements of paragraph (d)(1)(v) of this section, provide an Internet Web site address that is sufficiently specific to provide participants and beneficiaries access to the following information—

(i) The name of the alternative's issuer;

(ii) The alternatives objectives or goals (*e.g.,* to provide stability of principal and guarantee a minimum rate of return);

(iii) The alternative's performance data described in paragraph (d)(1)(ii)(B) of this section updated on at least a quarterly basis, or more frequently if required by other applicable law;

(iv) The alternative's fee and expense information described in paragraph (d)(1)(iv)(B) of this section.

(4) *Target date or similar funds. Reserved.*

(j) *Dates.* (1) *Effective date.* This section shall be effective on December 20, 2010.

(2) *Applicability date.* This section shall apply to covered individual account plans for plan years beginning on or after November 1, 2011.

(3) *Transitional rules.* (i) Notwithstanding paragraphs (b), (c) and (d) of this section, the initial disclosures required on or before the date on which a participant or beneficiary can first direct his or her investment must be furnished no later than 60 days after such applicability date to participants or beneficiaries who had the right to direct the investment of assets held in, or contributed to, their individual account on the applicability date.

(ii) For plan years beginning before October 1, 2021, if a plan administrator reasonably and in good faith determines that it does not have the information on expenses attributable to the plan that is necessary to calculate, in accordance with paragraph (h)(3) of this section, the 5-year and 10-year average annual total returns for a designated investment alternative that is not registered under the Investment Company Act of 1940, the plan administrator may use a reasonable estimate of such expenses or the plan administrator may use the most recently reported total annual operating expenses of the designated investment alternative as a substitute for such expenses. When a plan administrator uses a reasonable estimate or the most recently reported total annual operating expenses as a substitute for actual expenses pursuant to this paragraph, the administrator shall inform participants of the basis on which the returns were determined. Nothing in this section requires disclosure of returns for periods before the inception of a designated investment alternative.

APPENDIX to §2550.404a-5 – Model Comparative Chart

ABC Corporation 401k Retirement Plan

Investment Options – January 1, 20XX

This document includes important information to help you compare the investment options under your retirement plan. If you want additional information about your investment options, you can go to the specific Internet Web site address shown below or you can contact [insert name of plan administrator or designee] at [insert telephone number and address]. A free paper copy of the information available on the Web site[s] can be obtained by contacting [insert name of plan administrator or designee] at [insert telephone number].

Document Summary

This document has 3 parts. Part I consists of performance information for plan investment options. This part shows you how well the investments have performed in the past. Part II shows you the fees and expenses you will pay if you invest in an option. Part III contains information about the annuity options under your retirement plan.

Part I. Performance Information

Table 1 focuses on the performance of investment options that do not have a fixed or stated rate of return. Table 1 shows how these options have performed over time and allows you to compare them with an appropriate benchmark for the same time periods. Past performance does not guarantee how the investment option will perform in the future. Your investment in these options could lose money. Information about an option's principal risks is available on the Web site[s].

Table 1—Variable Return Investments

Name/ Type of Option	Average Annual Total Return as of 12/31/XX				Benchmark			
	1yr.	5yr.	10yr.	Since Inception	1yr.	5yr.	10yr.	Since Inception
Equity Funds								
A Index Fund/ S&P 500 www. website address	26.5%	.34%	-1.03%	9.25%	26.46%	.42%	-.95%	9.30%
					S&P 500			
B Fund/ Large Cap www. website address	27.6%	.99%	N/A	2.26%	27.80%	1.02%	N/A	2.77%
					US Prime Market 750 Index			
C Fund/ Int'l Stock www. website address	36.73%	5.26%	2.29%	9.37%	40.40%	5.40%	2.40%	12.09%
					MSCI EAFE			
D Fund/ Mid Cap www. website address	40.22%	2.28%	6.13%	3.29%	46.29%	2.40%	-.52%	4.16%
					Russell Midcap			
Bond Funds								
E Fund/ Bond Index www. website address	6.45%	4.43%	6.08%	7.08%	5.93%	4.97%	6.33%	7.01%
					Barclays Cap. Aggr. Bd.			
Other								
F Fund/ GICs	.72%	3.36%	3.11%	5.56%	1.8%	3.1%	3.3%	5.75%

www. website address					3-month US T-Bill Index			
G Fund/ Stable Value www. website address	4.36%	4.64%	5.07%	3.75%	1.8%	3.1%	3.3%	4.99%
					3-month US T-Bill Index			
Generations 2020/ Lifecycle Fund www. website address	27.94%	N/A	N/A	2.45%	26.46%	N/A	N/A	3.09%
					S&P 500			
					23.95%	N/A	N/A	3.74%
					Generations 2020 Composite Index*			

*Generations 2020 composite index is a combination of a total market index and a US aggregate bond index proportional to the equity/bond allocation in the Generations 2020 Fund.

Table 2 focuses on the performance of investment options that have a fixed or stated rate of return. Table 2 shows the annual rate of return of each such option, the term or length of time that you will earn this rate of return, and other information relevant to performance.

Table 2—Fixed Return Investments

Name/ Type of Option	Return	Term	Other
H 200X/ GIC www. website address	4%	2 Yr.	The rate of return does not change during the stated term.
I LIBOR Plus/ Fixed-Type Investment Account www. website address	LIBOR +2%	Quarterly	The rate of return on 12/31/xx was 2.45%. This rate is fixed quarterly, but will never fall below a guaranteed minimum rate of 2%. Current rate of return information is available on the option's Web site or at 1-800-yyy-zzzz.
J Financial Services Co./ Fixed Account Investment www. website address	3.75%	6 Mos.	The rate of return on 12/31/xx was 3.75%. This rate of return is fixed for six months. Current rate of return information is available on the option's Web site or at 1-800-yyy-zzzz.

Part II. Fee and Expense Information

Table 3 shows fee and expense information for the investment options listed in Table1 and Table 2. Table 3 shows the Total Annual Operating Expenses of the options in Table 1. Total Annual Operating Expenses are expenses that reduce the rate of return of the investment option. Table 3 also shows Shareholder-type Fees. These fees are in addition to Total Annual Operating Expenses.

Table 3—Fees and Expenses

Name / Type of Option	Total Annual Operating Expenses		Shareholder-Type Fees
	As a %	Per $1000	
Equity Funds			
A Index Fund/ S&P 500	0.18%	$1.80	$20 annual service charge subtracted from investments held in this option if valued at less than $10,000.
B Fund/ Large Cap	2.45%	$24.50	2.25% deferred sales charge subtracted from amounts withdrawn within 12 months of purchase.
C Fund/ International	0.79%	$7.90	5.75% sales charge subtracted from amounts invested.

Stock		
D Fund/ Mid Cap ETF	0.20% $2.00	4.25% sales charge subtracted from amounts withdrawn.
Bond Funds		
E Fund/ Bond Index	0.50% $5.00	N/A
Other		
F Fund/ GICs	0.46% $4.60	10% charge subtracted from amounts withdrawn within 18 months of initial investment.
G Fund/ Stable Value	0.65% $6.50	Amounts withdrawn may not be transferred to a competing option for 90 days after withdrawal.
Generations 2020/ Lifecycle Fund	1.50% $15.00	Excessive trading restricts additional purchases (other than contributions and loan repayments) for 85 days.
Fixed Return Investments		
H 200X / GIC	N/A	12% charge subtracted from amounts withdrawn before maturity.
I LIBOR Plus/ Fixed-Type Invest Account	N/A	5% contingent deferred sales charge subtracted from amounts withdrawn; charge reduced by 1% on 12-month anniversary of each investment.
J Financial Serv Co. / Fixed Account Investment	N/A	90 days of interest subtracted from amounts withdrawn before maturity.

The cumulative effect of fees and expenses can substantially reduce the growth of your retirement savings. Visit the Department of Labor's Web site for an example showing the long-term effect of fees and expenses at http://www.dol.gov/ebsa/publications/401k employee.html. Fees and expenses are only one of many factors to consider when you decide to invest in an option. You may also want to think about whether an investment in a particular option, along with your other investments, will help you achieve your financial goals.

Part III. Annuity Information

Table 4 focuses on the annuity options under the plan. Annuities are insurance contracts that allow you to receive a guaranteed stream of payments at regular intervals, usually beginning when you retire and lasting for your entire life. Annuities are issued by insurance companies. Guarantees of an insurance company are subject to its long-term financial strength and claims-paying ability.

Table 4—Annuity Options

Name	Objectives / Goals	Pricing Factors	Restrictions / Fees
Lifetime Income Option www. website address	To provide a guaranteed stream of income for your life, based on shares you acquire while you work. At age 65, you will receive monthly payments of $10 for each share you own, for your life. For example, if	The cost of each share depends on your age and interest rates when you buy it. Ordinarily the closer you are to retirement, the more it will cost you to buy a share.	Payment amounts are based on your life expectancy only and would be reduced if you choose a spousal joint and survivor benefit. You will pay a 25%

	you own 30 shares at age 65, you will receive $300 per month over your life.	The cost includes a guaranteed death benefit payable to a spouse or beneficiary if you die before payments begin. The death benefit is the total amount of your contributions, less any withdrawals.	surrender charge for any amount you withdraw before annuity payments begin. If your income payments are less than $50 per month, the option's issuer may combine payments and pay you less frequently, or return to you the larger of your net contributions or the cash-out value of your income shares.
Generations 2020 Variable Annuity Option www. website address	To provide a guaranteed stream of income for your life, or some other period of time, based on your account balance in the Generations 2020 Lifecycle Fund. This option is available through a variable annuity contract that your plan has with ABC Insurance Company.	You have the right to elect fixed annuity payments in the form of a life annuity, a joint and survivor annuity, or a life annuity with a term certain, but the payment amounts will vary based on the benefit you choose. The cost of this right is included in the Total Annual Operating Expenses of the Generations 2020 Lifecycle Fund, listed in Table 3 above. The cost also includes a guaranteed death benefit payable to a spouse or beneficiary if you die before payments begin. The death benefit is the greater of your account balance or contributions, less any withdrawals.	Maximum surrender charge of 8% of account balance. Maximum transfer fee of $30 for each transfer over 12 in a year. Annual service charge of $50 for account balances below $100,000.

Please visit www.ABCPlanglossary.com for a glossary of investment terms relevant to the investment options under this plan. This glossary is intended to help you better understand your options.

[75 FR 64937, Oct. 20, 2010]

§ 2550.404b–1 Maintenance of the indicia of ownership of plan assets outside the jurisdiction of the district courts of the United States.

(a) No fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States, unless:

(1) Such assets are:

(i) Securities issued by a person, as defined in section 3(9) of the Employee Retirement Income Security Act of 1974 (Act) (other than an individual), which is not organized under the laws of the United States or a State and does not have its principal place of business within the United States;

elaws - Employment Law Guide A Companion to the *FirstStep* Employment Law Advisor

Federal Contracts-Working Conditions: Prevailing Wages in Service Contracts

- Who Is Covered
- Basic Provisions/Requirements
- Employee Rights
- Recordkeeping, Reporting, Notices and Posters
  - Notices and Posters
  - Recordkeeping
  - Reporting
- Penalties/Sanctions
- Relation to State, Local, and Other Federal Laws
- Compliance Assistance Available
- DOL Contacts

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Related Information

Compliance Assistance By Law

- The McNamara-O'Hara Service Contract Act (SCA)

DOL Agency Assistance

- Wage and Hour Division SCA Page
- Wage Determinations On-Line

Updated: September 2009

McNamara-O'Hara Service Contract Act (SCA)

(41 USC §351 et seq.*(http://www.dol.gov/whd/regs/statutes/serv01.pdf)*; **29 CFR Parts 4, 6, and 8** *(http://www.dol.gov/dol/cfr/Title_29/Chapter_I.htm)*)

Who is Covered

The wage and hour requirements of the McNamara-O'Hara Service Contract Act (SCA) are administered by the Wage and Hour Division (WHD). The Act covers contracts and any bid specifications in excess of $2,500, whether negotiated or advertised, entered into by federal and District of Columbia agencies where the principal purpose of the contract is to furnish services in the U.S. through the use of service employees. The definition of a service employee includes any employee engaged in performing services on a covered contract other than a bona fide executive, administrative, or professional employee who meets the exemption criteria set forth in 29 CFR Part 541*(http://www.dol.gov/cgi-bin/leave-dol.asp?exiturl=http://s.dol.gov/7Z&exitTitle=www.gpoaccess.gov&fedpage=yes)*.

The Act does not apply to certain types of contractual services. These statutory exemptions include:

- Contracts for construction, alteration, and/or repair of public buildings or public works, including painting and decorating (those covered by

the Davis-Bacon Act*(http://www.dol.gov/whd/contracts/dbra.htm)*);

- Work required in accordance with the provisions of the Walsh-Healey Public Contracts Act*(http://www.dol.gov/whd/contracts/pca.htm)*;
- Contracts for transporting freight or personnel where published tariff rates are in effect;
- Contracts for furnishing services by radio, telephone, telegraph, or cable companies subject to the Communications Act of 1934;
- Contracts for public utility services;
- Employment contracts providing for direct services to a federal agency by an individual or individuals;
- Contracts for operating postal contract stations for the U.S. Postal Service;
- Services performed outside the U.S. (except in territories administered by the U.S., as defined in the Act); and
- Contracts administratively exempted by the Secretary of Labor in special circumstances because of the public interest or to avoid serious impairment of government business.

Basic Provisions/Requirements

The SCA requires contractors and subcontractors performing services on prime contracts in excess of $2,500 to pay service employees in various classes no less than the wage rates and fringe benefits found prevailing in the locality, or the rates (including prospective increases) contained in a predecessor contractor's collective bargaining agreement as provided in wage determinations issued by the Department of Labor. These determinations are incorporated into the contract.

For contracts equal to or less than $2,500, contractors are required to pay the federal minimum wage of $7.25 per hour effective July 24, 2009. Contractors must also, under the provisions of the Contract Work Hours and Safety Standards Act*(http://www.dol.gov/whd/contracts/cwhssa.htm)* and the Fair Labor Standards Act, *(http://www.dol.gov/whd/regs/statutes/FairLaborStandAct.pdf)* pay employees at least one and one-half times their regular rate of pay for all hours worked over 40 in a workweek.

Finally, employers must notify employees working in connection with the contract of the compensation due them under the wage and fringe benefits provisions of the contract.

Employee Rights

The SCA provides covered service workers on federal service contracts the right to receive at least the locally prevailing wage rate and fringe benefits, as determined by the Department of Labor, for the type of work performed. The Wage and Hour Division accepts complaints of alleged SCA wage violations.

Recordkeeping, Reporting, Notices and Posters

Notices and Posters

Every employer performing work covered by the Service Contract Act is required to provide each employee working on the contract notice of the SCA payment and fringe benefit requirements for the different classes of service employees and to post the "Employee Rights on Government Contracts*(http://www.dol.gov/whd/regs/compliance/posters/sca.htm)*" notice (including any applicable wage determination) at the site of the work in a prominent and accessible place where it may be easily seen by employees. There are no size requirements for the poster. The Employee Rights on Government Contracts poster is available Spanish *(http://www.dol.gov/whd/regs/compliance/posters/scaspan.htm)* as well.

If the contractor employs workers with disabilities under special minimum wage certificates, the "Notice to Workers with Disabilities/Special Minimum Wage (PDF) poster"*(http://www.dol.gov/whd/regs/compliance/posters/disab.htm)* must also be posted. This poster explains the conditions under which special minimum wages may be paid. It must be posted in a conspicuous place on the employer's premises where it can be readily seen by employees and the parents or guardians of workers with disabilities.

Recordkeeping

Some of the records required to be kept under this law are also required under the Fair Labor Standards Act (see Wage and Hour Division Fact Sheet #21: Recordkeeping *(http://www.dol.gov/whd/regs/compliance/whdfs21.pdf)*).

Under the Service Contract Act, contractors and subcontractors are required to maintain certain records for each employee performing work on the covered contract. Basic records, such as name, address, and Social Security number of each employee must be maintained for three years from completion of the work. In addition, records on the following must be maintained for three years:

- The correct work classification(s), wage rate(s), and fringe benefits provided (or cash equivalent payments provided in lieu of fringe benefits)
- The total daily and weekly compensation of each employee
- The number of daily and weekly hours worked by each employee
- Any deductions, rebates, or refunds from each employee's compensation
- Any list of a predecessor contractor's employees which had been furnished showing employee's length of service information
- A list of wages and fringe benefits for those classes of workers conformed to the wage determination attached to the contract

The contractor shall also make available a copy of the contract upon request from the Wage and Hour Division.

Reporting

There are no reporting requirements.

Penalties / Sanctions

Violations of the SCA may result in contract terminations and liability for any resulting costs to the government, withholding of contract payments in sufficient amounts to cover wage and fringe benefit underpayments, legal action to recover the underpayments, and debarment from future contracts for up to three years.

Contractors and subcontractors may challenge determinations of violations and debarment before an Administrative Law Judge. Contractors and subcontractors may appeal decisions of Administrative Law Judges to the Administrative Review Board. Final Board determinations on violations and debarment may be appealed to and are enforceable through the federal courts.

Relation to State, Local, and Other Federal Laws

The SCA applies only to contracts awarded by the federal or District of Columbia governments. As noted above, contractors are required to compensate employees working in connection with covered contracts for overtime work in accordance with the overtime pay standards of the Fair Labor Standards Act and the Contract Work Hours and Safety Standards Act.

Compliance Assistance Available

The Department of Labor provides employers, workers, and others with clear and easy-to-access information and assistance on how to comply with the SCA. Among the resources available to help comply with the SCA are:

- Compliance Assistance - SCA Web Page *(http://www.dol.gov/whd/contracts/sca.htm)*: Provides information on the wage and benefit requirements of the SCA.
- Service Contract Act FAQs *(http://www.dol.gov/whd/regs/compliance/web/SCA_FAQ.htm)*

Additional compliance assistance including explanatory brochures, fact sheets, and regulatory and interpretive materials is available on the Compliance Assistance “By Law” *(http://www.dol.gov/compliance/laws/comp-sca.htm)* Web page.

DOL Contacts

Wage and Hour Division *(http://www.dol.gov/whd/)*
Contact WHD *(http://www.dol.gov/whd/contactform.asp)*
Tel: 1-866-4USWAGE (1-866-487-9243); TTY: 1-877-889-5627

The Employment Law Guide is offered as a public resource. It does not create new legal obligations and it is not a substitute for the U.S. Code,

Federal Register, and Code of Federal Regulations as the official sources of applicable law. Every effort has been made to ensure that the information provided is complete and accurate as of the time of publication, and this will continue. Later versions of this Guide will be offered at www.dol.gov/compliance or by calling our Toll-Free Help Line at 1-866-4-USA-DOL (1-866-487-2365) (1-866-487-2365).

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WD 05-2375 (Rev.-10) was first posted on www.wdol.gov on 09/07/2010
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REGISTER OF WAGE DETERMINATIONS UNDER THE SERVICE CONTRACT ACT
By direction of the Secretary of Labor

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
WAGE AND HOUR DIVISION
WASHINGTON D.C. 20210

Wage Determination No.: 2005-2375
Revision No.: 10
Date Of Revision: 09/01/2010

Shirley F. Ebbesen
Director

Division of
Wage Determinations

State: New York

Area: New York Counties of Bronx, Kings, New York, Putnam, Queens, Richmond, Rockland, Westchester
OCCUPATION NOTE:

Janitor: The rate for the Janitor occupation applies to Putnam, Rockland, and Weschester Counties only. See Wage Determination 1977-0225 for wage rates and fringe benefits for Bronx, Kings, New York, Queens, and Richmond Counties.

Fringe Benefits Required Follow the Occupational Listing

OCCUPATION CODE - TITLE	FOOTNOTE	RATE
01000 - Administrative Support And Clerical Occupations		
01011 - Accounting Clerk I		15.11
01012 - Accounting Clerk II		19.61
01013 - Accounting Clerk III		21.89
01020 - Administrative Assistant		30.93
01040 - Court Reporter		21.64
01051 - Data Entry Operator I		14.71
01052 - Data Entry Operator II		16.05
01060 - Dispatcher, Motor Vehicle		25.79
01070 - Document Preparation Clerk		15.56
01090 - Duplicating Machine Operator		15.56
01111 - General Clerk I		14.82
01112 - General Clerk II		17.49
01113 - General Clerk III		18.82
01120 - Housing Referral Assistant		26.92
01141 - Messenger Courier		12.92
01191 - Order Clerk I		18.05
01192 - Order Clerk II		21.67
01261 - Personnel Assistant (Employment) I		18.96
01262 - Personnel Assistant (Employment) II		21.22
01263 - Personnel Assistant (Employment) III		23.66
01270 - Production Control Clerk		23.51
01280 - Receptionist		15.67
01290 - Rental Clerk		18.04
01300 - Scheduler, Maintenance		21.57
01311 - Secretary I		21.57
01312 - Secretary II		24.82
01313 - Secretary III		26.92
01320 - Service Order Dispatcher		20.50
01410 - Supply Technician		30.93
01420 - Survey Worker		21.64
01531 - Travel Clerk I		15.98
01532 - Travel Clerk II		17.31
01533 - Travel Clerk III		18.79
01611 - Word Processor I		17.62

01612 - Word Processor II	19.79
01613 - Word Processor III	22.13
05000 - Automotive Service Occupations	
05005 - Automobile Body Repairer, Fiberglass	28.29
05010 - Automotive Electrician	28.50
05040 - Automotive Glass Installer	27.31
05070 - Automotive Worker	27.31
05110 - Mobile Equipment Servicer	24.42
05130 - Motor Equipment Metal Mechanic	30.31
05160 - Motor Equipment Metal Worker	27.31
05190 - Motor Vehicle Mechanic	29.68
05220 - Motor Vehicle Mechanic Helper	23.15
05250 - Motor Vehicle Upholstery Worker	26.12
05280 - Motor Vehicle Wrecker	27.31
05310 - Painter, Automotive	28.50
05340 - Radiator Repair Specialist	27.31
05370 - Tire Repairer	18.22
05400 - Transmission Repair Specialist	29.68
07000 - Food Preparation And Service Occupations	
07010 - Baker	19.55
07041 - Cook I	17.97
07042 - Cook II	19.55
07070 - Dishwasher	14.67
07130 - Food Service Worker	14.67
07210 - Meat Cutter	19.55
07260 - Waiter/Waitress	15.50
09000 - Furniture Maintenance And Repair Occupations	
09010 - Electrostatic Spray Painter	21.14
09040 - Furniture Handler	16.07
09080 - Furniture Refinisher	21.14
09090 - Furniture Refinisher Helper	17.75
09110 - Furniture Repairer, Minor	19.44
09130 - Upholsterer	21.14
11000 - General Services And Support Occupations	
11030 - Cleaner, Vehicles	14.92
11060 - Elevator Operator	14.92
11090 - Gardener	18.74
11122 - Housekeeping Aide	15.70
11150 - Janitor	15.70
11210 - Laborer, Grounds Maintenance	15.89
11240 - Maid or Houseman	13.98
11260 - Pruner	14.75
11270 - Tractor Operator	18.02
11330 - Trail Maintenance Worker	15.89
11360 - Window Cleaner	16.95
12000 - Health Occupations	
12010 - Ambulance Driver	24.99
12011 - Breath Alcohol Technician	24.87
12012 - Certified Occupational Therapist Assistant	24.12
12015 - Certified Physical Therapist Assistant	22.28
12020 - Dental Assistant	16.75
12025 - Dental Hygienist	35.31
12030 - EKG Technician	28.65
12035 - Electroneurodiagnostic Technologist	28.65
12040 - Emergency Medical Technician	24.99
12071 - Licensed Practical Nurse I	21.76
12072 - Licensed Practical Nurse II	24.34
12073 - Licensed Practical Nurse III	24.48
12100 - Medical Assistant	16.66
12130 - Medical Laboratory Technician	20.63
12160 - Medical Record Clerk	18.00

12190 - Medical Record Technician		20.55
12195 - Medical Transcriptionist		19.01
12210 - Nuclear Medicine Technologist		36.93
12221 - Nursing Assistant I		12.37
12222 - Nursing Assistant II		14.72
12223 - Nursing Assistant III		15.82
12224 - Nursing Assistant IV		16.79
12235 - Optical Dispenser		24.64
12236 - Optical Technician		16.64
12250 - Pharmacy Technician		14.58
12280 - Phlebotomist		16.79
12305 - Radiologic Technologist		28.08
12311 - Registered Nurse I		32.76
12312 - Registered Nurse II		38.41
12313 - Registered Nurse II, Specialist		38.41
12314 - Registered Nurse III		49.39
12315 - Registered Nurse III, Anesthetist		49.39
12316 - Registered Nurse IV		59.22
12317 - Scheduler (Drug and Alcohol Testing)		26.17
13000 - Information And Arts Occupations		
13011 - Exhibits Specialist I		27.03
13012 - Exhibits Specialist II		33.49
13013 - Exhibits Specialist III		40.95
13041 - Illustrator I		26.51
13042 - Illustrator II		32.31
13043 - Illustrator III		39.22
13047 - Librarian		37.25
13050 - Library Aide/Clerk		15.79
13054 - Library Information Technology Systems Administrator		32.65
13058 - Library Technician		25.62
13061 - Media Specialist I		23.57
13062 - Media Specialist II		26.35
13063 - Media Specialist III		29.39
13071 - Photographer I		21.29
13072 - Photographer II		24.10
13073 - Photographer III		32.88
13074 - Photographer IV		38.49
13075 - Photographer V		46.55
13110 - Video Teleconference Technician		24.33
14000 - Information Technology Occupations		
14041 - Computer Operator I		19.00
14042 - Computer Operator II		21.26
14043 - Computer Operator III		23.71
14044 - Computer Operator IV		26.94
14045 - Computer Operator V		29.17
14071 - Computer Programmer I	(see 1)	
14072 - Computer Programmer II	(see 1)	
14073 - Computer Programmer III	(see 1)	
14074 - Computer Programmer IV	(see 1)	
14101 - Computer Systems Analyst I	(see 1)	
14102 - Computer Systems Analyst II	(see 1)	
14103 - Computer Systems Analyst III	(see 1)	
14150 - Peripheral Equipment Operator		19.00
14160 - Personal Computer Support Technician		26.94
15000 - Instructional Occupations		
15010 - Aircrew Training Devices Instructor (Non-Rated)		39.54
15020 - Aircrew Training Devices Instructor (Rated)		43.75
15030 - Air Crew Training Devices Instructor (Pilot)		52.46
15050 - Computer Based Training Specialist / Instructor		39.54
15060 - Educational Technologist		33.02

15070 - Flight Instructor (Pilot)	52.46
15080 - Graphic Artist	35.27
15090 - Technical Instructor	31.44
15095 - Technical Instructor/Course Developer	38.34
15110 - Test Proctor	25.30
15120 - Tutor	25.30
16000 - Laundry, Dry-Cleaning, Pressing And Related Occupations	
16010 - Assembler	11.62
16030 - Counter Attendant	11.62
16040 - Dry Cleaner	14.30
16070 - Finisher, Flatwork, Machine	11.62
16090 - Presser, Hand	11.62
16110 - Presser, Machine, Drycleaning	11.62
16130 - Presser, Machine, Shirts	11.62
16160 - Presser, Machine, Wearing Apparel, Laundry	11.62
16190 - Sewing Machine Operator	15.19
16220 - Tailor	16.04
16250 - Washer, Machine	12.60
19000 - Machine Tool Operation And Repair Occupations	
19010 - Machine-Tool Operator (Tool Room)	20.89
19040 - Tool And Die Maker	24.21
21000 - Materials Handling And Packing Occupations	
21020 - Forklift Operator	16.96
21030 - Material Coordinator	23.51
21040 - Material Expediter	23.51
21050 - Material Handling Laborer	16.41
21071 - Order Filler	15.58
21080 - Production Line Worker (Food Processing)	16.96
21110 - Shipping Packer	15.28
21130 - Shipping/Receiving Clerk	15.28
21140 - Store Worker I	15.06
21150 - Stock Clerk	18.88
21210 - Tools And Parts Attendant	16.96
21410 - Warehouse Specialist	16.96
23000 - Mechanics And Maintenance And Repair Occupations	
23010 - Aerospace Structural Welder	29.79
23021 - Aircraft Mechanic I	27.11
23022 - Aircraft Mechanic II	29.58
23023 - Aircraft Mechanic III	30.66
23040 - Aircraft Mechanic Helper	21.89
23050 - Aircraft, Painter	24.18
23060 - Aircraft Servicer	23.97
23080 - Aircraft Worker	25.01
23110 - Appliance Mechanic	21.38
23120 - Bicycle Repairer	17.13
23125 - Cable Splicer	36.53
23130 - Carpenter, Maintenance	29.89
23140 - Carpet Layer	27.98
23160 - Electrician, Maintenance	37.18
23181 - Electronics Technician Maintenance I	24.19
23182 - Electronics Technician Maintenance II	29.17
23183 - Electronics Technician Maintenance III	31.14
23260 - Fabric Worker	28.00
23290 - Fire Alarm System Mechanic	21.67
23310 - Fire Extinguisher Repairer	22.51
23311 - Fuel Distribution System Mechanic	29.94
23312 - Fuel Distribution System Operator	27.20
23370 - General Maintenance Worker	24.67
23380 - Ground Support Equipment Mechanic	27.11
23381 - Ground Support Equipment Servicer	23.97
23382 - Ground Support Equipment Worker	25.01

23391 - Gunsmith I	22.51
23392 - Gunsmith II	25.12
23393 - Gunsmith III	27.25
23410 - Heating, Ventilation And Air-Conditioning Mechanic	26.97
23411 - Heating, Ventilation And Air Contditioning Mechanic (Research Facility)	28.93
23430 - Heavy Equipment Mechanic	26.10
23440 - Heavy Equipment Operator	34.38
23460 - Instrument Mechanic	30.86
23465 - Laboratory/Shelter Mechanic	26.21
23470 - Laborer	15.95
23510 - Locksmith	20.70
23530 - Machinery Maintenance Mechanic	23.95
23550 - Machinist, Maintenance	20.81
23580 - Maintenance Trades Helper	16.90
23591 - Metrology Technician I	30.86
23592 - Metrology Technician II	33.34
23593 - Metrology Technician III	34.56
23640 - Millwright	31.22
23710 - Office Appliance Repairer	22.95
23760 - Painter, Maintenance	25.47
23790 - Pipefitter, Maintenance	32.88
23810 - Plumber, Maintenance	32.93
23820 - Pneudraulic Systems Mechanic	27.25
23850 - Rigger	24.36
23870 - Scale Mechanic	25.12
23890 - Sheet-Metal Worker, Maintenance	30.55
23910 - Small Engine Mechanic	19.30
23931 - Telecommunications Mechanic I	30.91
23932 - Telecommunications Mechanic II	32.20
23950 - Telephone Lineman	32.90
23960 - Welder, Combination, Maintenance	23.02
23965 - Well Driller	24.89
23970 - Woodcraft Worker	25.89
23980 - Woodworker	19.50
24000 - Personal Needs Occupations	
24570 - Child Care Attendant	13.87
24580 - Child Care Center Clerk	17.30
24610 - Chore Aide	12.67
24620 - Family Readiness And Support Services Coordinator	14.89
24630 - Homemaker	19.21
25000 - Plant And System Operations Occupations	
25010 - Boiler Tender	29.03
25040 - Sewage Plant Operator	27.01
25070 - Stationary Engineer	29.03
25190 - Ventilation Equipment Tender	23.71
25210 - Water Treatment Plant Operator	27.01
27000 - Protective Service Occupations	
27004 - Alarm Monitor	19.12
27007 - Baggage Inspector	17.98
27008 - Corrections Officer	30.97
27010 - Court Security Officer	30.66
27030 - Detection Dog Handler	20.36
27040 - Detention Officer	30.97
27070 - Firefighter	31.42
27101 - Guard I	17.98
27102 - Guard II	20.36
27131 - Police Officer I	32.37
27132 - Police Officer II	35.94

28000 - Recreation Occupations		
28041 - Carnival Equipment Operator		17.13
28042 - Carnival Equipment Repairer		17.97
28043 - Carnival Equpment Worker		14.67
28210 - Gate Attendant/Gate Tender		16.49
28310 - Lifeguard		13.13
28350 - Park Attendant (Aide)		18.46
28510 - Recreation Aide/Health Facility Attendant		18.95
28515 - Recreation Specialist		22.88
28630 - Sports Official		14.69
28690 - Swimming Pool Operator		20.98
29000 - Stevedoring/Longshoremen Occupational Services		
29010 - Blocker And Bracer		29.90
29020 - Hatch Tender		29.90
29030 - Line Handler		29.90
29041 - Stevedore I		26.22
29042 - Stevedore II		32.85
30000 - Technical Occupations		
30010 - Air Traffic Control Specialist, Center (HFO)	(see 2)	40.33
30011 - Air Traffic Control Specialist, Station (HFO)	(see 2)	27.82
30012 - Air Traffic Control Specialist, Terminal (HFO)	(see 2)	30.63
30021 - Archeological Technician I		19.69
30022 - Archeological Technician II		22.02
30023 - Archeological Technician III		27.27
30030 - Cartographic Technician		27.27
30040 - Civil Engineering Technician		25.21
30061 - Drafter/CAD Operator I		19.69
30062 - Drafter/CAD Operator II		22.02
30063 - Drafter/CAD Operator III		24.55
30064 - Drafter/CAD Operator IV		30.20
30081 - Engineering Technician I		19.98
30082 - Engineering Technician II		22.47
30083 - Engineering Technician III		25.28
30084 - Engineering Technician IV		31.22
30085 - Engineering Technician V		38.08
30086 - Engineering Technician VI		46.07
30090 - Environmental Technician		22.90
30210 - Laboratory Technician		21.67
30240 - Mathematical Technician		26.78
30361 - Paralegal/Legal Assistant I		23.36
30362 - Paralegal/Legal Assistant II		28.94
30363 - Paralegal/Legal Assistant III		35.39
30364 - Paralegal/Legal Assistant IV		42.84
30390 - Photo-Optics Technician		27.27
30461 - Technical Writer I		27.81
30462 - Technical Writer II		33.91
30463 - Technical Writer III		41.04
30491 - Unexploded Ordnance (UXO) Technician I		25.63
30492 - Unexploded Ordnance (UXO) Technician II		31.02
30493 - Unexploded Ordnance (UXO) Technician III		37.18
30494 - Unexploded (UXO) Safety Escort		25.63
30495 - Unexploded (UXO) Sweep Personnel		25.63
30620 - Weather Observer, Combined Upper Air Or Surface Programs	(see 2)	24.55
30621 - Weather Observer, Senior	(see 2)	27.27
31000 - Transportation/Mobile Equipment Operation Occupations		
31020 - Bus Aide		16.40
31030 - Bus Driver		19.89
31043 - Driver Courier		16.75
31260 - Parking and Lot Attendant		10.97
31290 - Shuttle Bus Driver		17.80

31310 - Taxi Driver	15.21
31361 - Truckdriver, Light	17.80
31362 - Truckdriver, Medium	18.87
31363 - Truckdriver, Heavy	24.52
31364 - Truckdriver, Tractor-Trailer	24.52
99000 - Miscellaneous Occupations	
99030 - Cashier	10.95
99050 - Desk Clerk	16.69
99095 - Embalmer	28.51
99251 - Laboratory Animal Caretaker I	16.32
99252 - Laboratory Animal Caretaker II	17.14
99310 - Mortician	34.64
99410 - Pest Controller	18.75
99510 - Photofinishing Worker	16.23
99710 - Recycling Laborer	19.78
99711 - Recycling Specialist	22.59
99730 - Refuse Collector	18.36
99810 - Sales Clerk	14.70
99820 - School Crossing Guard	15.07
99830 - Survey Party Chief	23.68
99831 - Surveying Aide	15.48
99832 - Surveying Technician	20.42
99840 - Vending Machine Attendant	19.20
99841 - Vending Machine Repairer	23.47
99842 - Vending Machine Repairer Helper	18.98

ALL OCCUPATIONS LISTED ABOVE RECEIVE THE FOLLOWING BENEFITS:

HEALTH & WELFARE: $3.50 per hour or $140.00 per week or $606.67 per month

VACATION: 2 weeks paid vacation after 1 year of service with a contractor or successor; 3 weeks after 5 years, 4 weeks after 10 years, and 5 weeks after 20 years. Length of service includes the whole span of continuous service with the present contractor or successor, wherever employed, and with the predecessor contractors in the performance of similar work at the same Federal facility. (Reg. 29 CFR 4.173)

HOLIDAYS: A minimum of ten paid holidays per year, New Year's Day, Martin Luther King Jr's Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, and Christmas Day. (A contractor may substitute for any of the named holidays another day off with pay in accordance with a plan communicated to the employees involved.) (See 29 CFR 4174)

THE OCCUPATIONS WHICH HAVE NUMBERED FOOTNOTES IN PARENTHESES RECEIVE THE FOLLOWING:

1) COMPUTER EMPLOYEES: Under the SCA at section 8(b), this wage determination does not apply to any employee who individually qualifies as a bona fide executive, administrative, or professional employee as defined in 29 C.F.R. Part 541. Because most Computer System Analysts and Computer Programmers who are compensated at a rate not less than $27.63 (or on a salary or fee basis at a rate not less than $455 per week) an hour would likely qualify as exempt computer professionals, (29 C.F.R. 541. 400) wage rates may not be listed on this wage determination for all occupations within those job families. In addition, because this wage determination may not list a wage rate for some or all occupations within those job families if the survey data indicates that the prevailing wage rate for the occupation equals or exceeds

$27.63 per hour conformances may be necessary for certain nonexempt employees. For example, if an individual employee is nonexempt but nevertheless performs duties within the scope of one of the Computer Systems Analyst or Computer Programmer occupations for which this wage determination does not specify an SCA wage rate, then the wage rate for that employee must be conformed in accordance with the conformance procedures described in the conformance note included on this wage determination.

Additionally, because job titles vary widely and change quickly in the computer industry, job titles are not determinative of the application of the computer professional exemption. Therefore, the exemption applies only to computer employees who satisfy the compensation requirements and whose primary duty consists of:
(1) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
(2) The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
(3) The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
(4) A combination of the aforementioned duties, the performance of which requires the same level of skills. (29 C.F.R. 541.400).

2) AIR TRAFFIC CONTROLLERS AND WEATHER OBSERVERS - NIGHT PAY & SUNDAY PAY: If you work at night as part of a regular tour of duty, you will earn a night differential and receive an additional 10% of basic pay for any hours worked between 6pm and 6am. If you are a full-time employed (40 hours a week) and Sunday is part of your regularly scheduled workweek, you are paid at your rate of basic pay plus a Sunday premium of 25% of your basic rate for each hour of Sunday work which is not overtime (i.e. occasional work on Sunday outside the normal tour of duty is considered overtime work).

HAZARDOUS PAY DIFFERENTIAL: An 8 percent differential is applicable to employees employed in a position that represents a high degree of hazard when working with or in close proximity to ordinance, explosives, and incendiary materials. This includes work such as screening, blending, dying, mixing, and pressing of sensitive ordance, explosives, and pyrotechnic compositions such as lead azide, black powder and photoflash powder. All dry-house activities involving propellants or explosives. Demilitarization, modification, renovation, demolition, and maintenance operations on sensitive ordnance, explosives and incendiary materials. All operations involving regrading and cleaning of artillery ranges.

A 4 percent differential is applicable to employees employed in a position that represents a low degree of hazard when working with, or in close proximity to ordance, (or employees possibly adjacent to) explosives and incendiary materials which involves potential injury such as laceration of hands, face, or arms of the employee engaged in the operation, irritation of the skin, minor burns and the like; minimal damage to immediate or adjacent work area or equipment being used. All operations involving, unloading, storage, and hauling of ordance, explosive, and incendiary ordnance material other than small arms ammunition. These differentials are only applicable to work that has been specifically designated by the agency for ordance, explosives, and incendiary material differential pay.

** UNIFORM ALLOWANCE **

If employees are required to wear uniforms in the performance of this contract (either by the terms of the Government contract, by the employer, by the state or local law, etc.), the cost of furnishing such uniforms and maintaining (by laundering or dry cleaning) such uniforms is an expense that may not be borne by an employee where such cost reduces the hourly rate below that required by the wage

determination. The Department of Labor will accept payment in accordance with the following standards as compliance:

The contractor or subcontractor is required to furnish all employees with an adequate number of uniforms without cost or to reimburse employees for the actual cost of the uniforms. In addition, where uniform cleaning and maintenance is made the responsibility of the employee, all contractors and subcontractors subject to this wage determination shall (in the absence of a bona fide collective bargaining agreement providing for a different amount, or the furnishing of contrary affirmative proof as to the actual cost), reimburse all employees for such cleaning and maintenance at a rate of $3.35 per week (or $.67 cents per day). However, in those instances where the uniforms furnished are made of "wash and wear" materials, may be routinely washed and dried with other personal garments, and do not require any special treatment such as dry cleaning, daily washing, or commercial laundering in order to meet the cleanliness or appearance standards set by the terms of the Government contract, by the contractor, by law, or by the nature of the work, there is no requirement that employees be reimbursed for uniform maintenance costs.

The duties of employees under job titles listed are those described in the "Service Contract Act Directory of Occupations", Fifth Edition, April 2006, unless otherwise indicated. Copies of the Directory are available on the Internet. A links to the Directory may be found on the WHD home page at http://www.dol.gov/esa/whd/ or through the Wage Determinations On-Line (WDOL) Web site at http://wdol.gov/.

REQUEST FOR AUTHORIZATION OF ADDITIONAL CLASSIFICATION AND WAGE RATE {Standard Form 1444 (SF 1444)}

Conformance Process:

The contracting officer shall require that any class of service employee which is not listed herein and which is to be employed under the contract (i.e., the work to be performed is not performed by any classification listed in the wage determination), be classified by the contractor so as to provide a reasonable relationship (i.e., appropriate level of skill comparison) between such unlisted classifications and the classifications listed in the wage determination. Such conformed classes of employees shall be paid the monetary wages and furnished the fringe benefits as are determined. Such conforming process shall be initiated by the contractor prior to the performance of contract work by such unlisted class(es) of employees. The conformed classification, wage rate, and/or fringe benefits shall be retroactive to the commencement date of the contract. {See Section 4.6 (C)(vi)} When multiple wage determinations are included in a contract, a separate SF 1444 should be prepared for each wage determination to which a class(es) is to be conformed.

The process for preparing a conformance request is as follows:

1) When preparing the bid, the contractor identifies the need for a conformed occupation(s) and computes a proposed rate(s).

2) After contract award, the contractor prepares a written report listing in order proposed classification title(s), a Federal grade equivalency (FGE) for each proposed classification(s), job description(s), and rationale for proposed wage rate(s), including information regarding the agreement or disagreement of the authorized representative of the employees involved, or where there is no authorized representative, the employees themselves. This report should be submitted to the contracting officer no later than 30 days after such unlisted class(es) of employees performs any contract work.

3) The contracting officer reviews the proposed action and promptly submits a report of the action, together with the agency's recommendations and pertinent

information including the position of the contractor and the employees, to the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, for review. (See section 4.6(b)(2) of Regulations 29 CFR Part 4).

4) Within 30 days of receipt, the Wage and Hour Division approves, modifies, or disapproves the action via transmittal to the agency contracting officer, or notifies the contracting officer that additional time will be required to process the request.

5) The contracting officer transmits the Wage and Hour decision to the contractor.

6) The contractor informs the affected employees.

Information required by the Regulations must be submitted on SF 1444 or bond paper.

When preparing a conformance request, the "Service Contract Act Directory of Occupations" (the Directory) should be used to compare job definitions to insure that duties requested are not performed by a classification already listed in the wage determination. Remember, it is not the job title, but the required tasks that determine whether a class is included in an established wage determination. Conformances may not be used to artificially split, combine, or subdivide classifications listed in the wage determination.

WD 05-2047 (Rev.-11) was first posted on www.wdol.gov on 06/22/2010
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REGISTER OF WAGE DETERMINATIONS UNDER THE SERVICE CONTRACT ACT
By direction of the Secretary of Labor

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
WAGE AND HOUR DIVISION
WASHINGTON D.C. 20210

Wage Determination No.: 2005-2047
Revision No.: 11
Date Of Revision: 06/15/2010

Shirley F. Ebbesen
Director

Division of
Wage Determinations

State: California

Area: California Counties of Los Angeles, Orange
OCCUPATION NOTES:

Heating, Air Conditioning and Refrigeration: Wage rates and fringe benefits can be found on Wage Determinations 1986-0879.

Laundry: Wage rates and fringe benefits can be found on Wage Determination 1977-1297.

Fringe Benefits Required Follow the Occupational Listing

OCCUPATION CODE - TITLE	FOOTNOTE	RATE
01000 - Administrative Support And Clerical Occupations		
01011 - Accounting Clerk I		15.83
01012 - Accounting Clerk II		17.77
01013 - Accounting Clerk III		20.27
01020 - Administrative Assistant		28.08
01040 - Court Reporter		19.93
01051 - Data Entry Operator I		12.26
01052 - Data Entry Operator II		13.37
01060 - Dispatcher, Motor Vehicle		22.41
01070 - Document Preparation Clerk		13.75
01090 - Duplicating Machine Operator		13.75
01111 - General Clerk I		11.76
01112 - General Clerk II		14.92
01113 - General Clerk III		17.43
01120 - Housing Referral Assistant		21.90
01141 - Messenger Courier		11.45
01191 - Order Clerk I		16.98
01192 - Order Clerk II		18.53
01261 - Personnel Assistant (Employment) I		18.07
01262 - Personnel Assistant (Employment) II		20.20
01263 - Personnel Assistant (Employment) III		22.53
01270 - Production Control Clerk		23.51
01280 - Receptionist		14.51
01290 - Rental Clerk		16.83
01300 - Scheduler, Maintenance		17.39
01311 - Secretary I		17.39
01312 - Secretary II		19.45
01313 - Secretary III		21.90
01320 - Service Order Dispatcher		19.54
01410 - Supply Technician		26.82
01420 - Survey Worker		19.93
01531 - Travel Clerk I		14.72
01532 - Travel Clerk II		16.02
01533 - Travel Clerk III		17.21

01611 - Word Processor I	15.18
01612 - Word Processor II	16.87
01613 - Word Processor III	18.76
05000 - Automotive Service Occupations	
05005 - Automobile Body Repairer, Fiberglass	23.56
05010 - Automotive Electrician	22.18
05040 - Automotive Glass Installer	20.84
05070 - Automotive Worker	20.84
05110 - Mobile Equipment Servicer	19.16
05130 - Motor Equipment Metal Mechanic	23.56
05160 - Motor Equipment Metal Worker	20.84
05190 - Motor Vehicle Mechanic	23.56
05220 - Motor Vehicle Mechanic Helper	18.38
05250 - Motor Vehicle Upholstery Worker	20.40
05280 - Motor Vehicle Wrecker	20.84
05310 - Painter, Automotive	22.18
05340 - Radiator Repair Specialist	20.84
05370 - Tire Repairer	15.47
05400 - Transmission Repair Specialist	23.56
07000 - Food Preparation And Service Occupations	
07010 - Baker	12.28
07041 - Cook I	12.91
07042 - Cook II	14.31
07070 - Dishwasher	10.29
07130 - Food Service Worker	11.20
07210 - Meat Cutter	15.92
07260 - Waiter/Waitress	9.85
09000 - Furniture Maintenance And Repair Occupations	
09010 - Electrostatic Spray Painter	20.45
09040 - Furniture Handler	13.66
09080 - Furniture Refinisher	20.45
09090 - Furniture Refinisher Helper	16.30
09110 - Furniture Repairer, Minor	18.74
09130 - Upholsterer	20.45
11000 - General Services And Support Occupations	
11030 - Cleaner, Vehicles	11.76
11060 - Elevator Operator	11.76
11090 - Gardener	19.21
11122 - Housekeeping Aide	12.58
11150 - Janitor	14.04
11210 - Laborer, Grounds Maintenance	14.40
11240 - Maid or Houseman	10.16
11260 - Pruner	13.27
11270 - Tractor Operator	17.13
11330 - Trail Maintenance Worker	14.40
11360 - Window Cleaner	15.77
12000 - Health Occupations	
12010 - Ambulance Driver	17.82
12011 - Breath Alcohol Technician	17.82
12012 - Certified Occupational Therapist Assistant	26.38
12015 - Certified Physical Therapist Assistant	26.70
12020 - Dental Assistant	17.27
12025 - Dental Hygienist	38.39
12030 - EKG Technician	28.14
12035 - Electroneurodiagnostic Technologist	28.14
12040 - Emergency Medical Technician	17.82
12071 - Licensed Practical Nurse I	18.43
12072 - Licensed Practical Nurse II	20.68
12073 - Licensed Practical Nurse III	23.72
12100 - Medical Assistant	14.82
12130 - Medical Laboratory Technician	19.73

12160 - Medical Record Clerk		16.07
12190 - Medical Record Technician		18.53
12195 - Medical Transcriptionist		19.35
12210 - Nuclear Medicine Technologist		36.54
12221 - Nursing Assistant I		10.19
12222 - Nursing Assistant II		11.46
12223 - Nursing Assistant III		12.50
12224 - Nursing Assistant IV		14.03
12235 - Optical Dispenser		17.00
12236 - Optical Technician		15.71
12250 - Pharmacy Technician		17.83
12280 - Phlebotomist		14.03
12305 - Radiologic Technologist		25.24
12311 - Registered Nurse I		31.47
12312 - Registered Nurse II		38.49
12313 - Registered Nurse II, Specialist		38.49
12314 - Registered Nurse III		48.20
12315 - Registered Nurse III, Anesthetist		48.20
12316 - Registered Nurse IV		57.77
12317 - Scheduler (Drug and Alcohol Testing)		25.09
13000 - Information And Arts Occupations		
13011 - Exhibits Specialist I		24.83
13012 - Exhibits Specialist II		30.76
13013 - Exhibits Specialist III		37.63
13041 - Illustrator I		27.84
13042 - Illustrator II		34.51
13043 - Illustrator III		42.16
13047 - Librarian		31.80
13050 - Library Aide/Clerk		16.49
13054 - Library Information Technology Systems Administrator		28.71
13058 - Library Technician		22.40
13061 - Media Specialist I		20.36
13062 - Media Specialist II		22.76
13063 - Media Specialist III		25.38
13071 - Photographer I		17.95
13072 - Photographer II		20.08
13073 - Photographer III		26.61
13074 - Photographer IV		33.56
13075 - Photographer V		40.61
13110 - Video Teleconference Technician		20.08
14000 - Information Technology Occupations		
14041 - Computer Operator I		17.82
14042 - Computer Operator II		19.93
14043 - Computer Operator III		22.89
14044 - Computer Operator IV		25.73
14045 - Computer Operator V		27.35
14071 - Computer Programmer I	(see 1)	27.42
14072 - Computer Programmer II	(see 1)	
14073 - Computer Programmer III	(see 1)	
14074 - Computer Programmer IV	(see 1)	
14101 - Computer Systems Analyst I	(see 1)	
14102 - Computer Systems Analyst II	(see 1)	
14103 - Computer Systems Analyst III	(see 1)	
14150 - Peripheral Equipment Operator		17.82
14160 - Personal Computer Support Technician		25.73
15000 - Instructional Occupations		
15010 - Aircrew Training Devices Instructor (Non-Rated)		34.73
15020 - Aircrew Training Devices Instructor (Rated)		42.03
15030 - Air Crew Training Devices Instructor (Pilot)		50.37
15050 - Computer Based Training Specialist / Instructor		34.73

15060 - Educational Technologist	36.09
15070 - Flight Instructor (Pilot)	50.37
15080 - Graphic Artist	26.72
15090 - Technical Instructor	25.70
15095 - Technical Instructor/Course Developer	31.47
15110 - Test Proctor	20.77
15120 - Tutor	20.77
19000 - Machine Tool Operation And Repair Occupations	
19010 - Machine-Tool Operator (Tool Room)	18.52
19040 - Tool And Die Maker	23.95
21000 - Materials Handling And Packing Occupations	
21020 - Forklift Operator	14.54
21030 - Material Coordinator	23.51
21040 - Material Expediter	23.51
21050 - Material Handling Laborer	13.02
21071 - Order Filler	13.31
21080 - Production Line Worker (Food Processing)	14.54
21110 - Shipping Packer	15.08
21130 - Shipping/Receiving Clerk	15.08
21140 - Store Worker I	11.53
21150 - Stock Clerk	17.13
21210 - Tools And Parts Attendant	14.54
21410 - Warehouse Specialist	14.54
23000 - Mechanics And Maintenance And Repair Occupations	
23010 - Aerospace Structural Welder	30.78
23021 - Aircraft Mechanic I	29.10
23022 - Aircraft Mechanic II	30.78
23023 - Aircraft Mechanic III	31.94
23040 - Aircraft Mechanic Helper	20.38
23050 - Aircraft, Painter	24.41
23060 - Aircraft Servicer	23.55
23080 - Aircraft Worker	24.58
23110 - Appliance Mechanic	20.11
23120 - Bicycle Repairer	15.47
23125 - Cable Splicer	32.84
23130 - Carpenter, Maintenance	27.67
23140 - Carpet Layer	21.12
23160 - Electrician, Maintenance	30.18
23181 - Electronics Technician Maintenance I	23.67
23182 - Electronics Technician Maintenance II	25.21
23183 - Electronics Technician Maintenance III	26.76
23260 - Fabric Worker	23.87
23290 - Fire Alarm System Mechanic	22.33
23310 - Fire Extinguisher Repairer	20.03
23311 - Fuel Distribution System Mechanic	25.94
23312 - Fuel Distribution System Operator	19.83
23370 - General Maintenance Worker	23.26
23380 - Ground Support Equipment Mechanic	29.10
23381 - Ground Support Equipment Servicer	23.55
23382 - Ground Support Equipment Worker	24.58
23391 - Gunsmith I	20.03
23392 - Gunsmith II	23.16
23393 - Gunsmith III	26.19
23430 - Heavy Equipment Mechanic	28.30
23440 - Heavy Equipment Operator	32.18
23460 - Instrument Mechanic	27.13
23465 - Laboratory/Shelter Mechanic	24.67
23470 - Laborer	12.49
23510 - Locksmith	20.69
23530 - Machinery Maintenance Mechanic	27.12
23550 - Machinist, Maintenance	25.41

23580 - Maintenance Trades Helper	14.82
23591 - Metrology Technician I	27.13
23592 - Metrology Technician II	28.74
23593 - Metrology Technician III	31.63
23640 - Millwright	25.45
23710 - Office Appliance Repairer	20.86
23760 - Painter, Maintenance	21.05
23790 - Pipefitter, Maintenance	25.74
23810 - Plumber, Maintenance	24.24
23820 - Pneudraulic Systems Mechanic	26.19
23850 - Rigger	26.81
23870 - Scale Mechanic	23.16
23890 - Sheet-Metal Worker, Maintenance	24.34
23910 - Small Engine Mechanic	18.70
23931 - Telecommunications Mechanic I	26.30
23932 - Telecommunications Mechanic II	27.86
23950 - Telephone Lineman	24.18
23960 - Welder, Combination, Maintenance	19.75
23965 - Well Driller	24.56
23970 - Woodcraft Worker	23.90
23980 - Woodworker	18.49
24000 - Personal Needs Occupations	
24570 - Child Care Attendant	13.05
24580 - Child Care Center Clerk	16.03
24610 - Chore Aide	10.57
24620 - Family Readiness And Support Services Coordinator	16.03
24630 - Homemaker	19.21
25000 - Plant And System Operations Occupations	
25010 - Boiler Tender	27.59
25040 - Sewage Plant Operator	28.83
25070 - Stationary Engineer	27.59
25190 - Ventilation Equipment Tender	19.34
25210 - Water Treatment Plant Operator	28.83
27000 - Protective Service Occupations	
27004 - Alarm Monitor	23.77
27007 - Baggage Inspector	13.15
27008 - Corrections Officer	31.01
27010 - Court Security Officer	31.00
27030 - Detection Dog Handler	23.77
27040 - Detention Officer	31.01
27070 - Firefighter	29.97
27101 - Guard I	13.15
27102 - Guard II	23.77
27131 - Police Officer I	36.78
27132 - Police Officer II	40.87
28000 - Recreation Occupations	
28041 - Carnival Equipment Operator	12.76
28042 - Carnival Equipment Repairer	13.74
28043 - Carnival Equpment Worker	9.67
28210 - Gate Attendant/Gate Tender	14.16
28310 - Lifeguard	13.48
28350 - Park Attendant (Aide)	15.83
28510 - Recreation Aide/Health Facility Attendant	11.56
28515 - Recreation Specialist	19.61
28630 - Sports Official	12.61
28690 - Swimming Pool Operator	16.97
29000 - Stevedoring/Longshoremen Occupational Services	
29010 - Blocker And Bracer	23.42
29020 - Hatch Tender	23.42
29030 - Line Handler	23.42

29041 - Stevedore I		21.88
29042 - Stevedore II		24.95
30000 - Technical Occupations		
30010 - Air Traffic Control Specialist, Center (HFO)	(see 2)	39.85
30011 - Air Traffic Control Specialist, Station (HFO)	(see 2)	27.98
30012 - Air Traffic Control Specialist, Terminal (HFO)	(see 2)	30.26
30021 - Archeological Technician I		22.52
30022 - Archeological Technician II		24.21
30023 - Archeological Technician III		34.46
30030 - Cartographic Technician		34.46
30040 - Civil Engineering Technician		30.78
30061 - Drafter/CAD Operator I		24.86
30062 - Drafter/CAD Operator II		27.81
30063 - Drafter/CAD Operator III		31.00
30064 - Drafter/CAD Operator IV		38.15
30081 - Engineering Technician I		19.68
30082 - Engineering Technician II		22.09
30083 - Engineering Technician III		24.70
30084 - Engineering Technician IV		30.60
30085 - Engineering Technician V		37.43
30086 - Engineering Technician VI		45.29
30090 - Environmental Technician		27.72
30210 - Laboratory Technician		23.13
30240 - Mathematical Technician		33.92
30361 - Paralegal/Legal Assistant I		21.83
30362 - Paralegal/Legal Assistant II		27.04
30363 - Paralegal/Legal Assistant III		33.08
30364 - Paralegal/Legal Assistant IV		40.03
30390 - Photo-Optics Technician		33.92
30461 - Technical Writer I		23.62
30462 - Technical Writer II		28.89
30463 - Technical Writer III		34.96
30491 - Unexploded Ordnance (UXO) Technician I		25.32
30492 - Unexploded Ordnance (UXO) Technician II		30.64
30493 - Unexploded Ordnance (UXO) Technician III		36.72
30494 - Unexploded (UXO) Safety Escort		25.32
30495 - Unexploded (UXO) Sweep Personnel		25.32
30620 - Weather Observer, Combined Upper Air Or Surface Programs	(see 2)	30.42
30621 - Weather Observer, Senior	(see 2)	33.79
31000 - Transportation/Mobile Equipment Operation Occupations		
31020 - Bus Aide		13.63
31030 - Bus Driver		19.62
31043 - Driver Courier		13.27
31260 - Parking and Lot Attendant		9.39
31290 - Shuttle Bus Driver		14.48
31310 - Taxi Driver		13.23
31361 - Truckdriver, Light		14.48
31362 - Truckdriver, Medium		20.63
31363 - Truckdriver, Heavy		21.78
31364 - Truckdriver, Tractor-Trailer		21.78
99000 - Miscellaneous Occupations		
99030 - Cashier		12.13
99050 - Desk Clerk		12.65
99095 - Embalmer		23.19
99251 - Laboratory Animal Caretaker I		11.02
99252 - Laboratory Animal Caretaker II		12.08
99310 - Mortician		34.35
99410 - Pest Controller		15.19
99510 - Photofinishing Worker		16.36
99710 - Recycling Laborer		21.03

99711 - Recycling Specialist	24.67
99730 - Refuse Collector	18.76
99810 - Sales Clerk	17.13
99820 - School Crossing Guard	9.51
99830 - Survey Party Chief	37.97
99831 - Surveying Aide	21.26
99832 - Surveying Technician	27.95
99840 - Vending Machine Attendant	12.77
99841 - Vending Machine Repairer	15.42
99842 - Vending Machine Repairer Helper	12.77

ALL OCCUPATIONS LISTED ABOVE RECEIVE THE FOLLOWING BENEFITS:

HEALTH & WELFARE: $3.50 per hour or $140.00 per week or $606.67 per month

VACATION: 2 weeks paid vacation after 1 year of service with a contractor or successor; 3 weeks after 5 years, and 4 weeks after 15 years. Length of service includes the whole span of continuous service with the present contractor or successor, wherever employed, and with the predecessor contractors in the performance of similar work at the same Federal facility. (Reg. 29 CFR 4.173)

HOLIDAYS: A minimum of ten paid holidays per year, New Year's Day, Martin Luther King Jr's Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, and Christmas Day. (A contractor may substitute for any of the named holidays another day off with pay in accordance with a plan communicated to the employees involved.) (See 29 CFR 4174)

THE OCCUPATIONS WHICH HAVE NUMBERED FOOTNOTES IN PARENTHESES RECEIVE THE FOLLOWING:

1) COMPUTER EMPLOYEES: Under the SCA at section 8(b), this wage determination does not apply to any employee who individually qualifies as a bona fide executive, administrative, or professional employee as defined in 29 C.F.R. Part 541. Because most Computer System Analysts and Computer Programmers who are compensated at a rate not less than $27.63 (or on a salary or fee basis at a rate not less than $455 per week) an hour would likely qualify as exempt computer professionals, (29 C.F.R. 541. 400) wage rates may not be listed on this wage determination for all occupations within those job families. In addition, because this wage determination may not list a wage rate for some or all occupations within those job families if the survey data indicates that the prevailing wage rate for the occupation equals or exceeds $27.63 per hour conformances may be necessary for certain nonexempt employees. For example, if an individual employee is nonexempt but nevertheless performs duties within the scope of one of the Computer Systems Analyst or Computer Programmer occupations for which this wage determination does not specify an SCA wage rate, then the wage rate for that employee must be conformed in accordance with the conformance procedures described in the conformance note included on this wage determination.

Additionally, because job titles vary widely and change quickly in the computer industry, job titles are not determinative of the application of the computer professional exemption. Therefore, the exemption applies only to computer employees who satisfy the compensation requirements and whose primary duty consists of:
(1) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;

(2) The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
(3) The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
(4) A combination of the aforementioned duties, the performance of which requires the same level of skills. (29 C.F.R. 541.400).

2) AIR TRAFFIC CONTROLLERS AND WEATHER OBSERVERS - NIGHT PAY & SUNDAY PAY: If you work at night as part of a regular tour of duty, you will earn a night differential and receive an additional 10% of basic pay for any hours worked between 6pm and 6am. If you are a full-time employed (40 hours a week) and Sunday is part of your regularly scheduled workweek, you are paid at your rate of basic pay plus a Sunday premium of 25% of your basic rate for each hour of Sunday work which is not overtime (i.e. occasional work on Sunday outside the normal tour of duty is considered overtime work).

HAZARDOUS PAY DIFFERENTIAL: An 8 percent differential is applicable to employees employed in a position that represents a high degree of hazard when working with or in close proximity to ordinance, explosives, and incendiary materials. This includes work such as screening, blending, dying, mixing, and pressing of sensitive ordance, explosives, and pyrotechnic compositions such as lead azide, black powder and photoflash powder. All dry-house activities involving propellants or explosives. Demilitarization, modification, renovation, demolition, and maintenance operations on sensitive ordnance, explosives and incendiary materials. All operations involving regrading and cleaning of artillery ranges.

A 4 percent differential is applicable to employees employed in a position that represents a low degree of hazard when working with, or in close proximity to ordance, (or employees possibly adjacent to) explosives and incendiary materials which involves potential injury such as laceration of hands, face, or arms of the employee engaged in the operation, irritation of the skin, minor burns and the like; minimal damage to immediate or adjacent work area or equipment being used. All operations involving, unloading, storage, and hauling of ordance, explosive, and incendiary ordnance material other than small arms ammunition. These differentials are only applicable to work that has been specifically designated by the agency for ordance, explosives, and incendiary material differential pay.

** UNIFORM ALLOWANCE **

If employees are required to wear uniforms in the performance of this contract (either by the terms of the Government contract, by the employer, by the state or local law, etc.), the cost of furnishing such uniforms and maintaining (by laundering or dry cleaning) such uniforms is an expense that may not be borne by an employee where such cost reduces the hourly rate below that required by the wage determination. The Department of Labor will accept payment in accordance with the following standards as compliance:

The contractor or subcontractor is required to furnish all employees with an adequate number of uniforms without cost or to reimburse employees for the actual cost of the uniforms. In addition, where uniform cleaning and maintenance is made the responsibility of the employee, all contractors and subcontractors subject to this wage determination shall (in the absence of a bona fide collective bargaining agreement providing for a different amount, or the furnishing of contrary affirmative proof as to the actual cost), reimburse all employees for such cleaning and maintenance at a rate of $3.35 per week (or $.67 cents per day). However, in those instances where the uniforms furnished are made of "wash and wear" materials, may be routinely washed and dried with other personal garments, and do not require any special treatment such as dry cleaning, daily washing, or commercial laundering in order to meet the cleanliness or appearance standards set by the terms

of the Government contract, by the contractor, by law, or by the nature of the work, there is no requirement that employees be reimbursed for uniform maintenance costs.

The duties of employees under job titles listed are those described in the "Service Contract Act Directory of Occupations", Fifth Edition, April 2006, unless otherwise indicated. Copies of the Directory are available on the Internet. A links to the Directory may be found on the WHD home page at http://www.dol.gov/esa/whd/ or through the Wage Determinations On-Line (WDOL) Web site at http://wdol.gov/.

REQUEST FOR AUTHORIZATION OF ADDITIONAL CLASSIFICATION AND WAGE RATE {Standard Form 1444 (SF 1444)}

Conformance Process:

The contracting officer shall require that any class of service employee which is not listed herein and which is to be employed under the contract (i.e., the work to be performed is not performed by any classification listed in the wage determination), be classified by the contractor so as to provide a reasonable relationship (i.e., appropriate level of skill comparison) between such unlisted classifications and the classifications listed in the wage determination. Such conformed classes of employees shall be paid the monetary wages and furnished the fringe benefits as are determined. Such conforming process shall be initiated by the contractor prior to the performance of contract work by such unlisted class(es) of employees. The conformed classification, wage rate, and/or fringe benefits shall be retroactive to the commencement date of the contract. {See Section 4.6 (C)(vi)} When multiple wage determinations are included in a contract, a separate SF 1444 should be prepared for each wage determination to which a class(es) is to be conformed.

The process for preparing a conformance request is as follows:

1) When preparing the bid, the contractor identifies the need for a conformed occupation(s) and computes a proposed rate(s).

2) After contract award, the contractor prepares a written report listing in order proposed classification title(s), a Federal grade equivalency (FGE) for each proposed classification(s), job description(s), and rationale for proposed wage rate(s), including information regarding the agreement or disagreement of the authorized representative of the employees involved, or where there is no authorized representative, the employees themselves. This report should be submitted to the contracting officer no later than 30 days after such unlisted class(es) of employees performs any contract work.

3) The contracting officer reviews the proposed action and promptly submits a report of the action, together with the agency's recommendations and pertinent information including the position of the contractor and the employees, to the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, for review. (See section 4.6(b)(2) of Regulations 29 CFR Part 4).

4) Within 30 days of receipt, the Wage and Hour Division approves, modifies, or disapproves the action via transmittal to the agency contracting officer, or notifies the contracting officer that additional time will be required to process the request.

5) The contracting officer transmits the Wage and Hour decision to the contractor.

6) The contractor informs the affected employees.

Information required by the Regulations must be submitted on SF 1444 or bond paper.

When preparing a conformance request, the "Service Contract Act Directory of Occupations" (the Directory) should be used to compare job definitions to insure that duties requested are not performed by a classification already listed in the wage determination. Remember, it is not the job title, but the required tasks that determine whether a class is included in an established wage determination. Conformances may not be used to artificially split, combine, or subdivide classifications listed in the wage determination.

Law by source: Uniform laws

3/15/2004

Uniform Commercial Code Locator

This locator links to state statutes that correspond to Articles of the Uniform Commercial Code.

Locators are also available for the Uniform Probate Code, Uniform Code of Evidence, and uniform laws in the areas of: matrimonial, family and health and business and finance. If you are unclear about what Uniform Laws are see the LII "Uniform Laws" page.

U.C.C.

- Article 1: General Provisions
- Article 2: Sales
- Article 2A: Leases
- Article 3: Commercial Paper
- Article 4: Bank Deposits and Collections
- Article 4A: Funds Transfers
- Article 5: Letters of Credit
- Article 6: Bulk Transfers
- Article 7: Warehouse Receipts, Bills of Lading and Other Documents of Title
- Article 8: Investment Securities
- Article 9: Secured Transactions; Sales of Accounts and Chattel Paper

See also Minnesota U.C.C.-based commercial codes.

Article 1: General Provisions

UCC Article 1

Uniform Law Commissioners drafts bearing on past and future revisions

- Alabama
- Alaska
- Arizona - §§ 47-1101 to 47-1209
- Arkansas Title 4. Business and Commercial Law
- California - §§ 1101 to 1210
- Colorado - §§ 4-1-101 to 4-1-209
- Connecticut - §§ 42a-1-101 to 42a-1-208
- District of Columbia
- Delaware
- Florida
- Georgia - § 11-1-101
- Hawaii
- Idaho
- Maryland - article = "Commercial Law" §§ 1-101 - 1-109
- Massachusetts
- Michigan
- Minnesota - §§ 336.1-101 to 336.1-209.
- Mississippi - § 75-1-101
- Missouri
- Montana
- Nebraska - § U1-101
- Nevada
- New Hampshire - §§ 382-A:1-101 to 382-A:1-208.
- New Jersey - §§ 12A: 1-101 to 12A 1-209
- New Mexico - §§ 55-1-101
- Pennsylvania
- Rhode Island
- South Carolina
- South Dakota
- Tennessee
- Texas
- Utah
- Vermont
- Virgin Islands
- Virginia
- Washington
- West Virginia Chapter 46-1-101 to 46-1-208
- Wisconsin
- Wyoming

- Illinois
- Indiana
- Iowa
- Kansas - § 84-1-101 (Chapt. 84), fee based service
- Kentucky (PDF)
- Louisiana
- Maine

through 55-1-209.

- New York
- North Carolina - §§ 25-1-101 to 25-1-209
- North Dakota (PDF)
- Ohio (Title 1301)
- Oklahoma - 12A §§ 1-101
- Oregon

Article 2: Sales

UCC Article 2

Uniform Law Commissioners drafts bearing on past and future revisions

- Alabama
- Alaska
- Arizona - §§ 47-2101 to 47-2725
- Arkansas
- California - §§ 2101 to 2801
- Colorado - §§ 4-2-101 to 4-2-725
- Connecticut - §§ 42a-2-101 to 42a-2-725
- Delaware
- District of Columbia
- Florida
- Georgia - § 11-2-101
- Hawaii
- Idaho
- Illinois
- Indiana
- Iowa
- Kansas - § 84-2-101 (Chapt. 84): Fee based service
- Kentucky (PDF)
- Louisiana - did not adopt this article
- Maine
- Maryland - article = "Commercial Law" §§ 2-101 to 2-725
- Massachusetts
- Michigan
- Minnesota §§ 336.2-101 to 336.2-725.
- Mississippi - § 75-2-101
- Missouri
- Montana
- Nebraska - § U2-101
- Nevada
- New Hampshire - §§ 382-A:1-101 to 382-A:1-208.
- New Jersey - §§ 12A: 2-101 to 12A: 2-725
- New Mexico - §§ 55-2-101 through 55-2-725.
- New York
- North Carolina - §§ 25-2-101 to 25-2-725
- North Dakota (PDF)
- Ohio (Title 1302)
- Oklahoma - 12A §§ 2-101
- Oregon
- Pennsylvania
- Rhode Island
- South Carolina
- South Dakota
- Tennessee
- Texas
- Utah
- Vermont
- Virgin Islands
- Virginia
- Washington
- West Virginia Chapter 46-2-101 to 46-1-725
- Wisconsin
- Wyoming

Article 2A: Leases

UCC Article 2A

Uniform Law Commissioners drafts bearing on past and future revisions

- Alabama
- Alaska
- Arizona - §§ 47-2A101 to 47-2A532
- Arkansas
- California - §§ 10101 to 10600
- Colorado - §§ 4-2.5-101 to 4-2.5-533
- Connecticut - not adopted
- Delaware
- District of Columbia
- Florida
- Georgia
- Hawaii
- Idaho
- Illinois
- Maryland - article = "Commercial Law" §§ 2A-101 to 2A-532.
- Massachusetts
- Michigan
- Minnesota - §§ 336.2A-101 to 336.2A-531.
- Mississippi - § 75-2a-101
- Missouri
- Montana
- Nebraska - § U2A-101
- Nevada
- New Hampshire - §§ 382-A:2A-101 to 382-A:2A-532.
- New Jersey - §§ 12A: 2A-101 to 12A: 2A-532
- New Mexico - §§ 55-2A-101
- Oregon
- Pennsylvania - article not on-line
- Rhode Island
- South Carolina
- South Dakota
- Tennessee
- Texas
- Utah
- Vermont
- Virgin Islands
- Virginia
- Washington
- West Virginia Chapter 46-2A-101 to 46-2A-532
- Wisconsin
- Wyoming

- Indiana
- Iowa
- Kansas - § 84-2a-101 (Chapt. 84): Fee based service
- Kentucky (PDF)
- Louisiana - did not adopt this article
- Maine

through 55-2A-532.
- New York
- North Carolina - §§ 25-2A-101 to 25-2A-532
- North Dakota (PDF)
- Ohio (Title 1310)
- Oklahoma - 12A §§ 2A-101

Article 3: Commercial Paper

UCC Article 3

Uniform Law Commissioners drafts bearing on past and future revisions

- Alabama
- Alaska
- Arizona - §§ 47-3101 to 47-3605
- Arkansas
- California - §§ 3101 to 3605
- Colorado - §§ 4-3-101 to 4-3-605
- Connecticut - §§ 42a-3-101 to 42a-3-805
- Delaware
- District of Columbia
- Florida
- Georgia - Ga. Code § 11-3-101
- Hawaii
- Idaho
- Illinois
- Indiana
- Iowa
- Kansas - § 84-3-101 (Chapt. 84): Fee based service
- Kentucky
- Louisiana
- Maine
- Maryland - article = "Commercial Law" §§ 3-101 to 3-605.
- Massachusetts*
- Michigan
- Minnesota - §§ 336.3-101 to 336.3-805.
- Mississippi - § 75-3-101
- Missouri
- Montana
- Nebraska - § U3-101
- Nevada
- New Hampshire - §§ 382-A:3-101 to 382-A:3-605.
- New Jersey - §§ 12A: 3-101 to 12A: 3-805
- New Mexico - §§ 55-3-101 through 55-3-805.
- New York*
- North Carolina - §§ 25-3-101 to 25-3-605
- North Dakota (PDF)
- Ohio (Title 1303)
- Oklahoma - 12A §§ 3-101
- Oregon
- Pennsylvania
- Rhode Island*
- South Carolina
- South Dakota
- Tennessee
- Texas
- Utah*
- Vermont
- Virgin Islands
- Virginia
- Washington
- West Virginia Chapter 46-3-101 to 46-3-605
- Wisconsin
- Wyoming

* All states except Massachusetts, New York, Rhode Island, South Carolina, and Utah adopted the 1990 revision ("Negotiable Instruments").

Article 4: Bank Deposits and Collections

UCC Article 4

Uniform Law Commissioners drafts bearing on past and future revisions

- Alabama
- Alaska
- Arizona - §§ 47-4101 to 47-4504
- Arkansas
- California - §§ 4101 to 4504
- Colorado - §§ 4-4-101 to 4-4-504
- Connecticut - §§ 42a-4-101 to 42a-4-504
- Delaware
- District of Columbia
- Florida
- Maryland - article = "Commercial Law" §§ 4-101 to 4-504.
- Massachusetts**
- Michigan
- Minnesota - §§ 336.4-101 to 336.4-504.
- Mississippi - § 75-4-101
- Missouri
- Montana
- Nebraska - § U4-101
- Nevada
- New Hampshire - §§ 382-A:4-
- Oregon
- Pennsylvania
- Rhode Island**
- South Carolina
- South Dakota
- Tennessee
- Texas
- Utah
- Vermont
- Virgin Islands
- Virginia
- Washington

- Georgia - § 11-4-101
- Hawaii
- Idaho
- Illinois
- Indiana
- Iowa
- Kansas - § 84-4-101 (Chapt. 84): Fee based service
- Kentucky
- Louisiana
- Maine
- Maryland - article = "Commercial Law" §§ 4-101 to 4-504.
- Massachusetts
- Michigan
- Minnesota - §§ 336.4-101 to 336.4-504.
- New Jersey - §§ 12A: 4-101 to 12A: 4-504
- New Mexico - §§ 55-4-101 through 55-4-504.
- New York**
- North Carolina - §§ 25-4-101 to 25-4-504
- North Dakota (PDF)
- Ohio (Title 1304)
- Oklahoma - 12A §§ 4-101
- Oregon
- Pennsylvania - article not on-line
- Rhode Island
- South Carolina
- South Dakota
- Tennessee
- Texas
- Utah
- Vermont
- Virgin Islands
- Virginia
- Washington
- West Virginia Chapter 46-4-101 to 46-4-504
- Wisconsin
- Wyoming

**All states except Massachusetts, New York, Rhode Island, and South Carolina adopted the 1990 amendments.

Article 4A: Funds Transfers

UCC Article 4A

Uniform Law Commissioners drafts bearing on past and future revisions

- Alabama
- Alaska
- Arizona - §§ 47-4A101 to 47-4A507
- Arkansas
- California - §§ 11101 to 11507
- Colorado - §§ 4-4.5-101 to 4-4.5-507
- Connecticut - §§ 42a-4a-101 to 42a-4a-507
- Delaware
- District of Columbia
- Florida
- Georgia
- Hawaii
- Idaho
- Illinois
- Indiana
- Iowa
- Kansas - § 84-4a-101 (Chapt. 84): Fee based service
- Kentucky
- Louisiana
- Maine
- Maryland - article = "Commercial Law" §§ 4A-101 to 4A-507.
- Massachusetts
- Michigan
- Minnesota - §§ 336.4A-101 to 336.4A-507.
- Mississippi - § 75-4a-101
- Missouri
- Montana
- Nebraska - § U4A-101
- Nevada
- New Hampshire - §§ 382-A:4A-101 to 382-A:4A-507.
- New Jersey - §§ 12A: 4A-101 to 12A: 4A-507
- New Mexico - §§ 55-4A-101 through 55-4A-507.
- New York
- North Carolina - §§ 25-4A-101 to 25-4A-507
- North Dakota (PDF)
- Ohio
- Oklahoma - 12A §§ 4A-101
- Oregon
- Pennsylvania - article not on-line
- Rhode Island
- South Carolina
- South Dakota
- Tennessee
- Texas
- Utah
- Vermont
- Virgin Islands
- Virginia
- Washington
- West Virginia Chapter 46-4A-101 to 46-4A-507
- Wisconsin
- Wyoming

Article 5: Letters of Credit

UCC Article 5

- Alabama
- Alaska
- Arizona - §§ 47-5101 to 47-5117
- Arkansas
- California - §§ 5101 to 5117 - adopted 1995 revision
- Colorado - §§ 4-5-101 to 4-5-119 - adopted 1995 revision
- Connecticut - §§ 42a-5-101 to 42a-5-119 - adopted 1995 revision
- Maryland - article = "Commercial Law" §§ 5-101 to 5-118. - adopted 1995 revision
- Massachusetts - adopted 1995 revision
- Michigan
- Minnesota - §§ 336.5-101 to 336.5-118. - adopted 1995 revision
- Misssissippi - § 75-5-101 - adopted 1995 revision
- Oregon - adopted 1995 revision
- Pennsylvania
- Rhode Island
- South Carolina
- South Dakota
- Tennessee
- Texas
- Utah
- Vermont
- Virgin Islands
- Virginia

- Delaware
- District of Columbia - adopted 1995 revision
- Florida
- Georgia - § 11-5-101
- Hawaii - adopted 1995 revision
- Idaho
- Illinois
- Indiana - adopted 1995 revision
- Iowa
- Kansas - § 84-5-101 - adopted 1995 revision (Chapt. 84): Fee based service
- Kentucky
- Louisiana
- Maine - adopted 1995 revision
- Missouri - adopted 1995 revision
- Montana - adopted 1995 revision
- Nebraska - § U5-101
- Nevada - adopted 1995 revision
- New Hampshire - §§ 382-A:5-101 to 382-A:5-118.
- New Jersey - §§ 12A: 5-101 to 12A: 5-117
- New Mexico - §§ 55-5-101 through 55-5-117. - adopted 1995 revision
- New York
- North Carolina - §§ 25-5-101 to 25-5-117 - adopted 1995 revision
- North Dakota (PDF)
- Ohio (Title 1305)
- Oklahoma - 12A §§ 5-101 - adopted 1995 revision
- Washington - adopted 1995 revision
- West Virginia - adopted 1995 revision Chapter 46-5-101 to 46-5-120
- Wisconsin
- Wyoming

Article 6: Bulk Sales

UCC Article 6

- Alabama
- Alaska - repealed without adopting 1989 revision
- Arizona - §§ 47-6101 to 47-6110
- Arkansas
- California - §§ 6101 to 6111 - adopted 1989 revision
- Colorado - §§ 4-6-101 to 4-6-112 - repealed without adopting 1989 revision
- Connecticut - §§ 42a-6-101 to 42a-6-110b
- Delaware - repealed without adopting 1989 revision
- District of Columbia - adopted 1989 revision
- Florida - repealed without adopting 1989 revision
- Georgia - § 11-6-101
- Hawaii - repealed
- Idaho -repealed without adopting 1989 Revision
- Illinois - repealed without adopting 1989 Revision
- Indiana - adopted 1989 revision
- Iowa - repealed without adopting 1989 revision
- Kansas - repealed without adopting 1989 revision
- Kentucky -repealed without adopting 1989 revision
- Louisiana - did not adopt this article
- Maine - repealed without adopting 1989 revision
- Maryland - article = "Commercial Law" §§ 6-101 to 6-111.
- Massachusetts - repealed without adopting 1989 revision
- Michigan
- Minnesota - repealed without adopting 1989 revision
- Mississippi - § 75-6-101
- Missouri
- Montana - repealed without adopting 1989 revision
- Nebraska
- Nevada - repealed without adopting 1989 revision
- New Hampshire - repealed without adopting 1989 revision
- New Jersey
- New Mexico - repealed without adopting 1989 revision
- New York
- North Carolina - §§ 25-6-101 to 25-6-111
- North Dakota - repealed without adopting 1989 revision
- Ohio - repealed without adopting 1989 revision
- Oklahoma - 12A §§ 6-101 - adopted and later repealed 1989 revision
- Oregon - repealed without adopting 1989 revision
- Pennsylvania - repealed
- Rhode Island
- South Carolina -repealed
- South Dakota -repealed without adopting 1989 revision
- Tennessee - repealed
- Texas - repealed without adopting 1989 revision
- Utah - repealed 1989 revision
- Vermont
- Virgin Islands - repealed
- Virginia
- Washington - repealed without adopting 1989 revision
- West Virginia - repealed
- Wisconsin
- Wyoming

Article 7: Warehouse Receipts, Bills of Lading and Other Documents of Title

UCC Article 7

Uniform Law Commissioners drafts bearing on past and future revisions

- Alabama
- Alaska
- Arizona - §§ 47-7101 to 47-7603
- Arkansas
- California - §§ 7101 to 7509
- Colorado - §§ 4-7-101 to 4-7-603
- Connecticut - §§ 42a-7-101 to 42a-7-603
- Delaware
- District of Columbia
- Florida
- Georgia - § 11-7-101
- Hawaii
- Idaho
- Illinois
- Indiana
- Iowa
- Kansas - § 84-7-101 (Chapt. 84): Fee based service
- Kentucky
- Louisiana
- Maine
- Maryland - article = "Commercial Law" §§ 7-101 to 7-603.
- Massachusetts
- Michigan
- Minnesota - §§ 336. 7-101 to 336.7-603.
- Mississippi - § 75-7-101
- Missouri
- Montana
- Nebraska - § U7-101
- Nevada
- New Hampshire - §§ 382-A:7-101 to 382-A:7-603.
- New Jersey - §§ 12A: 7-101 to 12A: 7-603
- New Mexico - §§ 55-7-101 through 55-7-807.
- New York
- North Carolina - §§ 25-7-101 to 25-7-603
- North Dakota (PDF)
- Ohio (Title 1307)
- Oklahoma - 12A §§ 7-101
- Oregon
- Pennsylvania - article not on-line
- Rhode Island
- South Carolina
- South Dakota
- Tennessee
- Texas
- Utah
- Vermont
- Virgin Islands
- Virginia
- Washington
- West Virginia Chapter 46-7-101 to 46-7-603
- Wisconsin
- Wyoming

Article 8: Investment Securities

UCC Article 8

- Alabama
- Alaska - adopted 1994 revision
- Arizona - §§ 47-8101 to 47-8511 adopted 1977 revision
- Arkansas - adopted 1994 revision
- California - §§ 8101 to 8603 - adopted 1994 revision
- Colorado - §§ 4-8-101 to 4-8-603 - adopted 1994 revision
- Connecticut - §§ 42a-8-101 to 42a-8-408 - adopted 1994 revision
- Delaware - adopted 1994 revision
- District of Columbia - adopted 1994 revision
- Florida - adopted 1977 revision
- Georgia - § 11-8-101 - adopted 1977 revision
- Hawaii - adopted 1994 revision
- Idaho - adopted 1994 revision
- Illinois
- Indiana - adopted 1994 revision
- Iowa - adopted 1994 revision
- Kansas - § 84-8-101 (Chapt. 84) - adopted 1994 revision: Fee based service
- Kentucky -adopted 1977 revision
- Louisiana - adopted 1994 revision
- Maine - adopted 1994 revision
- Maryland - article = "Commercial Law" §§ 8-101 to 8-511. - adopted 1994 revision
- Massachusetts - adopted 1994 revision
- Michigan - adopted 1977 revision
- Minnesota - §§ 336.8-101 to 336.8-603. - adopted 1994 revision - repealed §§ 8-308 to 8-321
- Mississippi - § 75-8-101 - adopted 1994 revision
- Missouri - adopted 1994 revision
- Montana - adopted 1994 revision
- Nebraska - § U8-101
- Nevada - adopted 1994 revision
- New Hampshire - adopted 1977 revision - §§ See 382-A:8-101 to 382-A:8-511.
- New Jersey - §§ 12A: 8-101 to 12A: 8-601
- New Mexico -§§ 55-8-101 through 55-8-511. - adopted 1994 revision
- New York - adopted 1994 revision
- North Carolina - §§ 25-8-101 to 25-8-204- adopted 1994 revision
- North Dakota (PDF)- adopted 1994 revision
- Ohio - adopted 1994 revision (Title 1308)
- Oklahoma - 12A §§ 8-101 - adopted 1994 revision
- Oregon - adopted 1994 revision
- Pennsylvania - article not on-line - adopted 1994 revision
- Rhode Island - adopted 1977 revision
- South Carolina - adopted 1977 revision
- South Dakota - adopted 1977 revision
- Tennessee
- Texas - adopted 1994 revision
- Utah - adopted 1977 revision
- Vermont
- Virgin Islands
- Virginia
- Washington - adopted 1994 revision
- West Virginia Chapter 46-8-101 to 46-8-601
- Wisconsin - adopted 1977 revision
- Wyoming

Article 9: Secured Transactions; Sales of Accounts and Chattel Paper

UCC Article 9

Uniform Law Commissioners drafts bearing on past and future revisions

- Alabama
- Alaska
- Arizona - §§ 47-9101 to 47-9507
- Arkansas
- California - §§ 9101 to 9508
- Colorado - §§ 4-9-101 to 4-9-509
- Connecticut - §§ 42a-9-101 to 42a-9-507
- Delaware
- District of Columbia
- Florida
- Georgia - § 11-9-101
- Hawaii
- Idaho
- Illinois
- Indiana
- Iowa
- Kansas - § 84-9-101 (Chapt. 84): Fee based service
- Kentucky
- Louisiana
- Maine
- Maryland - article = "Commercial Law" §§ 9-101 to 9-709.
- Massachusetts
- Michigan
- Minnesota - §§ 336.9-101 to 336.9-709.
- Mississippi - § 75-9-101
- Missouri
- Montana - repealed Parts 1-5
- Nebraska - § U9-101
- Nevada
- New Hampshire - §§ See 382-A:9-101 to 382-A:9-710.
- New Jersey - §§ 12A: 9-101 to 12A: 9-507
- New Mexico - §§ 55-9-101 through 55-9-710.
- New York
- North Carolina - §§ 25-9-101 to 25-9-607
- North Dakota (PDF)
- Ohio (Title XIII)
- Oklahoma - 12A §§ 9-101
- Oregon
- Pennsylvania - selected chapters on-line
- Rhode Island
- South Carolina
- South Dakota
- Tennessee
- Texas
- Utah
- Vermont
- Virgin Islands
- Virginia
- Washington
- West Virginia Chapter 46-9-101 to 46-9-709
- Wisconsin
- Wyoming

Public Law 108–187
108th Congress

An Act

To regulate interstate commerce by imposing limitations and penalties on the transmission of unsolicited commercial electronic mail via the Internet.

Dec. 16, 2003
[S. 877]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003.
15 USC 7701 note.

SECTION 1. SHORT TITLE.

This Act may be cited as the "Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003", or the "CAN-SPAM Act of 2003".

15 USC 7701.

SEC. 2. CONGRESSIONAL FINDINGS AND POLICY.

(a) FINDINGS.—The Congress finds the following:

(1) Electronic mail has become an extremely important and popular means of communication, relied on by millions of Americans on a daily basis for personal and commercial purposes. Its low cost and global reach make it extremely convenient and efficient, and offer unique opportunities for the development and growth of frictionless commerce.

(2) The convenience and efficiency of electronic mail are threatened by the extremely rapid growth in the volume of unsolicited commercial electronic mail. Unsolicited commercial electronic mail is currently estimated to account for over half of all electronic mail traffic, up from an estimated 7 percent in 2001, and the volume continues to rise. Most of these messages are fraudulent or deceptive in one or more respects.

(3) The receipt of unsolicited commercial electronic mail may result in costs to recipients who cannot refuse to accept such mail and who incur costs for the storage of such mail, or for the time spent accessing, reviewing, and discarding such mail, or for both.

(4) The receipt of a large number of unwanted messages also decreases the convenience of electronic mail and creates a risk that wanted electronic mail messages, both commercial and noncommercial, will be lost, overlooked, or discarded amidst the larger volume of unwanted messages, thus reducing the reliability and usefulness of electronic mail to the recipient.

(5) Some commercial electronic mail contains material that many recipients may consider vulgar or pornographic in nature.

(6) The growth in unsolicited commercial electronic mail imposes significant monetary costs on providers of Internet access services, businesses, and educational and nonprofit institutions that carry and receive such mail, as there is a finite volume of mail that such providers, businesses, and

institutions can handle without further investment in infrastructure.

(7) Many senders of unsolicited commercial electronic mail purposefully disguise the source of such mail.

(8) Many senders of unsolicited commercial electronic mail purposefully include misleading information in the messages' subject lines in order to induce the recipients to view the messages.

(9) While some senders of commercial electronic mail messages provide simple and reliable ways for recipients to reject (or "opt-out" of) receipt of commercial electronic mail from such senders in the future, other senders provide no such "opt-out" mechanism, or refuse to honor the requests of recipients not to receive electronic mail from such senders in the future, or both.

(10) Many senders of bulk unsolicited commercial electronic mail use computer programs to gather large numbers of electronic mail addresses on an automated basis from Internet websites or online services where users must post their addresses in order to make full use of the website or service.

(11) Many States have enacted legislation intended to regulate or reduce unsolicited commercial electronic mail, but these statutes impose different standards and requirements. As a result, they do not appear to have been successful in addressing the problems associated with unsolicited commercial electronic mail, in part because, since an electronic mail address does not specify a geographic location, it can be extremely difficult for law-abiding businesses to know with which of these disparate statutes they are required to comply.

(12) The problems associated with the rapid growth and abuse of unsolicited commercial electronic mail cannot be solved by Federal legislation alone. The development and adoption of technological approaches and the pursuit of cooperative efforts with other countries will be necessary as well.

(b) CONGRESSIONAL DETERMINATION OF PUBLIC POLICY.—On the basis of the findings in subsection (a), the Congress determines that—

(1) there is a substantial government interest in regulation of commercial electronic mail on a nationwide basis;

(2) senders of commercial electronic mail should not mislead recipients as to the source or content of such mail; and

(3) recipients of commercial electronic mail have a right to decline to receive additional commercial electronic mail from the same source.

15 USC 7702.

SEC. 3. DEFINITIONS.

In this Act:

(1) AFFIRMATIVE CONSENT.—The term "affirmative consent", when used with respect to a commercial electronic mail message, means that—

(A) the recipient expressly consented to receive the message, either in response to a clear and conspicuous request for such consent or at the recipient's own initiative; and

(B) if the message is from a party other than the party to which the recipient communicated such consent, the recipient was given clear and conspicuous notice at

the time the consent was communicated that the recipient's electronic mail address could be transferred to such other party for the purpose of initiating commercial electronic mail messages.

(2) COMMERCIAL ELECTRONIC MAIL MESSAGE.—

(A) IN GENERAL.—The term "commercial electronic mail message" means any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service (including content on an Internet website operated for a commercial purpose).

(B) TRANSACTIONAL OR RELATIONSHIP MESSAGES.—The term "commercial electronic mail message" does not include a transactional or relationship message.

(C) REGULATIONS REGARDING PRIMARY PURPOSE.—Not later than 12 months after the date of the enactment of this Act, the Commission shall issue regulations pursuant to section 13 defining the relevant criteria to facilitate the determination of the primary purpose of an electronic mail message. Deadline.

(D) REFERENCE TO COMPANY OR WEBSITE.—The inclusion of a reference to a commercial entity or a link to the website of a commercial entity in an electronic mail message does not, by itself, cause such message to be treated as a commercial electronic mail message for purposes of this Act if the contents or circumstances of the message indicate a primary purpose other than commercial advertisement or promotion of a commercial product or service.

(3) COMMISSION.—The term "Commission" means the Federal Trade Commission.

(4) DOMAIN NAME.—The term "domain name" means any alphanumeric designation which is registered with or assigned by any domain name registrar, domain name registry, or other domain name registration authority as part of an electronic address on the Internet.

(5) ELECTRONIC MAIL ADDRESS.—The term "electronic mail address" means a destination, commonly expressed as a string of characters, consisting of a unique user name or mailbox (commonly referred to as the "local part") and a reference to an Internet domain (commonly referred to as the "domain part"), whether or not displayed, to which an electronic mail message can be sent or delivered.

(6) ELECTRONIC MAIL MESSAGE.—The term "electronic mail message" means a message sent to a unique electronic mail address.

(7) FTC ACT.—The term "FTC Act" means the Federal Trade Commission Act (15 U.S.C. 41 et seq.).

(8) HEADER INFORMATION.—The term "header information" means the source, destination, and routing information attached to an electronic mail message, including the originating domain name and originating electronic mail address, and any other information that appears in the line identifying, or purporting to identify, a person initiating the message.

(9) INITIATE.—The term "initiate", when used with respect to a commercial electronic mail message, means to originate or transmit such message or to procure the origination or

transmission of such message, but shall not include actions that constitute routine conveyance of such message. For purposes of this paragraph, more than one person may be considered to have initiated a message.

(10) INTERNET.—The term "Internet" has the meaning given that term in the Internet Tax Freedom Act (47 U.S.C. 151 nt).

(11) INTERNET ACCESS SERVICE.—The term "Internet access service" has the meaning given that term in section 231(e)(4) of the Communications Act of 1934 (47 U.S.C. 231(e)(4)).

(12) PROCURE.—The term "procure", when used with respect to the initiation of a commercial electronic mail message, means intentionally to pay or provide other consideration to, or induce, another person to initiate such a message on one's behalf.

(13) PROTECTED COMPUTER.—The term "protected computer" has the meaning given that term in section 1030(e)(2)(B) of title 18, United States Code.

(14) RECIPIENT.—The term "recipient", when used with respect to a commercial electronic mail message, means an authorized user of the electronic mail address to which the message was sent or delivered. If a recipient of a commercial electronic mail message has one or more electronic mail addresses in addition to the address to which the message was sent or delivered, the recipient shall be treated as a separate recipient with respect to each such address. If an electronic mail address is reassigned to a new user, the new user shall not be treated as a recipient of any commercial electronic mail message sent or delivered to that address before it was reassigned.

(15) ROUTINE CONVEYANCE.—The term "routine conveyance" means the transmission, routing, relaying, handling, or storing, through an automatic technical process, of an electronic mail message for which another person has identified the recipients or provided the recipient addresses.

(16) SENDER.—

(A) IN GENERAL.—Except as provided in subparagraph (B), the term "sender", when used with respect to a commercial electronic mail message, means a person who initiates such a message and whose product, service, or Internet web site is advertised or promoted by the message.

(B) SEPARATE LINES OF BUSINESS OR DIVISIONS.—If an entity operates through separate lines of business or divisions and holds itself out to the recipient throughout the message as that particular line of business or division rather than as the entity of which such line of business or division is a part, then the line of business or the division shall be treated as the sender of such message for purposes of this Act.

(17) TRANSACTIONAL OR RELATIONSHIP MESSAGE.—

(A) IN GENERAL.—The term "transactional or relationship message" means an electronic mail message the primary purpose of which is—

(i) to facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender;

(ii) to provide warranty information, product recall information, or safety or security information with respect to a commercial product or service used or purchased by the recipient;

(iii) to provide—

(I) notification concerning a change in the terms or features of;

(II) notification of a change in the recipient's standing or status with respect to; or

(III) at regular periodic intervals, account balance information or other type of account statement with respect to,

a subscription, membership, account, loan, or comparable ongoing commercial relationship involving the ongoing purchase or use by the recipient of products or services offered by the sender;

(iv) to provide information directly related to an employment relationship or related benefit plan in which the recipient is currently involved, participating, or enrolled; or

(v) to deliver goods or services, including product updates or upgrades, that the recipient is entitled to receive under the terms of a transaction that the recipient has previously agreed to enter into with the sender.

(B) MODIFICATION OF DEFINITION.—The Commission by regulation pursuant to section 13 may modify the definition in subparagraph (A) to expand or contract the categories of messages that are treated as transactional or relationship messages for purposes of this Act to the extent that such modification is necessary to accommodate changes in electronic mail technology or practices and accomplish the purposes of this Act.

SEC. 4. PROHIBITION AGAINST PREDATORY AND ABUSIVE COMMERCIAL E-MAIL. 15 USC 7703.

(a) OFFENSE.—

(1) IN GENERAL.—Chapter 47 of title 18, United States Code, is amended by adding at the end the following new section:

"§ 1037. Fraud and related activity in connection with electronic mail

"(a) IN GENERAL.—Whoever, in or affecting interstate or foreign commerce, knowingly—

"(1) accesses a protected computer without authorization, and intentionally initiates the transmission of multiple commercial electronic mail messages from or through such computer,

"(2) uses a protected computer to relay or retransmit multiple commercial electronic mail messages, with the intent to deceive or mislead recipients, or any Internet access service, as to the origin of such messages,

"(3) materially falsifies header information in multiple commercial electronic mail messages and intentionally initiates the transmission of such messages,

"(4) registers, using information that materially falsifies the identity of the actual registrant, for five or more electronic

mail accounts or online user accounts or two or more domain names, and intentionally initiates the transmission of multiple commercial electronic mail messages from any combination of such accounts or domain names, or

"(5) falsely represents oneself to be the registrant or the legitimate successor in interest to the registrant of 5 or more Internet Protocol addresses, and intentionally initiates the transmission of multiple commercial electronic mail messages from such addresses,

or conspires to do so, shall be punished as provided in subsection (b).

"(b) PENALTIES.—The punishment for an offense under subsection (a) is—

"(1) a fine under this title, imprisonment for not more than 5 years, or both, if—

"(A) the offense is committed in furtherance of any felony under the laws of the United States or of any State; or

"(B) the defendant has previously been convicted under this section or section 1030, or under the law of any State for conduct involving the transmission of multiple commercial electronic mail messages or unauthorized access to a computer system;

"(2) a fine under this title, imprisonment for not more than 3 years, or both, if—

"(A) the offense is an offense under subsection (a)(1);

"(B) the offense is an offense under subsection (a)(4) and involved 20 or more falsified electronic mail or online user account registrations, or 10 or more falsified domain name registrations;

"(C) the volume of electronic mail messages transmitted in furtherance of the offense exceeded 2,500 during any 24-hour period, 25,000 during any 30-day period, or 250,000 during any 1-year period;

"(D) the offense caused loss to one or more persons aggregating $5,000 or more in value during any 1-year period;

"(E) as a result of the offense any individual committing the offense obtained anything of value aggregating $5,000 or more during any 1-year period; or

"(F) the offense was undertaken by the defendant in concert with three or more other persons with respect to whom the defendant occupied a position of organizer or leader; and

"(3) a fine under this title or imprisonment for not more than 1 year, or both, in any other case.

"(c) FORFEITURE.—

Courts.

"(1) IN GENERAL.—The court, in imposing sentence on a person who is convicted of an offense under this section, shall order that the defendant forfeit to the United States—

"(A) any property, real or personal, constituting or traceable to gross proceeds obtained from such offense; and

"(B) any equipment, software, or other technology used or intended to be used to commit or to facilitate the commission of such offense.

"(2) PROCEDURES.—The procedures set forth in section 413 of the Controlled Substances Act (21 U.S.C. 853), other than subsection (d) of that section, and in Rule 32.2 of the Federal Rules of Criminal Procedure, shall apply to all stages of a criminal forfeiture proceeding under this section. Applicability.

"(d) DEFINITIONS.—In this section:

"(1) LOSS.—The term 'loss' has the meaning given that term in section 1030(e) of this title.

"(2) MATERIALLY.—For purposes of paragraphs (3) and (4) of subsection (a), header information or registration information is materially falsified if it is altered or concealed in a manner that would impair the ability of a recipient of the message, an Internet access service processing the message on behalf of a recipient, a person alleging a violation of this section, or a law enforcement agency to identify, locate, or respond to a person who initiated the electronic mail message or to investigate the alleged violation.

"(3) MULTIPLE.—The term 'multiple' means more than 100 electronic mail messages during a 24-hour period, more than 1,000 electronic mail messages during a 30-day period, or more than 10,000 electronic mail messages during a 1-year period.

"(4) OTHER TERMS.—Any other term has the meaning given that term by section 3 of the CAN-SPAM Act of 2003.".

(2) CONFORMING AMENDMENT.—The chapter analysis for chapter 47 of title 18, United States Code, is amended by adding at the end the following:

"Sec.
"1037. Fraud and related activity in connection with electronic mail.".

(b) UNITED STATES SENTENCING COMMISSION.— 28 USC 994 note.

(1) DIRECTIVE.—Pursuant to its authority under section 994(p) of title 28, United States Code, and in accordance with this section, the United States Sentencing Commission shall review and, as appropriate, amend the sentencing guidelines and policy statements to provide appropriate penalties for violations of section 1037 of title 18, United States Code, as added by this section, and other offenses that may be facilitated by the sending of large quantities of unsolicited electronic mail.

(2) REQUIREMENTS.—In carrying out this subsection, the Sentencing Commission shall consider providing sentencing enhancements for—

(A) those convicted under section 1037 of title 18, United States Code, who—

(i) obtained electronic mail addresses through improper means, including—

(I) harvesting electronic mail addresses of the users of a website, proprietary service, or other online public forum operated by another person, without the authorization of such person; and

(II) randomly generating electronic mail addresses by computer; or

(ii) knew that the commercial electronic mail messages involved in the offense contained or advertised an Internet domain for which the registrant of the domain had provided false registration information; and

(B) those convicted of other offenses, including offenses involving fraud, identity theft, obscenity, child pornography, and the sexual exploitation of children, if such offenses involved the sending of large quantities of electronic mail.

(c) SENSE OF CONGRESS.—It is the sense of Congress that—

(1) Spam has become the method of choice for those who distribute pornography, perpetrate fraudulent schemes, and introduce viruses, worms, and Trojan horses into personal and business computer systems; and

(2) the Department of Justice should use all existing law enforcement tools to investigate and prosecute those who send bulk commercial e-mail to facilitate the commission of Federal crimes, including the tools contained in chapters 47 and 63 of title 18, United States Code (relating to fraud and false statements); chapter 71 of title 18, United States Code (relating to obscenity); chapter 110 of title 18, United States Code (relating to the sexual exploitation of children); and chapter 95 of title 18, United States Code (relating to racketeering), as appropriate.

15 USC 7704.

SEC. 5. OTHER PROTECTIONS FOR USERS OF COMMERCIAL ELECTRONIC MAIL.

(a) REQUIREMENTS FOR TRANSMISSION OF MESSAGES.—

(1) PROHIBITION OF FALSE OR MISLEADING TRANSMISSION INFORMATION.—It is unlawful for any person to initiate the transmission, to a protected computer, of a commercial electronic mail message, or a transactional or relationship message, that contains, or is accompanied by, header information that is materially false or materially misleading. For purposes of this paragraph—

(A) header information that is technically accurate but includes an originating electronic mail address, domain name, or Internet Protocol address the access to which for purposes of initiating the message was obtained by means of false or fraudulent pretenses or representations shall be considered materially misleading;

(B) a "from" line (the line identifying or purporting to identify a person initiating the message) that accurately identifies any person who initiated the message shall not be considered materially false or materially misleading; and

(C) header information shall be considered materially misleading if it fails to identify accurately a protected computer used to initiate the message because the person initiating the message knowingly uses another protected computer to relay or retransmit the message for purposes of disguising its origin.

(2) PROHIBITION OF DECEPTIVE SUBJECT HEADINGS.—It is unlawful for any person to initiate the transmission to a protected computer of a commercial electronic mail message if such person has actual knowledge, or knowledge fairly implied on the basis of objective circumstances, that a subject heading of the message would be likely to mislead a recipient, acting reasonably under the circumstances, about a material fact

regarding the contents or subject matter of the message (consistent with the criteria used in enforcement of section 5 of the Federal Trade Commission Act (15 U.S.C. 45)).

(3) INCLUSION OF RETURN ADDRESS OR COMPARABLE MECHANISM IN COMMERCIAL ELECTRONIC MAIL.—

(A) IN GENERAL.—It is unlawful for any person to initiate the transmission to a protected computer of a commercial electronic mail message that does not contain a functioning return electronic mail address or other Internet-based mechanism, clearly and conspicuously displayed, that—

(i) a recipient may use to submit, in a manner specified in the message, a reply electronic mail message or other form of Internet-based communication requesting not to receive future commercial electronic mail messages from that sender at the electronic mail address where the message was received; and

(ii) remains capable of receiving such messages or communications for no less than 30 days after the transmission of the original message.

(B) MORE DETAILED OPTIONS POSSIBLE.—The person initiating a commercial electronic mail message may comply with subparagraph (A)(i) by providing the recipient a list or menu from which the recipient may choose the specific types of commercial electronic mail messages the recipient wants to receive or does not want to receive from the sender, if the list or menu includes an option under which the recipient may choose not to receive any commercial electronic mail messages from the sender.

(C) TEMPORARY INABILITY TO RECEIVE MESSAGES OR PROCESS REQUESTS.—A return electronic mail address or other mechanism does not fail to satisfy the requirements of subparagraph (A) if it is unexpectedly and temporarily unable to receive messages or process requests due to a technical problem beyond the control of the sender if the problem is corrected within a reasonable time period.

(4) PROHIBITION OF TRANSMISSION OF COMMERCIAL ELECTRONIC MAIL AFTER OBJECTION.—

(A) IN GENERAL.—If a recipient makes a request using a mechanism provided pursuant to paragraph (3) not to receive some or any commercial electronic mail messages from such sender, then it is unlawful—

(i) for the sender to initiate the transmission to the recipient, more than 10 business days after the receipt of such request, of a commercial electronic mail message that falls within the scope of the request;

(ii) for any person acting on behalf of the sender to initiate the transmission to the recipient, more than 10 business days after the receipt of such request, of a commercial electronic mail message with actual knowledge, or knowledge fairly implied on the basis of objective circumstances, that such message falls within the scope of the request;

(iii) for any person acting on behalf of the sender to assist in initiating the transmission to the recipient, through the provision or selection of addresses to which the message will be sent, of a commercial electronic

mail message with actual knowledge, or knowledge fairly implied on the basis of objective circumstances, that such message would violate clause (i) or (ii); or

(iv) for the sender, or any other person who knows that the recipient has made such a request, to sell, lease, exchange, or otherwise transfer or release the electronic mail address of the recipient (including through any transaction or other transfer involving mailing lists bearing the electronic mail address of the recipient) for any purpose other than compliance with this Act or other provision of law.

(B) SUBSEQUENT AFFIRMATIVE CONSENT.—A prohibition in subparagraph (A) does not apply if there is affirmative consent by the recipient subsequent to the request under subparagraph (A).

(5) INCLUSION OF IDENTIFIER, OPT-OUT, AND PHYSICAL ADDRESS IN COMMERCIAL ELECTRONIC MAIL.—(A) It is unlawful for any person to initiate the transmission of any commercial electronic mail message to a protected computer unless the message provides—

(i) clear and conspicuous identification that the message is an advertisement or solicitation;

(ii) clear and conspicuous notice of the opportunity under paragraph (3) to decline to receive further commercial electronic mail messages from the sender; and

(iii) a valid physical postal address of the sender.

(B) Subparagraph (A)(i) does not apply to the transmission of a commercial electronic mail message if the recipient has given prior affirmative consent to receipt of the message.

(6) MATERIALLY.—For purposes of paragraph (1), the term "materially", when used with respect to false or misleading header information, includes the alteration or concealment of header information in a manner that would impair the ability of an Internet access service processing the message on behalf of a recipient, a person alleging a violation of this section, or a law enforcement agency to identify, locate, or respond to a person who initiated the electronic mail message or to investigate the alleged violation, or the ability of a recipient of the message to respond to a person who initiated the electronic message.

(b) AGGRAVATED VIOLATIONS RELATING TO COMMERCIAL ELECTRONIC MAIL.—

(1) ADDRESS HARVESTING AND DICTIONARY ATTACKS.—

(A) IN GENERAL.—It is unlawful for any person to initiate the transmission, to a protected computer, of a commercial electronic mail message that is unlawful under subsection (a), or to assist in the origination of such message through the provision or selection of addresses to which the message will be transmitted, if such person had actual knowledge, or knowledge fairly implied on the basis of objective circumstances, that—

(i) the electronic mail address of the recipient was obtained using an automated means from an Internet website or proprietary online service operated by another person, and such website or online service included, at the time the address was obtained, a notice stating that the operator of such website or online

service will not give, sell, or otherwise transfer addresses maintained by such website or online service to any other party for the purposes of initiating, or enabling others to initiate, electronic mail messages; or

(ii) the electronic mail address of the recipient was obtained using an automated means that generates possible electronic mail addresses by combining names, letters, or numbers into numerous permutations.

(B) DISCLAIMER.—Nothing in this paragraph creates an ownership or proprietary interest in such electronic mail addresses.

(2) AUTOMATED CREATION OF MULTIPLE ELECTRONIC MAIL ACCOUNTS.—It is unlawful for any person to use scripts or other automated means to register for multiple electronic mail accounts or online user accounts from which to transmit to a protected computer, or enable another person to transmit to a protected computer, a commercial electronic mail message that is unlawful under subsection (a).

(3) RELAY OR RETRANSMISSION THROUGH UNAUTHORIZED ACCESS.—It is unlawful for any person knowingly to relay or retransmit a commercial electronic mail message that is unlawful under subsection (a) from a protected computer or computer network that such person has accessed without authorization.

(c) SUPPLEMENTARY RULEMAKING AUTHORITY.—The Commission shall by regulation, pursuant to section 13—

(1) modify the 10-business-day period under subsection (a)(4)(A) or subsection (a)(4)(B), or both, if the Commission determines that a different period would be more reasonable after taking into account—

(A) the purposes of subsection (a);

(B) the interests of recipients of commercial electronic mail; and

(C) the burdens imposed on senders of lawful commercial electronic mail; and

(2) specify additional activities or practices to which subsection (b) applies if the Commission determines that those activities or practices are contributing substantially to the proliferation of commercial electronic mail messages that are unlawful under subsection (a).

(d) REQUIREMENT TO PLACE WARNING LABELS ON COMMERCIAL ELECTRONIC MAIL CONTAINING SEXUALLY ORIENTED MATERIAL.—

(1) IN GENERAL.—No person may initiate in or affecting interstate commerce the transmission, to a protected computer, of any commercial electronic mail message that includes sexually oriented material and—

(A) fail to include in subject heading for the electronic mail message the marks or notices prescribed by the Commission under this subsection; or

(B) fail to provide that the matter in the message that is initially viewable to the recipient, when the message is opened by any recipient and absent any further actions by the recipient, includes only—

(i) to the extent required or authorized pursuant to paragraph (2), any such marks or notices;

(ii) the information required to be included in the message pursuant to subsection (a)(5); and

(iii) instructions on how to access, or a mechanism to access, the sexually oriented material.

(2) PRIOR AFFIRMATIVE CONSENT.—Paragraph (1) does not apply to the transmission of an electronic mail message if the recipient has given prior affirmative consent to receipt of the message.

Deadline.

(3) PRESCRIPTION OF MARKS AND NOTICES.—Not later than 120 days after the date of the enactment of this Act, the Commission in consultation with the Attorney General shall prescribe clearly identifiable marks or notices to be included in or associated with commercial electronic mail that contains sexually oriented material, in order to inform the recipient of that fact and to facilitate filtering of such electronic mail. The Commission shall publish in the Federal Register and provide notice to the public of the marks or notices prescribed under this paragraph.

Federal Register, publication.

(4) DEFINITION.—In this subsection, the term "sexually oriented material" means any material that depicts sexually explicit conduct (as that term is defined in section 2256 of title 18, United States Code), unless the depiction constitutes a small and insignificant part of the whole, the remainder of which is not primarily devoted to sexual matters.

(5) PENALTY.—Whoever knowingly violates paragraph (1) shall be fined under title 18, United States Code, or imprisoned not more than 5 years, or both.

15 USC 7705.

SEC. 6. BUSINESSES KNOWINGLY PROMOTED BY ELECTRONIC MAIL WITH FALSE OR MISLEADING TRANSMISSION INFORMATION.

(a) IN GENERAL.—It is unlawful for a person to promote, or allow the promotion of, that person's trade or business, or goods, products, property, or services sold, offered for sale, leased or offered for lease, or otherwise made available through that trade or business, in a commercial electronic mail message the transmission of which is in violation of section 5(a)(1) if that person—

(1) knows, or should have known in the ordinary course of that person's trade or business, that the goods, products, property, or services sold, offered for sale, leased or offered for lease, or otherwise made available through that trade or business were being promoted in such a message;

(2) received or expected to receive an economic benefit from such promotion; and

(3) took no reasonable action—

(A) to prevent the transmission; or

(B) to detect the transmission and report it to the Commission.

(b) LIMITED ENFORCEMENT AGAINST THIRD PARTIES.—

(1) IN GENERAL.—Except as provided in paragraph (2), a person (hereinafter referred to as the "third party") that provides goods, products, property, or services to another person that violates subsection (a) shall not be held liable for such violation.

(2) EXCEPTION.—Liability for a violation of subsection (a) shall be imputed to a third party that provides goods, products, property, or services to another person that violates subsection (a) if that third party—

(A) owns, or has a greater than 50 percent ownership or economic interest in, the trade or business of the person that violated subsection (a); or

(B)(i) has actual knowledge that goods, products, property, or services are promoted in a commercial electronic mail message the transmission of which is in violation of section 5(a)(1); and

(ii) receives, or expects to receive, an economic benefit from such promotion.

(c) EXCLUSIVE ENFORCEMENT BY FTC.—Subsections (f) and (g) of section 7 do not apply to violations of this section.

(d) SAVINGS PROVISION.—Except as provided in section 7(f)(8), nothing in this section may be construed to limit or prevent any action that may be taken under this Act with respect to any violation of any other section of this Act.

SEC. 7. ENFORCEMENT GENERALLY. 15 USC 7706.

(a) VIOLATION IS UNFAIR OR DECEPTIVE ACT OR PRACTICE.—Except as provided in subsection (b), this Act shall be enforced by the Commission as if the violation of this Act were an unfair or deceptive act or practice proscribed under section 18(a)(1)(B) of the Federal Trade Commission Act (15 U.S.C. 57a(a)(1)(B)).

(b) ENFORCEMENT BY CERTAIN OTHER AGENCIES.—Compliance with this Act shall be enforced—

(1) under section 8 of the Federal Deposit Insurance Act (12 U.S.C. 1818), in the case of—

(A) national banks, and Federal branches and Federal agencies of foreign banks, by the Office of the Comptroller of the Currency;

(B) member banks of the Federal Reserve System (other than national banks), branches and agencies of foreign banks (other than Federal branches, Federal agencies, and insured State branches of foreign banks), commercial lending companies owned or controlled by foreign banks, organizations operating under section 25 or 25A of the Federal Reserve Act (12 U.S.C. 601 and 611), and bank holding companies, by the Board;

(C) banks insured by the Federal Deposit Insurance Corporation (other than members of the Federal Reserve System) and insured State branches of foreign banks, by the Board of Directors of the Federal Deposit Insurance Corporation; and

(D) savings associations the deposits of which are insured by the Federal Deposit Insurance Corporation, by the Director of the Office of Thrift Supervision;

(2) under the Federal Credit Union Act (12 U.S.C. 1751 et seq.) by the Board of the National Credit Union Administration with respect to any Federally insured credit union;

(3) under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) by the Securities and Exchange Commission with respect to any broker or dealer;

(4) under the Investment Company Act of 1940 (15 U.S.C. 80a–1 et seq.) by the Securities and Exchange Commission with respect to investment companies;

(5) under the Investment Advisers Act of 1940 (15 U.S.C. 80b–1 et seq.) by the Securities and Exchange Commission with respect to investment advisers registered under that Act;

(6) under State insurance law in the case of any person engaged in providing insurance, by the applicable State insurance authority of the State in which the person is domiciled, subject to section 104 of the Gramm-Bliley-Leach Act (15 U.S.C. 6701), except that in any State in which the State insurance authority elects not to exercise this power, the enforcement authority pursuant to this Act shall be exercised by the Commission in accordance with subsection (a);

(7) under part A of subtitle VII of title 49, United States Code, by the Secretary of Transportation with respect to any air carrier or foreign air carrier subject to that part;

(8) under the Packers and Stockyards Act, 1921 (7 U.S.C. 181 et seq.) (except as provided in section 406 of that Act (7 U.S.C. 226, 227)), by the Secretary of Agriculture with respect to any activities subject to that Act;

(9) under the Farm Credit Act of 1971 (12 U.S.C. 2001 et seq.) by the Farm Credit Administration with respect to any Federal land bank, Federal land bank association, Federal intermediate credit bank, or production credit association; and

(10) under the Communications Act of 1934 (47 U.S.C. 151 et seq.) by the Federal Communications Commission with respect to any person subject to the provisions of that Act.

(c) EXERCISE OF CERTAIN POWERS.—For the purpose of the exercise by any agency referred to in subsection (b) of its powers under any Act referred to in that subsection, a violation of this Act is deemed to be a violation of a Federal Trade Commission trade regulation rule. In addition to its powers under any provision of law specifically referred to in subsection (b), each of the agencies referred to in that subsection may exercise, for the purpose of enforcing compliance with any requirement imposed under this Act, any other authority conferred on it by law.

(d) ACTIONS BY THE COMMISSION.—The Commission shall prevent any person from violating this Act in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though all applicable terms and provisions of the Federal Trade Commission Act (15 U.S.C. 41 et seq.) were incorporated into and made a part of this Act. Any entity that violates any provision of that subtitle is subject to the penalties and entitled to the privileges and immunities provided in the Federal Trade Commission Act in the same manner, by the same means, and with the same jurisdiction, power, and duties as though all applicable terms and provisions of the Federal Trade Commission Act were incorporated into and made a part of that subtitle.

(e) AVAILABILITY OF CEASE-AND-DESIST ORDERS AND INJUNCTIVE RELIEF WITHOUT SHOWING OF KNOWLEDGE.—Notwithstanding any other provision of this Act, in any proceeding or action pursuant to subsection (a), (b), (c), or (d) of this section to enforce compliance, through an order to cease and desist or an injunction, with section 5(a)(1)(C), section 5(a)(2), clause (ii), (iii), or (iv) of section 5(a)(4)(A), section 5(b)(1)(A), or section 5(b)(3), neither the Commission nor the Federal Communications Commission shall be required to allege or prove the state of mind required by such section or subparagraph.

(f) ENFORCEMENT BY STATES.—

(1) CIVIL ACTION.—In any case in which the attorney general of a State, or an official or agency of a State, has reason to believe that an interest of the residents of that State has been or is threatened or adversely affected by any person who

violates paragraph (1) or (2) of section 5(a), who violates section 5(d), or who engages in a pattern or practice that violates paragraph (3), (4), or (5) of section 5(a), of this Act, the attorney general, official, or agency of the State, as parens patriae, may bring a civil action on behalf of the residents of the State in a district court of the United States of appropriate jurisdiction—

(A) to enjoin further violation of section 5 of this Act by the defendant; or

(B) to obtain damages on behalf of residents of the State, in an amount equal to the greater of—

(i) the actual monetary loss suffered by such residents; or

(ii) the amount determined under paragraph (3).

(2) AVAILABILITY OF INJUNCTIVE RELIEF WITHOUT SHOWING OF KNOWLEDGE.—Notwithstanding any other provision of this Act, in a civil action under paragraph (1)(A) of this subsection, the attorney general, official, or agency of the State shall not be required to allege or prove the state of mind required by section 5(a)(1)(C), section 5(a)(2), clause (ii), (iii), or (iv) of section 5(a)(4)(A), section 5(b)(1)(A), or section 5(b)(3).

(3) STATUTORY DAMAGES.—

(A) IN GENERAL.—For purposes of paragraph (1)(B)(ii), the amount determined under this paragraph is the amount calculated by multiplying the number of violations (with each separately addressed unlawful message received by or addressed to such residents treated as a separate violation) by up to $250.

(B) LIMITATION.—For any violation of section 5 (other than section 5(a)(1)), the amount determined under subparagraph (A) may not exceed $2,000,000.

(C) AGGRAVATED DAMAGES.—The court may increase a damage award to an amount equal to not more than three times the amount otherwise available under this paragraph if—

(i) the court determines that the defendant committed the violation willfully and knowingly; or

(ii) the defendant's unlawful activity included one or more of the aggravating violations set forth in section 5(b).

(D) REDUCTION OF DAMAGES.—In assessing damages under subparagraph (A), the court may consider whether—

(i) the defendant has established and implemented, with due care, commercially reasonable practices and procedures designed to effectively prevent such violations; or

(ii) the violation occurred despite commercially reasonable efforts to maintain compliance the practices and procedures to which reference is made in clause (i).

(4) ATTORNEY FEES.—In the case of any successful action under paragraph (1), the court, in its discretion, may award the costs of the action and reasonable attorney fees to the State.

(5) RIGHTS OF FEDERAL REGULATORS.—The State shall serve prior written notice of any action under paragraph (1) upon

Notice.
Records.

the Federal Trade Commission or the appropriate Federal regulator determined under subsection (b) and provide the Commission or appropriate Federal regulator with a copy of its complaint, except in any case in which such prior notice is not feasible, in which case the State shall serve such notice immediately upon instituting such action. The Federal Trade Commission or appropriate Federal regulator shall have the right—

(A) to intervene in the action;

(B) upon so intervening, to be heard on all matters arising therein;

(C) to remove the action to the appropriate United States district court; and

(D) to file petitions for appeal.

(6) CONSTRUCTION.—For purposes of bringing any civil action under paragraph (1), nothing in this Act shall be construed to prevent an attorney general of a State from exercising the powers conferred on the attorney general by the laws of that State to—

(A) conduct investigations;

(B) administer oaths or affirmations; or

(C) compel the attendance of witnesses or the production of documentary and other evidence.

(7) VENUE; SERVICE OF PROCESS.—

(A) VENUE.—Any action brought under paragraph (1) may be brought in the district court of the United States that meets applicable requirements relating to venue under section 1391 of title 28, United States Code.

(B) SERVICE OF PROCESS.—In an action brought under paragraph (1), process may be served in any district in which the defendant—

(i) is an inhabitant; or

(ii) maintains a physical place of business.

(8) LIMITATION ON STATE ACTION WHILE FEDERAL ACTION IS PENDING.—If the Commission, or other appropriate Federal agency under subsection (b), has instituted a civil action or an administrative action for violation of this Act, no State attorney general, or official or agency of a State, may bring an action under this subsection during the pendency of that action against any defendant named in the complaint of the Commission or the other agency for any violation of this Act alleged in the complaint.

(9) REQUISITE SCIENTER FOR CERTAIN CIVIL ACTIONS.—Except as provided in section 5(a)(1)(C), section 5(a)(2), clause (ii), (iii), or (iv) of section 5(a)(4)(A), section 5(b)(1)(A), or section 5(b)(3), in a civil action brought by a State attorney general, or an official or agency of a State, to recover monetary damages for a violation of this Act, the court shall not grant the relief sought unless the attorney general, official, or agency establishes that the defendant acted with actual knowledge, or knowledge fairly implied on the basis of objective circumstances, of the act or omission that constitutes the violation.

(g) ACTION BY PROVIDER OF INTERNET ACCESS SERVICE.—

(1) ACTION AUTHORIZED.—A provider of Internet access service adversely affected by a violation of section 5(a)(1), 5(b), or 5(d), or a pattern or practice that violates paragraph (2), (3), (4), or (5) of section 5(a), may bring a civil action in

any district court of the United States with jurisdiction over the defendant—

(A) to enjoin further violation by the defendant; or

(B) to recover damages in an amount equal to the greater of—

(i) actual monetary loss incurred by the provider of Internet access service as a result of such violation; or

(ii) the amount determined under paragraph (3).

(2) SPECIAL DEFINITION OF "PROCURE".—In any action brought under paragraph (1), this Act shall be applied as if the definition of the term "procure" in section 3(12) contained, after "behalf" the words "with actual knowledge, or by consciously avoiding knowing, whether such person is engaging, or will engage, in a pattern or practice that violates this Act".

(3) STATUTORY DAMAGES.—

(A) IN GENERAL.—For purposes of paragraph (1)(B)(ii), the amount determined under this paragraph is the amount calculated by multiplying the number of violations (with each separately addressed unlawful message that is transmitted or attempted to be transmitted over the facilities of the provider of Internet access service, or that is transmitted or attempted to be transmitted to an electronic mail address obtained from the provider of Internet access service in violation of section 5(b)(1)(A)(i), treated as a separate violation) by—

(i) up to $100, in the case of a violation of section 5(a)(1); or

(ii) up to $25, in the case of any other violation of section 5.

(B) LIMITATION.—For any violation of section 5 (other than section 5(a)(1)), the amount determined under subparagraph (A) may not exceed $1,000,000.

(C) AGGRAVATED DAMAGES.—The court may increase a damage award to an amount equal to not more than three times the amount otherwise available under this paragraph if—

(i) the court determines that the defendant committed the violation willfully and knowingly; or

(ii) the defendant's unlawful activity included one or more of the aggravated violations set forth in section 5(b).

(D) REDUCTION OF DAMAGES.—In assessing damages under subparagraph (A), the court may consider whether—

(i) the defendant has established and implemented, with due care, commercially reasonable practices and procedures designed to effectively prevent such violations; or

(ii) the violation occurred despite commercially reasonable efforts to maintain compliance with the practices and procedures to which reference is made in clause (i).

(4) ATTORNEY FEES.—In any action brought pursuant to paragraph (1), the court may, in its discretion, require an undertaking for the payment of the costs of such action, and assess reasonable costs, including reasonable attorneys' fees, against any party.

15 USC 7707.

SEC. 8. EFFECT ON OTHER LAWS.

(a) FEDERAL LAW.—(1) Nothing in this Act shall be construed to impair the enforcement of section 223 or 231 of the Communications Act of 1934 (47 U.S.C. 223 or 231, respectively), chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, United States Code, or any other Federal criminal statute.

(2) Nothing in this Act shall be construed to affect in any way the Commission's authority to bring enforcement actions under FTC Act for materially false or deceptive representations or unfair practices in commercial electronic mail messages.

(b) STATE LAW.—

(1) IN GENERAL.—This Act supersedes any statute, regulation, or rule of a State or political subdivision of a State that expressly regulates the use of electronic mail to send commercial messages, except to the extent that any such statute, regulation, or rule prohibits falsity or deception in any portion of a commercial electronic mail message or information attached thereto.

(2) STATE LAW NOT SPECIFIC TO ELECTRONIC MAIL.—This Act shall not be construed to preempt the applicability of—

(A) State laws that are not specific to electronic mail, including State trespass, contract, or tort law; or

(B) other State laws to the extent that those laws relate to acts of fraud or computer crime.

(c) NO EFFECT ON POLICIES OF PROVIDERS OF INTERNET ACCESS SERVICE.—Nothing in this Act shall be construed to have any effect on the lawfulness or unlawfulness, under any other provision of law, of the adoption, implementation, or enforcement by a provider of Internet access service of a policy of declining to transmit, route, relay, handle, or store certain types of electronic mail messages.

15 USC 7708.

SEC. 9. DO-NOT-E-MAIL REGISTRY.

Deadline. Reports.

(a) IN GENERAL.—Not later than 6 months after the date of enactment of this Act, the Commission shall transmit to the Senate Committee on Commerce, Science, and Transportation and the House of Representatives Committee on Energy and Commerce a report that—

(1) sets forth a plan and timetable for establishing a nationwide marketing Do-Not-E-Mail registry;

(2) includes an explanation of any practical, technical, security, privacy, enforceability, or other concerns that the Commission has regarding such a registry; and

(3) includes an explanation of how the registry would be applied with respect to children with e-mail accounts.

(b) AUTHORIZATION TO IMPLEMENT.—The Commission may establish and implement the plan, but not earlier than 9 months after the date of enactment of this Act.

15 USC 7709.

SEC. 10. STUDY OF EFFECTS OF COMMERCIAL ELECTRONIC MAIL.

Deadline. Reports.

(a) IN GENERAL.—Not later than 24 months after the date of the enactment of this Act, the Commission, in consultation with the Department of Justice and other appropriate agencies, shall submit a report to the Congress that provides a detailed analysis of the effectiveness and enforcement of the provisions of this Act and the need (if any) for the Congress to modify such provisions.

(b) REQUIRED ANALYSIS.—The Commission shall include in the report required by subsection (a)—

(1) an analysis of the extent to which technological and marketplace developments, including changes in the nature of the devices through which consumers access their electronic mail messages, may affect the practicality and effectiveness of the provisions of this Act;

(2) analysis and recommendations concerning how to address commercial electronic mail that originates in or is transmitted through or to facilities or computers in other nations, including initiatives or policy positions that the Federal Government could pursue through international negotiations, fora, organizations, or institutions; and

(3) analysis and recommendations concerning options for protecting consumers, including children, from the receipt and viewing of commercial electronic mail that is obscene or pornographic.

SEC. 11. IMPROVING ENFORCEMENT BY PROVIDING REWARDS FOR INFORMATION ABOUT VIOLATIONS; LABELING.

Reports. Deadlines. Procedures. 15 USC 7710.

The Commission shall transmit to the Senate Committee on Commerce, Science, and Transportation and the House of Representatives Committee on Energy and Commerce—

(1) a report, within 9 months after the date of enactment of this Act, that sets forth a system for rewarding those who supply information about violations of this Act, including—

(A) procedures for the Commission to grant a reward of not less than 20 percent of the total civil penalty collected for a violation of this Act to the first person that—

(i) identifies the person in violation of this Act; and

(ii) supplies information that leads to the successful collection of a civil penalty by the Commission; and

(B) procedures to minimize the burden of submitting a complaint to the Commission concerning violations of this Act, including procedures to allow the electronic submission of complaints to the Commission; and

(2) a report, within 18 months after the date of enactment of this Act, that sets forth a plan for requiring commercial electronic mail to be identifiable from its subject line, by means of compliance with Internet Engineering Task Force Standards, the use of the characters "ADV" in the subject line, or other comparable identifier, or an explanation of any concerns the Commission has that cause the Commission to recommend against the plan.

SEC. 12. RESTRICTIONS ON OTHER TRANSMISSIONS.

Section 227(b)(1) of the Communications Act of 1934 (47 U.S.C. 227(b)(1)) is amended, in the matter preceding subparagraph (A), by inserting ", or any person outside the United States if the recipient is within the United States" after "United States".

SEC. 13. REGULATIONS.

15 USC 7711.

(a) IN GENERAL.—The Commission may issue regulations to implement the provisions of this Act (not including the amendments made by sections 4 and 12). Any such regulations shall be issued in accordance with section 553 of title 5, United States Code.

(b) LIMITATION.—Subsection (a) may not be construed to authorize the Commission to establish a requirement pursuant to section 5(a)(5)(A) to include any specific words, characters, marks, or labels in a commercial electronic mail message, or to include the identification required by section 5(a)(5)(A) in any particular part of such a mail message (such as the subject line or body).

15 USC 7712.

SEC. 14. APPLICATION TO WIRELESS.

(a) EFFECT ON OTHER LAW.—Nothing in this Act shall be interpreted to preclude or override the applicability of section 227 of the Communications Act of 1934 (47 U.S.C. 227) or the rules prescribed under section 3 of the Telemarketing and Consumer Fraud and Abuse Prevention Act (15 U.S.C. 6102).

Deadline.

(b) FCC RULEMAKING.—The Federal Communications Commission, in consultation with the Federal Trade Commission, shall promulgate rules within 270 days to protect consumers from unwanted mobile service commercial messages. The Federal Communications Commission, in promulgating the rules, shall, to the extent consistent with subsection (c)—

(1) provide subscribers to commercial mobile services the ability to avoid receiving mobile service commercial messages unless the subscriber has provided express prior authorization to the sender, except as provided in paragraph (3);

(2) allow recipients of mobile service commercial messages to indicate electronically a desire not to receive future mobile service commercial messages from the sender;

(3) take into consideration, in determining whether to subject providers of commercial mobile services to paragraph (1), the relationship that exists between providers of such services and their subscribers, but if the Commission determines that such providers should not be subject to paragraph (1), the rules shall require such providers, in addition to complying with the other provisions of this Act, to allow subscribers to indicate a desire not to receive future mobile service commercial messages from the provider—

(A) at the time of subscribing to such service; and

(B) in any billing mechanism; and

(4) determine how a sender of mobile service commercial messages may comply with the provisions of this Act, considering the unique technical aspects, including the functional and character limitations, of devices that receive such messages.

(c) OTHER FACTORS CONSIDERED.—The Federal Communications Commission shall consider the ability of a sender of a commercial electronic mail message to reasonably determine that the message is a mobile service commercial message.

(d) MOBILE SERVICE COMMERCIAL MESSAGE DEFINED.—In this section, the term "mobile service commercial message" means a commercial electronic mail message that is transmitted directly to a wireless device that is utilized by a subscriber of commercial mobile service (as such term is defined in section 332(d) of the Communications Act of 1934 (47 U.S.C. 332(d))) in connection with such service.

15 USC 7713.

SEC. 15. SEPARABILITY.

If any provision of this Act or the application thereof to any person or circumstance is held invalid, the remainder of this Act and the application of such provision to other persons or circumstances shall not be affected.

SEC. 16. EFFECTIVE DATE.

15 USC 7701 note.

The provisions of this Act, other than section 9, shall take effect on January 1, 2004.

Approved December 16, 2003.

LEGISLATIVE HISTORY—S. 877:

SENATE REPORTS: No. 108–102 (Comm. on Commerce, Science, and Transportation).

CONGRESSIONAL RECORD, Vol. 149 (2003):

Oct. 22, considered and passed Senate.

Nov. 21, considered and passed House, amended.

Nov. 25, Senate concurred in House amendment with an amendment.

Dec. 8, House conccurred in Senate amendment.

○

Section 202 of the Unfunded Mandates Reform Act of 1995 also requires that agencies assess anticipated costs and benefits before issuing any rule that may result in expenditure in any 1 year by State, local, or tribal governments, in the aggregate, or by the private sector, of $110 million. While this final rule revises a statutory data reporting requirement for drug manufacturers, the costs associated with this requirement are expected to be below the $110 million annual threshold established by section 202 of the Unfunded Mandates Reform Act.

Executive Order 13132 establishes certain requirements that an agency must meet when it publishes a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. Since this final rule does not impose any costs on State or local governments, the requirements of E.O. 13132 are not applicable.

In accordance with the provisions of Executive Order 12866, this regulation was reviewed by the Office of Management and Budget.

List of Subjects in 42 CFR Part 414

Administrative practice and procedure, Health facilities, Health professions, Kidney diseases, Medicare, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services amends 42 CFR Chapter IV, as set forth below:

PART 414—PAYMENT FOR PART B MEDICAL AND OTHER HEALTH SERVICES

■ 1. The authority citation for part 414 continues to read as follows:

Authority: Secs. 1102, 1871, and 1881(b)(1) of the Social Security Act (42 U.S.C. 1302, 1395hh, and 1395rr(b)(1)).

■ 2. Section § 414.804 is amended by revising paragraph (a)(3) to read as follows:

§ 414.804 Basis of payment.

(a) * * *

(3) To the extent that data on price concessions, as described in paragraph (a)(2) of this section, are available on a lagged basis, the manufacturer must estimate this amount in accordance with the methodology described in paragraphs (a)(3)(i) through (a)(3)(iv) of this section.

(i) For each such National Drug Code, the manufacturer calculates a percentage equal to the sum of the price concessions for the most recent 12-month period available associated with sales subject to the average sales price reporting requirement divided by the total in dollars for the sales subject to the average sales price reporting requirement for the same 12-month period.

(ii) The manufacturer then multiplies the percentage described in paragraph (a)(3)(i) of this section by the total in dollars for the sales subject to the average sales price reporting requirement for the quarter being submitted. (The manufacturer must carry a sufficient number of decimal places in the calculation of the price concessions percentage in order to round accurately the net total sales amount for the quarter to the nearest whole dollar.) The result of this multiplication is then subtracted from the total in dollars for the sales subject to the average sales price reporting requirement for the quarter being submitted.

(iii) The manufacturer then uses the result of the calculation described in paragraph (a)(3)(ii) of this section as the numerator and the number of units sold in the quarter as the denominator to calculate the manufacturer's average sales price for the National Drug Code in the quarter being submitted.

(iv) *Example.* The total price concessions (discounts, rebates, etc.) over the most recent 12-month period available associated with sales for National Drug Code 12345–6789–01 subject to the ASP reporting requirement equal $200,000. The total in dollars for the sales subject to the average sales price reporting requirement for the same period equals $600,000. The price concessions percentage for this period equals 200,000/600,000 = .33333. The total in dollars for the sales subject to the average sales price reporting requirement for the quarter being reported equals $50,000 for 10,000 units sold. The manufacturer's average sales price calculation for this National Drug Code for this quarter is: $50,000 − (0.33333 × $50,000) = $33,334 (net total sales amount); $33,334/10,000 = $3.33 (average sales price).

* * * * *

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

Dated: August 17, 2004.

Mark McClellan,

Administrator, Centers for Medicare & Medicaid Services.

Approved: September 10, 2004.

Tommy G. Thompson,

Secretary.

[FR Doc. 04–20823 9–10–04; 4:16 pm]

BILLING CODE 4120–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 64

[CG Docket Nos. 04–53 and 02–278; FCC 04–194]

Rules and Regulations Implementing the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003; Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Commission adopts rules to implement those aspects of the Controlling the Assault of the Non-Solicited Pornography and Marketing Act of 2003 (CAN SPAM Act) directed to the Federal Communications Commission (FCC or Commission). Also, in this document, the Commission adopts a general prohibition on sending commercial messages to any address referencing an Internet domain name associated with wireless subscriber messaging services. Furthermore, the Commission clarifies the delineation between these new rules implementing the CAN SPAM Act and our existing rules concerning messages sent to wireless telephone numbers under the Telephone Consumer Protection Act (TCPA).

DATES: Effective October 18, 2004 except § 64.3100(a)(4), (d), (e) and (f) of the Commission's rules, which contain information collection requirements under the Paperwork Reduction Act (PRA) that are not effective until approved by Office of Management and Budget (OMB). Written comments by the public on the new and modified information collections are due November 15, 2004. The Commission will publish a document in the **Federal Register** announcing the effective date for these rules.

ADDRESSES: Federal Communications Commission, 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 (PRA) information collection requirements contained herein should be submitted to Judith B. Herman, Federal Communications Commission, Room 1–C804, 445 12th Street, SW., Washington, DC 20554, or via the Internet to *Judith-B.Herman@fcc.gov,* and to Kristy L. LaLonde, OMB Desk Officer, Room 10234 NEOB, 725 17th Street, NW., Washington, DC 20503, via the Internet to *Kristy_L._LaLonde@omb.eop.gov,* or via fax at (202) 395–5167.

FOR FURTHER INFORMATION CONTACT: Ruth Yodaiken, of the Consumer & Governmental Affairs Bureau at (202) 418–7928 (voice), or e-mail *Ruth.Yodaiken@fcc.gov.* For additional information concerning the PRA information collection requirements contained in this document, contact Judith B. Herman at (202) 418–0214, or via the Internet at *Judith-B.Herman@fcc.gov.*

SUPPLEMENTARY INFORMATION: This *Order* contains new or modified information collection requirements subject to the PRA of 1995, Public Law 104–13. These will be submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new or modified information collection requirements contained in this proceeding. The *Order* addresses issues arising from *Rules and Regulations Implementing the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003; Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 Notice of Proposed Rulemaking (NPRM),* CG Docket Nos. 02–278 and 04–53; FCC 04–52. Copies of any subsequently filed documents in this matter will be available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. The complete text of this decision may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc. (BCPI), Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554. Customers may contact BCPI, Inc. at their web site: *www.bcpiweb.com* or call 1–800–378–3160. 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) or (202) 418–0432 (TTY). This *Order* can also be downloaded in Word and Portable Document Format (PDF) at: *http://www.fcc.gov/cgb/pol.*

Paperwork Reduction Act of 1995 Analysis

This *Order* contains new or modified information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public to comment on the information collection requirements contained in the *Order* as required by the Paperwork Reduction Act (PRA) of 1995, Public Law 104–13. Public and agency comments are due November 15, 2004. 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.'' In the present document we have assessed the effects of adopting these rules, and find that there may be an administrative burden on businesses with fewer than 25 employees. However, since this action is consistent with our mandate from Congress under the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, we believe small businesses will also benefit from this requirement in that they too will receive less unwanted commercial messages. In addition, the rules allow entities and persons a variety of ways to obtain express prior authorization to send such messages, which should substantially alleviate any burdens imposed on all businesses, including those with fewer than 25 employees.

Synopsis

In this *Order,* the Commission adopts rules to implement those aspects of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (CAN SPAM Act) directed to the Federal Communications Commission (FCC or Commission). The CAN SPAM Act directs the Commission to issue regulations to protect consumers from ''unwanted mobile service commercial messages.'' Thus, we adopt a general prohibition on sending commercial messages to any address referencing an Internet domain name associated with wireless subscriber messaging services. To assist the senders of such messages in identifying those subscribers, we require that commercial mobile radio service (CMRS) providers submit those domain names to the Commission, for inclusion in a list that will be made publicly available. We also clarify the delineation between these new rules implementing the CAN SPAM Act, and our existing rules concerning messages sent to wireless telephone numbers under the Telephone Consumer Protection Act (TCPA).

Discussion

A. Mobile Service Commercial Message (MSCM)

Section 14 (b)(1) of the CAN SPAM Act requires that the Commission adopt rules to provide subscribers with the ability to avoid receiving a ''mobile service commercial message'' unless the subscriber has expressly authorized such messages beforehand. An MSCM is defined in the CAN SPAM Act as a ''commercial electronic mail message that is transmitted directly to a wireless device that is utilized by a subscriber of commercial mobile service'' as defined in 47 U.S.C. 332(d) ''in connection with that service.'' The CAN SPAM Act defines an electronic mail message as a message having a unique electronic mail address that includes ''a reference to an Internet domain.''

In the CAN SPAM *NPRM,* we asked whether it was appropriate to find that only commercial electronic mail messages transmitted directly to a wireless device used by a CMRS subscriber would fall within the definition of MSCMs under the CAN SPAM Act. We sought comment on whether the statutory language would be satisfied by our proposed interpretation that an MSCM is a message transmitted to an electronic mail address provided by a CMRS provider for delivery to the addressee subscriber's wireless device. We asked for comment on whether an MSCM must be limited to a message sent to a wireless device used by a subscriber of CMRS ''in connection with that service.''

Few commenters directly addressed the scope of MSCMs, aside from references to forwarding, SMS, and similar technology discussed below. We agree with Dobson that the definition of MSCM should be limited to messages sent to addresses referencing domain names assigned by each CMRS carrier for mobile service message (MSM) service. This is consistent with the intent of the CAN SPAM Act in that section 14 of the CAN SPAM Act governs only those messages that are mobile services messages. We therefore adopt a definition of MSCM that is limited to a message transmitted to an electronic mail address provided by a CMRS provider for delivery to the subscriber's wireless device. Our definition of MSCM only applies to

those CMRS mail addresses designated by carriers specifically for mobile service messaging. For example, if a wireless carrier offered general electronic mail service not designed specifically for mobile devices, such service would not be covered by section 14 of the CAN SPAM Act. *Forwarded messages.* We sought comment on our tentative conclusion that messages ''forwarded'' by a subscriber to his or her own wireless device are not covered under section 14 of the CAN SPAM Act. Commenters agree with the Commission that section 14 of the CAN SPAM Act is not meant to cover forwarding in general. The Consumers Union warned the Commission not to allow the exclusion of ''forwarded'' messages to become a loophole for marketers who encourage others to forward messages to their friends and associates. We agree that the rules should exclude those messages forwarded by the subscriber's actions to forward messages to his or her own wireless device. However, a person who receives consideration or inducement to forward a commercial message to a wireless device other than his or her own device would be subject to the rules implementing section 14 of the CAN SPAM Act. In addition, VeriSign notes that some technologies being explored would allow for differentiation of forwarded mail from other mail. We do not rule out revisiting this issue in the future if such technology becomes widely available.

SMS Messages: In the *NPRM,* we asked for comment on whether the definition of an MSCM should include messages using different technologies, including Internet-to-phone SMS. We noted that the TCPA and Commission's rules that specifically prohibit using automatic telephone dialing systems to call wireless numbers already apply to any type of call, including both voice and text calls. We also noted in the *NPRM* that the legislative history of The CAN SPAM Act suggests section 14, in conjunction with the TCPA, was intended to address wireless text messaging. We proposed that Internet-to-phone SMS calls, which include addresses that reference Internet domains, should be considered MSCMs and should be addressed under section 14 of the CAN SPAM Act.

Commenters in general agree with our proposal that Internet-to-phone SMS calls should be covered by section 14 of the CAN SPAM Act. National Association of Attorneys General (NAAG) and other commenters argue that the FCC should also address all SMS, whether Internet-to-phone or phone-to-phone SMS service. Several commenters raise the issue of whether MSCMs should include all types of message services, including those transmitting images, audio messages and those using short codes.

We conclude that the definition of MSCM under the CAN SPAM Act includes any commercial electronic mail message as long as the address to which it is sent or transmitted includes a reference to the Internet and is for a wireless device as discussed above. This holds true regardless of the format of the message, such as audio messages. We believe this interpretation best applies the statutory language to the evolving technology for delivering such messages. Therefore, messages sent using Internet-to-phone SMS technology are among messages covered by section 14 of the CAN SPAM Act when they include an Internet reference in the address to which the message is sent or delivered.

We find, however, that the CAN SPAM Act does not apply to those technologies that use other types of addresses or numbers to send or deliver messages to wireless devices. For example, as discussed above, we agree with those commenters who maintain that phone-to-phone SMS is not captured by section 14 of the CAN SPAM Act because such messages do not have references to Internet domains. However, we note that while section 14 of the CAN SPAM Act is limited in scope to messages sent or transmitted to addresses that have references to Internet domains, the TCPA provides separate protections for calls made to wireless telephone numbers (without such references). And, as we explained in the *NPRM* and a previous Commission *Order,* the TCPA prohibition on using automatic telephone dialing systems to make calls to wireless phone numbers applies to text messages (*e.g.,* phone-to-phone SMS), as well as voice calls. We clarify here that this prohibition applies to all autodialed calls made to wireless numbers, including audio and visual services, regardless of the format of the message.

B. Avoiding Unwanted MSCMs

As a preliminary matter, we noted in the *NPRM* that one possible interpretation of section 14 of the CAN SPAM Act is that it was intended to prohibit senders of commercial electronic mail from sending any MSCMs unless they first obtain express authorization from the recipient. This reading would allow a subscriber to avoid all MSCMs unless the subscriber acts affirmatively to give express prior authorization to receive messages from individual senders. Another interpretation of this provision is that Congress intended the subscriber to take affirmative steps to avoid receiving MSCMs by indicating his or her desire not to receive such messages.

Most commenters argue that Congress intended section 14 of the CAN SPAM Act to be a flat prohibition on sending MSCMs unless authorized by a given subscriber, and that such a prohibition is, in fact, necessary to protect subscribers. NAAG indicates that wireless devices are often used not for receiving commercial messages, but rather as security and safety devices—for emergencies and to communicate with family members. NAAG contends that Congress intended to craft a flat prohibition unless the consumer first consented to receive the messages, and that any rule treating inaction by the consumer as consent to receive any commercial messages would conflict with Congressional intent. The Direct Marketing Association (DMA) argues that the prohibition should apply only to messages for which the recipient must pay. The National Association of Realtors (NAR) contends that a general prohibition without certain exceptions would harm small businesses.

We conclude that wireless subscribers would be best protected by a flat prohibition on sending MSCMs unless express prior authorization has been obtained from the subscriber. We agree that wireless devices are not ones on which subscribers would expect to receive commercial messages. We agree that it is the intrusive nature of such messages, in addition to the costs to receive them, which necessitates our adopting a ban unless the consumer has taken some action to invite them. We believe that NAR's concerns about the burden on small businesses are addressed by the exemption for express prior authorization, discussed below.

Verizon Wireless argues that a prohibition without an exemption for wireless providers would violate the First Amendment. We disagree. A flat prohibition here satisfies the criteria set forth in *Central Hudson Gas & Elec.* v. *Pub. Serv. Comm. of N.Y.,* in which the Supreme Court established the applicable analytical framework for determining the constitutionality of a regulation of commercial speech. Under the framework established in *Central Hudson,* a regulation of commercial speech will be found compatible with the First Amendment if (1) there is a substantial government interest; (2) the regulation directly advances the substantial government interest; and (3) the proposed regulations are not more extensive than necessary to serve that interest.

Under the first prong, we find that there is a substantial governmental interest in protecting privacy. Congress found that ''there is a substantial government interest in regulation of commercial electronic mail on a nationwide basis.'' Specifically, Congress found that (1) electronic mail has become an extremely important and popular means of communication, (2) that the convenience and efficiency of electronic mail are threatened by the high volume of unsolicited commercial electronic mail, (3) that the receipt of unsolicited commercial electronic mail may result in costs for storage and/or time spent accessing, reviewing, and discarding such mail, and (4) that the growth in such electronic mail imposes significant monetary costs on providers of Internet access services, businesses, and educational and nonprofit institutions. NAAG notes that in addition to being intrusive in general, unwanted calls to wireless devices use battery power and interfere with a consumer's ability to use devices during emergencies.

We find that the rules we adopt today will advance those interests, and do so with regulations that are no more extensive than necessary. Under the second prong, the method we adopt directly advances the government's interest by alerting senders to the electronic mail addresses that are associated with mobile services and prohibiting the sending of such messages to wireless devices. Under the third prong, we have reviewed other possible options and we believe the method we adopt today, tailored to affect only those addresses associated with mobile service, is no more extensive than necessary. In addition, senders of such messages may continue to contact recipients that have provided express prior authorization to do so. Our conclusion is also consistent with Court of Appeals decisions regarding First Amendment challenges to the TCPA. We conclude we have the authority and a mandate to adopt measures to protect the public from such messages. We believe that a prohibition, combined with a domain name list as discussed below, is the most effective method, but it is no more extensive than necessary, to accomplish that end.

1. List of Wireless Domain Names

In the *NPRM* we noted that a key problem with regulating MSCMs, as opposed to messages sent to other devices such as desktop computers, is the current difficulty senders have in recognizing electronic mail addresses associated with wireless service and devices. Our task, therefore, differs substantially from that of the FTC's efforts to implement the CAN SPAM Act. We note that should the FTC or Congress take significant action to change the landscape of commercial electronic mail messaging, such as requiring labeling of all commercial electronic mail, the Commission may revisit the options discussed below.

We sought comment on several proposals to enable senders to recognize which addresses were associated with wireless devices. These included developing a list of domain names, requiring carriers to use standard subdomain names, requiring a registry of individual electronic mail addresses, incorporating challenge-response technology, and otherwise maximizing use of filters.

We believe that creating a list of Internet domain names associated with CMRS subscribers and prohibiting the sending of commercial messages to addresses using those domain names is the best option at this time to allow subscribers to avoid unwanted MSCMs. We believe that if senders are able to identify wireless subscribers by domain name, consumers and carriers alike will benefit. The record reveals that it is already industry practice for CMRS providers to use certain subdomains exclusively to serve their MSM subscribers and that these subdomains distinguish such customers from other customers. Therefore the burden on wireless providers, even small wireless providers, to supply such names for a directory would be minimal. In addition, we agree with those commenters who indicate that making available to senders of MSCMs a list of the domains used by wireless subscribers is the most efficient option to assist senders in complying with the rules.

Senders will need to check the list on a regular basis to avoid sending MSCMs to the domain names on the list. We believe that, due to the estimated small size of the list and the evidence that the list is anticipated to remain relatively static; the list is the option that imposes a burden that is no more extensive than necessary for senders as well. Furthermore, such a registry places no burdens on subscribers who wish to avoid unwanted MSCMs and it does not collect personal information about those subscribers. Subscribers need not change their electronic mail addresses or take any further action to avail themselves of the protections under section 14 of the CAN SPAM Act. Thus, despite the concerns of some commenters regarding other proposals in the *NPRM,* under this system wireless subscribers will not have to change addresses, and incur associated advertising and administrative costs, if they wish to avoid commercial electronic mail.

T-Mobile urges the Commission not to require wireless service providers to provide domain names for a domain name list. T-Mobile argues instead that a voluntary list would afford each provider the ability to choose whether to publicize its domain name. However, we note that many of these domain names are already widely known or publicly available. Congress has directed us to give all wireless consumers the ability to avoid unwanted MSCMs, and we have no authority to limit such protections to subscribers of those carriers that elect to submit a domain name to the list. Therefore, we decline to make the submission of domain names to the list voluntary for wireless providers.

Therefore, we require all CMRS carriers, including small carriers, to file with the Commission the names of all electronic mail domain names used to offer subscribers messaging specifically for mobile devices. Once we have obtained approval from the Office of Management and Budget (OMB) for information collections associated with these rules, the Commission will issue a separate public notice in this docket outlining the process for submitting this information and the timeframe for doing so. Carriers will also be required to file any updates to their listings with the Commission not less than 30 days before issuing subscribers a new or modified domain name. Carriers are encouraged to file updated information further in advance. In addition, to ensure the continued accuracy of the list, carriers must remove any domain name that has not been issued to subscribers or is no longer in use within 6 months of placing it on the list or last date of use.

We will make the official list of domain names available to the public from the FCC's website, in a similar fashion to the list of Section 255 Service Provider contacts. The list will be updated regularly. The Commission will issue a second public notice announcing the date on which senders of commercial electronic mail will have access to the domain name list from the Commission's website. Senders will then have an additional 30 days from the date the list becomes publicly available to comply with the rules to avoid sending MSCMs to wireless subscribers absent their express prior authorization.

As discussed above, to make such a list effective, we also adopt rules to prohibit the sending of any commercial

message to an address that references a domain name on the Commission's domain name list, unless the sender has received the express prior authorization of the person or entity to which the message is sent or delivered. This prohibition only applies to ''commercial'' messages, as defined in the CAN SPAM Act, and as interpreted by the FTC. We note that in promulgating the rules we adopt today, we have incorporated portions of the CAN SPAM Act directly.

Persons initiating commercial messages would be expected to check the domain name list to ensure that they are not sending MSCMs without express prior authorization. While we will not require any person or entity to provide proof of when they consulted the domain name list, any person or entity may use as a ''safe harbor'' defense proof that a specific domain name was not on the list more than 30 days before the offending message was initiated. This ''safe harbor'' defense shall not excuse any willful violation of the ban on sending unwanted messages to wireless subscribers. Any person or entity will be considered in violation of the prohibition if the message is initiated knowingly to a subscriber of MSM service, even if it is sent within 30 days of the domain name appearing on the list. This prohibition applies to the entity on whose behalf the message is sent and to any other entity that knowingly transmits an MSCM without consulting the domain name list.

2. Other Proposals

Standard subdomain names. We decline at this time to require CMRS providers to adopt a standard subdomain name for wireless devices. In the *NPRM* we sought comment on two related proposals. First, we sought comment on whether it would be possible and useful to require the use of specific top-level and second-level domains, which form the last two portions of the Internet domain address. No commenter specifically addressed our proposal. Second, we sought comment on whether we should require one portion of the domain to follow a standard naming convention to be used for all MSM service. As we noted in the *NPRM,* unless we required use of a limited top-level domain, we have no way to prevent entities that do not provide MSM service from adopting such names. In addition, any ban associated with such a subdomain outside a limited top-level domain, could inadvertently ban commercial messages for any entities that happened to already have such subdomains. Thus, the sender would not be able to distinguish between those addresses which were truly used for wireless messaging, and other addresses.

Cingular, Nextel, VeriSign and Verizon Wireless caution the Commission against requiring subdomain naming standards. They note this would be costly for subscribers, especially small businesses, who could have large administrative costs to change their advertising and business materials to reflect a new address. Cingular states that a subdomain naming standard would also force carriers to absorb considerable costs. Carriers argue also that any cost to protect wireless subscribers from unwanted commercial mail should fall instead to the senders of such mail. While we agree with NAAG and National Automobile Dealers Association (NADA) that a standard subdomain name would be simpler for senders, we believe it would be more burdensome for carriers, especially small businesses, to implement than a domain name list. In addition, we agree that, consistent with the intent of the CAN SPAM Act, subscribers should not have to bear additional costs, such as the administrative costs mentioned, in *Order* to avoid unwanted MSCMs. Thus, we decline to adopt this option at this time.

Registry of Individual E-mail Addresses. We also decline to establish a limited national registry containing individual electronic mail addresses, similar to the national ''do-not-call'' registry. In the *NPRM,* we noted that the FTC is tasked with reviewing whether a nationwide marketing ''Do-Not-E-Mail'' registry might offer protection for those consumers who opt to place their electronic mail addresses on such a registry. In June, the FTC released its report to Congress recommending against adopting a national do-not-e-mail registry at this time. The FTC noted that there is no directory of valid individual addresses and, therefore, creating a registry of individual addresses would create ''a gold mine'' for marketers, both legitimate and illegal. The report stated that existing security measures are currently inadequate to protect such a registry. In addition, the report noted that there were practical concerns with the large number of anticipated addresses.

Commenters generally oppose the establishment of a registry of individual subscriber addresses, even if it is limited to MSM subscribers. They contend that such a registry would not be secure, could enable spammers to send more unwanted electronic mail messages, and that the security risk would threaten consumer privacy interests. Commenters also maintain that such a registry would be burdensome for consumers and for senders, that there would be huge operational problems with setting up such a registry, that it would be ineffective, and that it would be costly to train senders to use it properly. The DMA submitted a detailed study demonstrating what it believes are significant problems with the security, practicality, and technical feasibility of such a registry. Only a few commenters argue that a registry of electronic mail addresses would be useful, with little or no support for their conclusions, and one commenter saying it would be beneficial if combined with other anti-spam measures.

Upon careful consideration of the costs and benefits of creating a national wireless do-not-e-mail registry of individual electronic mail addresses, we believe that the disadvantages of such a system described in the record outweigh any possible advantages at this time. A national registry containing individual electronic mail addresses would involve significant resources and cost to set up and administer. Because a registry of individual addresses may potentially contain millions of records, it could also be burdensome for senders of MSCMs, including small businesses, to regularly access, download, and use the registry to check against targeted addresses. It would be less burdensome to do the same with a much smaller list of mobile service domain names. Even if the resources were devoted to establishing such a registry, commenters describe serious concerns about a registry becoming a target for unscrupulous marketers who would target electronic mail addresses on the list. As noted by the DMA, other commenters, and by the FTC in a Report to Congress, because such a list would be considered valuable to such marketers, there is a significant risk that such individuals might be motivated to try to obtain the list specifically for the purpose of sending unsolicited messages to those addresses. The record also reveals that at this time such a registry would not be as effective as one containing only domain names. Commenters note that the annual rate for electronic mail address turnover is high'as much as 32 percent per annum. As the FTC noted, unlike the do-not-call registry, which uses phone databases to purge the list of disconnected phone numbers, there is no database for abandoned electronic mail addresses. Thus, any database containing such addresses would continually expand, and include valid and unused addresses. For all of these

reasons, we decline to adopt a registry of individual electronic mail addresses of wireless subscribers at this time.

Additional Mechanisms and CMRS Providers' Roles. There was little consensus on what other technical solutions should be required. Because the rules we adopt today address the statutory requirements for protecting consumers from unwanted messages to mobile devices, we decline to require other specific technical solutions such as the challenge-response mechanisms or technological solutions related to filtering as discussed in the *NPRM.* The Members of the U.S. House Representatives who commented in the proceeding urge the Commission to make things simple for users. We believe the domain name list does so.

We believe that it is the industry itself that can help give consumers additional protections and abilities to avoid unwanted electronic mail from sources other than legitimate businesses. Wireless and technology providers contend the Commission should not regulate in detail the wireless providers' efforts to combat unwanted messages. Those providers who commented in this proceeding note that they are aggressively working to stop unwanted messages. We applaud them for those efforts and do not want to interfere with this area of evolving technologies and market forces. We agree that at this time it is not necessary for the Commission to become involved in mandating detailed technical solutions. However, we strongly encourage providers to provide subscribers with additional reasonably effective methods to avoid receiving unauthorized MSCMs. We believe service providers should determine for themselves appropriate solutions to employ and offer, and we expect all providers to offer subscribers protections against unwanted messages. We will continue to monitor the effectiveness of our rules and the efforts of wireless providers to protect wireless subscribers from MSCMs and may revisit this issue at a later date to ensure that subscribers are afforded sufficient safeguards from all unwanted commercial messages.

C. Express Prior Authorization

Congress directed the FCC to adopt rules to provide consumers with the ability to avoid receiving MSCMs, unless the subscriber has provided express prior authorization to the sender. We sought comment on the form and content that such ''express prior authorization'' should take. Specifically, we sought comment on whether senders should be required to obtain a subscriber's express authorization in writing, and how any such requirement could be met electronically. We also asked if senders should be required to provide a notice to recipients about the possibility that costs could be incurred in receiving any such messages. We asked whether the term ''affirmative consent'' in The CAN SPAM Act would be suited to use in defining ''express prior authorization.''

Commenters were generally split on whether the Commission should require senders to obtain express authorization from subscribers in writing. Wireless providers generally oppose any written authorization requirement, while consumers' groups contend that authorization should be obtained in writing, along with a signature. Wireless providers instead argue that senders should be allowed flexibility to obtain authorization via the Internet, orally over the telephone, or through messages sent to the subscriber's wireless device. Some suggest that consent forms requiring a signature would be impractical and hinder communications between sellers and consumers. NAAG, on the other hand, contends that the rules should be modeled after the Commission's ''do-not-call'' provisions, where express authorization must be evidenced only with a signed, written agreement between the consumer and seller which states that the consumer agrees to be contacted by the seller and includes the telephone number to which calls may be placed. Electronic Privacy Information Center (EPIC) warns that authorization not provided in writing may result in some senders falsely claiming they had the recipient's authorization to send MSCMs. EPIC adds that any authorization notice to the subscriber should be clear and conspicuous and written in plain language for the subscriber.

As mandated by the CAN SPAM Act, we require any sender of MSCMs to obtain the express authorization of the recipient prior to sending any MSCMs to that subscriber. We agree with those commenters that contend that ''affirmative consent'' as defined in the CAN SPAM Act is not suited to defining ''express prior authorization'' because protections for wireless subscribers are meant to be more stringent. Given the intent of Congress to afford greater protections from spam to wireless subscribers than to consumers generally, we believe that the burden must rest with the sender of MSCMs to obtain authorization from any subscriber prior to sending any MSCMs. Senders must also do so in a manner that best protects subscribers' privacy interests. However, we decline to require senders to obtain a subscriber's authorization in writing.

We will permit senders to obtain authorization by oral or written means, including electronic methods. A sender may obtain the subscriber's express prior authorization to transmit MSCMs to that subscriber in writing. Written authorization may be obtained in paper form or via an electronic means such as an electronic mail message from the subscriber. It must include the subscriber's signature and the electronic mail address to which MSCMs may be sent. Senders who choose to obtain authorization in oral format are also expected to take reasonable steps to ensure that such authorization can be verified.

We note here that in the event any complaint is filed, the burden of proof rests squarely on the sender, whether authorization has been obtained in written or in oral form. We do so to avoid the likelihood that any businesses will try to fabricate authorization. Given the potential costs and inconvenience to subscribers to receive such MSCMs, it is important that such messages be sent only to those wireless devices belonging to receptive subscribers. We strongly suggest that senders take steps promptly to document that they received such authorization. Recognizing the potential for fraud by both a person signing up someone else to receive MSCMs and by businesses fabricating authorization, we recommend that the business confirm the electronic mail address with a confirmatory notice sent to the recipient requesting a reply. We emphasize that sending any commercial message to a wireless device, including any falsely purporting to be confirmatory messages, is a violation of our rules unless the subscriber has already provided express prior authorization and the sender bears the burden of showing that has occurred.

Whether given orally or in writing, express prior authorization must be express, must be given prior to the sending of any MSCMs, and must include the electronic mail address to which such MSCMs may be sent. In addition, we believe that consistent with the intent of the CAN SPAM Act, consumers must not bear any additional costs to receive a request for authorization, and must be able to reply to such a request without incurring any additional costs. In addition to actual costs for such messages, as noted above, recipients may incur costs for time spent accessing, reviewing, and discarding such mail. Thus, senders are prohibited from sending any request for authorization to any wireless subscriber's wireless devices. Express prior authorization may not be obtained in the form of a ''negative option.'' If a

sender chooses to use a website, we note that such authorization must include an affirmative action on the part of the subscriber, such as checking a box or hitting an ''I Accept'' button, accompanied by the clear disclosures outlined below. In addition, the subscriber must have an opportunity in the process to input the specific electronic mail address for which they are authorizing MSCMs. Express prior authorization need only be secured once from the recipient in Order to send MSCMs to that subscriber until the subscriber revokes such authorization. Senders who claim they obtained authorization from wireless subscribers to send them MSCMs prior to the effective date of these rules will not be in compliance with the rules unless they can demonstrate that such authorization met all the requirements as adopted herein, including the disclosure requirements below.

We emphasize that if the sender subsequently is notified by the subscriber that the subscriber does not wish to receive MSCMs, the sender must cease sending such messages within 10 business days of the receipt of such request in compliance with section 5(a)(4)(A) of the CAN SPAM Act. We note, however, that this 10-day time period may change should the FTC amend its rules. We delegate to the Consumer & Governmental Affairs Bureau the authority to amend the rules to reflect any updates in the time-frames adopted by the FTC.

A subscriber who provides an electronic mail address for a specific purpose, *e.g.*, notifying the subscriber when a car repair is completed, will not be considered to have given express prior authorization for purposes of sending MSCMs in general. In addition, should a sender allow subscribers to choose the types of MSCMs they receive from that sender, and authorization is provided for those specific types of messages, the sender should transmit only those types of MSCMs to the subscriber. Finally, authorization provided to a particular sender will not entitle that sender to send MSCMs on behalf of third parties, including on behalf of affiliated entities and marketing partners. If a sender obtains express prior authorization, that sender must be identified in the message in a form that will allow a subscriber to reasonably determine that the sender is the authorized entity.

Required Disclosures. As noted above, Congress found that the receipt of unsolicited commercial electronic mail often results in monetary costs and inconvenience for wireless subscribers. Thus, the rules we adopt today require senders to disclose to the subscriber at the time they obtain any subscriber's express prior authorization that: (1) The subscriber is agreeing to receive mobile service commercial messages sent to their wireless device from a particular sender; (2) the subscriber may be charged by their wireless service provider in connection with receipt of such messages; and (3) the subscriber may revoke her authorization to receive MSCMs at any time. Any such disclosure notice containing the required disclosures must be clearly legible, use sufficiently large type (or, if audio, be of sufficiently loud volume), and be placed so as to be readily apparent to a customer. The disclosure notice must also be separate from any other authorizations in the document. And, it must clearly provide the name of the person or entity sending the MSCM and the person or entity whose product or service is advertised or promoted in the MSCMs if different from the sender. Finally, if any portion of the disclosure notice is translated into another language, then all portions of the notice must be translated into that language. Senders are cautioned that if they use a website for obtaining authorization, such authorization notice must comply with these disclosure requirements as well. We note that if authorization is obtained orally, all required disclosures must still be made by the sender.

We decline to carve out any exemptions from the ''express prior authorization'' requirements. We find that any exemption for a particular industry would be in direct conflict with the intent of the CAN SPAM Act to protect wireless subscribers from commercial electronic mail messages that they do not wish to receive. We also find that permitting senders to obtain authorization orally or in writing, addresses the concerns described by certain commenters in obtaining such authorization.

The legislative history demonstrates that section 14 of the CAN SPAM Act was included so that wireless subscribers would have greater protections from commercial electronic mail messages than those protections provided elsewhere in the CAN SPAM Act. Congress was concerned about the intrusive nature of wireless spam and the costs to subscribers associated with receiving such spam. Thus, we emphasize that any MSCM sender that claims its messages are transmitted based on oral, written, or electronic authorization must be prepared to provide clear and convincing evidence of such express prior authorization by the subscriber. The failure to obtain such authorization before sending MSCMs will be a clear violation of the CAN SPAM Act and Commission's rules.

D. Electronic Rejection of MSCMs

Required technical mechanisms. In the *NPRM* we sought comment on how we could best fulfill the mandate of section 14 (b)(2) of the CAN SPAM Act to develop rules that ''allow recipients of MSCMs to indicate electronically a desire not to receive future MSCMs from the sender.'' We also sought comment on technical options that might be used to do this simply.

Commenters suggested technical options for withdrawing authorization including a return electronic mail address, a hyperlink to a website, the use of short code mechanisms, telephone-based techniques such as those that allow the caller to use key pads, or some combination of the foregoing. Members of the U.S. House of Representatives and the Motion Picture Association of America, encourage the Commission to adopt a simple, streamlined electronic response technique to quickly withdraw prior authorization using a recipient's handset. Two commenters contend that requiring small businesses to set-up and maintain a website for the purpose of rejecting future messages would impose an unreasonable burden. NAAG contends the first screen of any MSCM should display the existence of an option to decline to receive messages and the means by which it can be exercised.

As a preliminary matter we note that section 5(a)(3) of the CAN SPAM Act requires that all commercial electronic mail include ''a return electronic mail address or other Internet-based mechanism, clearly and conspicuously displayed.'' Several commenters endorsed the applicability of the general provision of section 5(a)(3) of the CAN SPAM Act for MSCMs, indicating that a return electronic mail address or other Internet-based mechanism, such as a link to a website, would serve as a mechanism for electronically rejecting further items and should be included in any MSCM sent. We agree that this provision would need to be included in all MSCMs in *Order* for our rules to be consistent with the CAN SPAM Act.

We believe, however, that more is required. Our decision is informed by the significant differences between the resources that may be available to recipients of MSCM and the resources available to recipients of electronic mail messages in general. In particular our definition of MSCM includes messages that originate on the Internet and that

are converted for delivery to wireless devices which may not have Internet access. Some of these wireless services and devices are by nature one-way services. Moreover, we cannot assume that all MSCM recipients have an alternative means of access to Internet-based electronic messaging or to other Internet-based mechanisms, such as a web browser. Consequently, we strongly agree with the Mobile Marketing Code of Conduct principle that ''consumers must be allowed to terminate their participation in an ongoing mobile messaging program through channels identical to those through which they can opt to receive messages about a given program.''

Therefore, we conclude that in addition to the general requirement of the CAN SPAM Act that each MSCM have a functioning return electronic mail address or other form of Internet-based communication, a sender of an MSCM must provide the recipient with access to whatever mechanism they were given access to in *Order* to grant express prior authorization. For example, if a subscriber was given a short-code mechanism for granting authorization for MSCMs to the sender, the sender must provide that subscriber with a way to send a short code as a means to electronically reject future MSCMs from that sender. A sender must also include basic instructions by which this option or these options can be exercised to reject further items.

A sender may include other mechanisms at his discretion, so long as these basic requirements are met. The means by which a recipient notifies the sender that the recipient does not wish to receive additional MSCMs can impose no new requirements on the recipient beyond the means by which he provided prior express authorization. In addition, the sender may not subject the subscriber to further commercial advertising or solicitation as part of the procedure the recipient must use to reject future messages.

Consistent with CAN SPAM Act section 5(a)(3), for no less than 30 days following the transmission of an MSCM, all included mechanisms for acquiring express prior authorization must remain capable of receiving and honoring the recipient's rejection of further messages. As we indicate above, the sender must cease sending further messages within the amount of time that the FTC has allotted for senders to act upon requests for rejecting subsequent messages, currently set at 10 business days after receipt of any request from the subscriber.

In regards to small businesses, we note that the flexibility provided for obtaining express prior authorization and for notifying the sender of the subsequent rejection of further items addresses the concerns of small business interests that, for example, a small business not be required to set-up and maintain a new website. We further note that because the recipient must be given express prior authorization for any MSCM that arrives, we see no need to adopt NAAG's suggestion to require material regarding how to decline to receive more messages to be displayed on the first screen of any MSCM. Finally, the record does not indicate that provider services and subscriber devices currently support a common response-based technique that is simple for subscribers to use and that the Commission could adopt. We therefore encourage industry to develop an industry-standard means by which a subscriber can use his handset to easily respond to a sender that he no longer wishes to receive MSCMs. We will monitor whether industry has developed a standard means by which subscribers can use handsets to respond and may revisit this issue at a later date.

Other technical mechanisms. In the *NPRM* we sought comment on the applicability of a variety of other technical options that could be used by subscribers for electronically rejecting messages. For example, we asked about the possible applicability of mechanisms for blocking messages from particular senders at the subscriber's request, of an ability to add a changeable personal identifier to a wireless device mail address by means of which the subscriber could easily alter his address, and of challenge-response mechanisms that a subscriber might invoke. One commenter supported establishing a policy framework to deploy subscriber-controlled blocking solutions. Many providers acknowledged that they voluntarily provide their subscribers such means for mitigating unsolicited MSCM, but cautioned the Commission against mandating their availability. Given the record and the apparent success to date of the voluntary approach in generally blocking unwanted MSCMs, we decline to require that all providers make such mechanisms available for use at the option of their subscribers.

E. Consideration of CMRS Provider Exemption

Section 14 (b)(3) of the CAN SPAM Act allows the Commission to exempt providers of commercial mobile services to the general prohibition on the sending of MSCMs. In doing so, the Commission must take into consideration the ''relationship that exists between providers of such services and their subscribers.'' However, as the CAN SPAM Act clearly states, our overall mandate is to protect consumers from unwanted MSCMs. The CAN SPAM Act does not require the Commission to provide an exemption, only to consider whether such an exemption would be appropriate. As a result, the Commission sought comment in the *NPRM* on whether there is a need for such an exemption and how it would impact consumers.

In the *NPRM,* we noted that the CAN SPAM Act already excludes certain ''transactional and relationship'' messages from the definition of unsolicited commercial electronic mail. Specifically the CAN SPAM Act states that transaction and relationship messages are those messages in which the primary purpose is:

> (i) To facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender; (ii) to provide warranty information, product recall information, or safety or security information with respect to a commercial product or service used or purchased by the recipient; (iii) to provide (I) notification concerning a change in the terms or features of; (II) notification of a change in the recipient's standing or status with respect to; or (III) at regular periodic intervals, account balance information or other type of account statement with respect to a subscription, membership, account, loan, or comparable ongoing commercial relationship involving the ongoing purchase or use by the recipient of products or services offered by the sender; (iv) to provide information directly related to an employment relationship or related benefit plan in which the recipient is currently involved, participating, or enrolled; or (v) to deliver goods or services, including product updates or upgrades, that the recipient is entitled to receive under the terms of a transaction that the recipient has previously agreed to enter into with the sender.

In light of the exclusions of those types of messages, we asked in the *NPRM* whether there was a need for a separate exemption for CMRS providers from the section 14 of the CAN SPAM Act ''express prior authorization'' requirement and, if so, how the Commission would implement the requirements allowing subscribers who indicated a desire not to receive future MSCMs from the provider (1) at the time of subscribing to such service and (2) in any billing mechanism. Additionally, we requested in the *NPRM* that CMRS providers supply us with specific examples of messages that they send to their customers that are not already excluded from the CAN SPAM Act. Finally, if such an exemption were created, we asked whether there would

be any impact on small businesses and whether small wireless service providers should be treated differently.

NAAG, consumer groups, and a privacy organization argue that there is no basis for granting an exemption for CMRS providers. CMRS providers argue they should have an exemption—with two providers noting this should be only if the carriers do not charge subscribers for the messages they send. However, despite the *NPRM's* request that carriers provide specific examples of messages that would not already be covered by the CAN SPAM Act's exemption for ''transactional'' or ''relationship'' messages, CMRS providers offer few such examples and, as discussed below, they might already be allowed under The CAN SPAM Act. NAR says it would be unfair to give an exemption to one business model and not others. Many CMRS providers counter that we should not make a special exemption for small businesses. As to the scope of the exemption, CTIA urges that any exemption for CMRS providers also should extend to its business partners, while the DMA warns that any such exemption must be narrowed to include only messages from a carrier about its own services. Verizon argues that declining to exempt carriers would be an unlawful restriction on commercial speech; however, we have already addressed that issue above.

Based upon the record before us, we decline to grant CMRS providers a special exemption from the requirement to obtain express prior authorization from their current subscribers before sending them any MSCM. In reaching this decision, we are persuaded by commenters, including many consumer groups and individuals, who urge us to provide greater consumer protection for wireless consumers—protection that is not diluted by such an exemption. The CAN SPAM Act itself requires us to protect consumers from ''unwanted'' commercial messages, not only those that have additional costs. As commenters note, consumers are concerned with the nuisance of receiving such messages.

Several of these commenters emphasize that CMRS providers should not be exempt from the rules requiring express prior authorization because the bulk of CMRS providers' communications with their customers are already expressly exempted under the CAN SPAM Act as ''transactional and relationship'' messages. We agree that the few examples that CMRS providers supplied in the record appear to already fall within ''transactional and relationship'' messages or otherwise outside of the definition of ''commercial'' messages. For example, T-Mobile contends that it needs to be able to send notices to customers about fraud. As noted above, the CAN SPAM Act defines a ''commercial electronic mail message'' as an electronic message for which the ''primary purpose'' is the ''commercial advertisement or promotion of a commercial product or service (including content on an Internet website operated for a commercial purpose).'' If the primary purpose of the message was to alert customers about fraud, we do not believe T-Mobile's example would fall within the definition of ''commercial'' and therefore would not fall under the CAN SPAM Act at all. In addition, Nextel provides the example of a carrier needing to send out an alert to a prepaid customer that his account balance is running low. If that was the primary purpose of the message, such a message would fall under the exemption for transaction and relationship message.

As noted previously, the FTC has authority to develop the criteria used to define whether a message is ''commercial,'' as well as any modifications for what is considered in the exemption of transactional and relationship messages. Therefore, we delegate to the Consumer & Governmental Affairs Bureau the authority to amend the rules we adopt today to ensure consistency with any rule the FTC adopts under the CAN SPAM Act to further define ''commercial'' and ''transactional relationship'' messages.

Although CMRS providers contend that an exemption should be provided, very little support for such an exemption was provided in the record in this proceeding. Much of the comment in support of the exemption is conclusory in nature. T–Mobile states that, by empowering the Commission to exempt wireless carriers from section 14 (b)(1) of the CAN SPAM Act, Congress has recognized that the MSCMs sent by wireless carriers are fundamentally different than MSCMs sent by all other senders. Cingular, Nextel and Sprint urge the Commission to presume that the customer is willing to receive information about their providers' new products and services. Nextel notes that, unlike third parties, wireless carriers can ensure that customers are not charged for such messages. Dobson states that, in many cases, a subscriber would prefer an SMS message from its carrier rather than a phone call or bill insert.

We note again that Congress' intent in including section 14 in the CAN SPAM Act was to afford wireless consumers greater protection from unwanted commercial electronic mail messages. Ultimately, we are persuaded that safeguarding wireless consumers from MSCMs, undiluted with an exemption for CMRS providers, will ensure that consumers receive ''less, not more, spam.'' The record shows that MSCMs sent by CMRS providers are not fundamentally different from those sent by other senders, other than that they may be provided without additional cost to subscribers. An MSCM from a CMRS provider may be just as intrusive, and costly in other respects, as an MSCM from a third party. As Congress noted, the receipt of unwanted mail can result in costs ''for the storage of such mail, or for the time spent accessing, reviewing, and discarding such mail.'' In addition, providers have unique channels such as monthly statements and web sites, through which they can request a subscriber's prior express authorization. We note that the rules we establish in this proceeding are sufficiently flexible to enable the CMRS provider to readily obtain the subscriber's express prior authorization in a number of ways, if a CMRS provider desires to send an MSCM to any wireless subscriber. For all of those reasons, a promise to make them cost-free alone does not suffice as justification for an exemption.

Accordingly, we decline to exempt CMRS providers from the requirement to obtain express prior authorization from their current subscribers before sending them any MSCM. For similar reasons, we also decline to create an exemption for other entities, such as realtors or small businesses. NAR argues that the MSCM rules should not apply to a real estate professional's communications to their clients about the services they are providing to that client, or to communications between associations and their members. As noted above, the CAN SPAM Act's existing exemption already broadly covers many transaction and relationship messages. Furthermore, the allowance for orally obtaining express prior authorization, which NAR advocates, should allow realtors to obtain such authorizations as needed. NAR has not established that messages sent by its members are fundamentally different from those sent by other senders. An MSCM from a real estate professional may be just as intrusive, and costly as an MSCM from any other entity. ACA International contends that messages sent to wireless devices for the primary purpose of collecting debts are not MSCMs as they are not ''commercial'' and therefore are exempt from the CAN SPAM Act. As we noted

previously, while the statute leaves the interpretation of ''transactional and relationship'' messages to the FTC, in the absence of any ruling to the contrary, we believe that messages from a person or entity with whom the recipient has previously agreed to enter into a transaction and that concern a debt owed for that transaction would fall under the exemption. However, consistent with our *2003 TCPA Order,* a call to sell debt consolidation services, for example, is a commercial call regardless of whether the consumer is also referred to a tax-exempt nonprofit organization for counseling services. We believe that to do so would be inconsistent with our mandate from Congress to protect subscribers from unwanted commercial messages.

F. General Compliance With the CAN SPAM Act

We asked for comment on specific compliance issues that senders of MSCM might have with other sections of the CAN SPAM Act. We noted in the *NPRM* that although we believed that currently, some carriers choose to limit the length of certain text messages that some commercial mobile service subscribers already appeared to be supplementing the limited text handling functionality with ancillary personal computer technology. We received little response about this issue. CTIA states that some handsets are limited in message storage beyond a certain length and screens are small; thus, CTIA argues that senders should not be required to meet all of the disclosures. Consumer Action, the Consumer Federation of America and the National Consumers League contend that the disclosure requirements of the main provisions of the CAN SPAM Act are so important that they should trump any awkwardness with messages being filled with disclosures. We agree. There is insufficient evidence on the record to warrant a waiver of the basic disclosure requirements mandated by the CAN SPAM Act.

Finally, CTIA contends that wireless carriers should be given special treatment with regard to general compliance with the information requirements of section 5 of the CAN SPAM Act, given that they can provide this data at the time of subscription and in each monthly bill. CTIA contends in a footnote that interpreting the statute to mean that CMRS providers would need to comply with all the information requirements of section 5 would render section 14 (b)(4) of the CAN SPAM Act meaningless. We disagree. Based on the information discussed above regarding messages sent by CMRS providers, we find there is no reason for treating them differently from other businesses.

Final Regulatory Flexibility Analysis

As required by the Regulatory Flexibility Act of 1980, as amended (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking* (NPRM & FNPRM) released by the Federal Communications Commission (Commission) on March 19, 2004. The Commission sought written public comments on the proposals contained in both the NPRM & FNPRM, including comments on the IRFA. None of the comments filed in this proceeding was specifically identified as comments addressing the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

Need for, and Objectives of, This Order

On December 8, 2003, Congress passed the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (CAN SPAM Act) to address the growing number of unwanted commercial electronic mail messages, which Congress determined to be costly, inconvenient, and often fraudulent or deceptive. Congress found that recipients ''who cannot refuse to accept such mail'' may incur costs for storage and for ''time spent accessing, reviewing, and discarding such mail.'' The CAN SPAM Act prohibits any person from transmitting such messages with false or misleading information about the source or content, and gives recipients the right to decline to receive additional messages from the same source. Certain agencies, including the Commission, are charged with enforcement of the CAN SPAM Act.

Section 14 of the CAN SPAM Act requires the Commission to (1) promulgate rules to protect consumers from unwanted mobile service commercial messages, and (2) consider, in doing so, the ability of senders to determine whether a message is a mobile commercial electronic mail message. In addition, the Commission shall consider the ability of senders of mobile service commercial messages to comply with the CAN SPAM Act in general. Furthermore, the CAN SPAM Act requires the Commission to consider the relationship that exists between providers of such services and their subscribers.

On March 19, 2004, the Commission issued the *NPRM & FNPRM* regarding implementation of section 14 of the CAN SPAM Act. The Commission sought comment on how to protect wireless subscribers from those electronic mail messages, such as traditional e-mail and forms of text messaging, that fall under section 14 of the CAN SPAM Act, while not interfering with regular electronic messages that are covered under the CAN SPAM Act in general. In the *NPRM & FNPRM,* the Commission sought comment on the ability of senders to determine whether a message is a mobile service commercial electronic mail message, as well as different options and technologies that might enable the sender to make that determination. In addition, the *NPRM & FNPRM* sought comment on the following six issues or alternatives: (1) The scope of section 14 of the CAN SPAM Act, specifically what falls within the definition of mobile service commercial messages (MSCMs); (2) mechanisms to give consumers the ability to avoid MSCMs without relying upon the sender to determine whether a message is a mobile service message; (3) the requirements for obtaining express prior authorization; (4) whether commercial mobile radio service providers should be exempted from the obligation of obtaining express prior authorization before contacting their customers; (5) how wireless subscribers may electronically reject future MSCMs; and (6) how MSCM senders may generally comply with the CAN SPAM Act.

In 1991, the Telephone Consumer Protection Act (TCPA) was enacted to address certain telemarketing practices, including calls to wireless telephone numbers, which Congress found to be an invasion of consumer privacy and even a risk to public safety. The TCPA specifically prohibits calls using an automatic telephone dialing system or artificial or prerecorded message ''to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other common carrier service, or any service for which the called party is charged.'' The CAN SPAM Act provides that ''[n]othing in this Act shall be interpreted to preclude or override the applicability'' of the TCPA.

In 2003, we released a *Report and Order* in which we reaffirmed that the TCPA prohibits *any call* using an automatic telephone dialing system or an artificial or prerecorded message to any wireless telephone number. We concluded that this encompasses both voice calls and text calls, including Short Message Service (SMS) text messaging calls, to wireless phone numbers.

In the *NPRM & FNPRM,* we noted that the legislative history of the CAN SPAM Act suggests that section 14, in

conjunction with the TCPA, was intended to address wireless text messaging. We sought comment on whether the definition of an MSCM should include SMS messages.

This *Order* adopts a general prohibition against commercial electronic messages sent to any address using a domain name that appears on a list to be maintained by the Commission and available to the public. We believe these measures are the ones best suited to protect wireless subscribers from unwanted commercial messages and do not overburden carriers and legitimate businesses, especially small businesses.

In addition, this *Order* clarifies the delineation between the new rules implementing the CAN SPAM Act, and our existing rules concerning messages sent to wireless telephone numbers under the TCPA. Because this *Order* clarifies this delineation and does not modify any rules, there is no discussion of the TCPA included in this FRFA. All remaining TCPA issues, raised in the *NPRM & FNPRM,* will be addressed in a separate *Order* issued by the Commission at a later date.

Summary of Significant Issues Raised by Public Comments in Response to the IRFA

There were no comments filed that specifically addressed the rules and policies proposed in the IRFA.

Description and Estimate of the Number of Small Entities to Which the Rules Will Apply

The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the rules adopted herein. The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act. Under the Small Business Act, a ''small business concern'' is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).

The rules adopted in this *Order,* concerning the prohibition of sending electronic commercial mail messages, apply to a wide range of entities, including the myriad of businesses throughout the nation that use electronic messaging to advertise. In the IRFA we identified, with as much specificity as possible, all business entities that might be affected by this *Order.* In *Order* to assure that we have covered all possible entities we included general categories, such as Wireless Service Providers and Wireless Communications Equipment Manufacturers, while also including more specific categories, such as Cellular Licensees and Common Carrier Paging. Similarly, for completeness, we have also included descriptions of small entities in various categories, such as 700 MHz Guard Band Licenses, who may potentially be affected by this *Order* but who would not be subject to regulation simply because of their membership in that category.

Sometimes when identifying small entities we provide information describing auctions' results, including the number of small entities that were winning bidders. We note, however, that the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily reflect the total number of small entities currently in a particular service. The Commission does not generally require that applicants do not provide business size information, nor does the Commission track subsequent business size, except in the context of an assignment or transfer of control application where unjust enrichment issues are implicated.

Small Businesses. Nationwide, there are a total of 22.4 million small businesses, according to SBA data.

Telemarketers. SBA has determined that ''telemarketing bureaus'' with $6 million or less in annual receipts qualify as small businesses. For 1997, there were 1,727 firms in the ''telemarketing bureau'' category, total, which operated for the entire year. Of this total, 1,536 reported annual receipts of less than $5 million, and an additional 77 reported receipts of $5 million to $9,999,999. Therefore, the majority of such firms can be considered to be small businesses.

Wireless Service Providers. The SBA has developed a small business size standard for wireless firms within the two broad economic census categories of ''Paging'' and ''Cellular and Other Wireless Telecommunications.'' Under both SBA categories, a wireless business is small if it has 1,500 or fewer employees. For the census category of Paging, Census Bureau data for 1997 show that there were 1,320 firms in this category, total, that operated for the entire year. Of this total, 1,303 firms had employment of 999 or fewer employees, and an additional 17 firms had employment of 1,000 employees or more. Thus, under this category and associated small business size standard, the great majority of firms can be considered small. For the census category Cellular and Other Wireless Telecommunications, Census Bureau data for 1997 show that there were 977 firms in this category, total, that operated for the entire year. Of this total, 965 firms had employment of 999 or fewer employees, and an additional 12 firms had employment of 1,000 employees or more. Thus, under this second category and size standard, the great majority of firms can, again, be considered small.

Internet Service Providers. The SBA has developed a small business size standard for Internet Service Providers. This category comprises establishments ''primarily engaged in providing direct access through telecommunications networks to computer-held information compiled or published by others.'' Under the SBA size standard, such a business is small if it has average annual receipts of $21 million or less. According to Census Bureau data for 1997, there were 2,751 firms in this category that operated for the entire year. Of these, 2,659 firms had annual receipts of under $10 million, and an additional 67 firms had receipts of between $10 million and $24,999,999. Thus, under this size standard, the great majority of firms can be considered small entities.

Wireless Communications Equipment Manufacturers. The Commission has not developed special small business size standards for entities that manufacture radio, television, and wireless communications equipment. Therefore, the applicable small business size standard is the definition under the SBA rules applicable to ''Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing.'' Examples of products that fall under this category include ''transmitting and receiving antennas, cable television equipment, GPS equipment, pagers, cellular phones, mobile communications equipment, and radio and television studio and broadcasting equipment'' and may include other devices that transmit and receive Internet Protocol enabled services, such as personal digital assistants. Under that standard, firms are considered small if they have 750 or fewer employees. Census Bureau data for 1997 indicate that, for that year, there were a total of 1,215 establishments in this category. Of those, there were 1,150 that had employment under 500, and an additional 37 that had employment of 500 to 999. The percentage of wireless equipment manufacturers in this category is approximately 61.35%, so

the Commission estimates that the number of wireless equipment manufacturers with employment under 500 was actually closer to 706, with an additional 23 establishments having employment of between 500 and 999. Given the above, the Commission estimates that the great majority of wireless communications equipment manufacturers are small businesses.

Radio Frequency Equipment Manufacturers. The Commission has not developed a special small business size standard applicable to Radio Frequency Equipment Manufacturers. Therefore, the applicable small business size standard is the definition under the SBA rules applicable to ''Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing.'' Under that standard, firms are considered small if they have 750 or fewer employees. Census Bureau data for 1997 indicate that, for that year, there were a total of 1,215 establishments in this category. Of those, there were 1,150 that had employment under 500, and an additional 37 that had employment of 500 to 999. Thus, under this size standard, the majority of establishments can be considered small entities.

Paging Equipment Manufacturers. The Commission has not developed a special small business size standard applicable to Paging Equipment Manufacturers. Therefore, the applicable small business size standard is the definition under the SBA rules applicable to ''Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing.'' Under that standard, firms are considered small if they have 750 or fewer employees. Census Bureau data for 1997 indicate that, for that year, there were a total of 1,215 establishments in this category. Of those, there were 1,150 that had employment under 500, and an additional 37 that had employment of 500 to 999. Thus, under this size standard, the majority of establishments can be considered small entities.

Telephone Equipment Manufacturers. The Commission has not developed a special small business size standard applicable to Telephone Equipment Manufacturers. Therefore, the applicable small business size standard is the definition under the SBA rules applicable to ''Telephone Apparatus Manufacturing.'' Under that standard, firms are considered small if they have 1,000 or fewer employees. Census Bureau data indicates that for 1997 there were 598 establishments that manufacture telephone equipment. Of those, there were 574 that had fewer than 1,000 employees, and an additional 17 that had employment of 1,000 to 2,499. Thus, under this size standard, the majority of establishments can be considered small.

As noted in paragraph [8], we believe that all small entities affected by the rules contained in this Order will fall into one of the large SBA categories described above. In an attempt to provide as specific information as possible, however, we are providing the following more specific categories.

Cellular Licensees. The SBA has developed a small business size standard for wireless firms within the broad economic census category ''Cellular and Other Wireless Telecommunications.'' Under this SBA category, a wireless business is small if it has 1,500 or fewer employees. For the census category Cellular and Other Wireless Telecommunications firms, Census Bureau data for 1997 show that there were 977 firms in this category, total, that operated for the entire year. Of this total, 965 firms had employment of 999 or fewer employees, and an additional 12 firms had employment of 1,000 employees or more. Thus, under this category and size standard, the great majority of firms can be considered small. According to the most recent *Trends in Telephone Service* data, 719 carriers reported that they were engaged in the provision of cellular service, personal communications service, or specialized mobile radio telephony services, which are placed together in the data. We have estimated that 294 of these are small, under the SBA small business size standard.

Common Carrier Paging. The SBA has developed a small business size standard for wireless firms within the broad economic census categories of ''Cellular and Other Wireless Telecommunications.'' Under this SBA category, a wireless business is small if it has 1,500 or fewer employees. For the census category of Paging, Census Bureau data for 1997 show that there were 1,320 firms in this category, total, that operated for the entire year. Of this total, 1,303 firms had employment of 999 or fewer employees, and an additional 17 firms had employment of 1,000 employees or more. Thus, under this category and associated small business size standard, the great majority of firms can be considered small.

In the *Paging Second Report and Order,* the Commission adopted a size standard for ''small businesses'' for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. A small business is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years. The SBA has approved this definition. An auction of Metropolitan Economic Area (MEA) licenses commenced on February 24, 2000, and closed on March 2, 2000. Of the 2,499 licenses auctioned, 985 were sold. Fifty-seven companies claiming small business status won 440 licenses. An auction of MEA and Economic Area (EA) licenses commenced on October 30, 2001, and closed on December 5, 2001. Of the 15,514 licenses auctioned, 5,323 were sold. One hundred thirty-two companies claiming small business status purchased 3,724 licenses. A third auction, consisting of 8,874 licenses in each of 175 EAs and 1,328 licenses in all but three of the 51 MEAs commenced on May 13, 2003, and closed on May 28, 2003. Seventy-seven bidders claiming small or very small business status won 2,093 licenses. Currently, there are approximately 74,000 Common Carrier Paging licenses. According to the most recent *Trends in Telephone Service,* 608 private and common carriers reported that they were engaged in the provision of either paging or ''other mobile'' services. Of these, we estimate that 589 are small, under the SBA-approved small business size standard. We estimate that the majority of common carrier paging providers would qualify as small entities under the SBA definition.

Wireless Communications Services. This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission defined ''small business'' for the wireless communications services (WCS) auction as an entity with average gross revenues of $40 million for each of the three preceding years, and a ''very small business'' as an entity with average gross revenues of $15 million for each of the three preceding years. The SBA has approved these definitions. The Commission auctioned geographic area licenses in the WCS service. In the auction, which commenced on April 15, 1997 and closed on April 25, 1997, there were seven bidders that won 31 licenses that qualified as very small business entities, and one bidder that won one license that qualified as a small business entity. An auction for one license in the 1670–1674 MHz band commenced on April 30, 2003 and closed the same day. One license was awarded. The winning bidder was not a small entity.

Wireless Telephony. Wireless telephony includes cellular, personal communications services, and specialized mobile radio telephony

carriers. The SBA has developed a small business size standard for ''Cellular and Other Wireless Telecommunications'' services. Under that SBA small business size standard, a business is small if it has 1,500 or fewer employees. According to the most recent *Trends in Telephone Service data,* 719 carriers reported that they were engaged in the provision of wireless telephony. We have estimated that 294 of these are small under the SBA small business size standard.

Broadband Personal Communications Service. The broadband personal communications services (PCS) spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission has created a small business size standard for Blocks C and F as an entity that has average gross revenues of less than $40 million in the three previous calendar years. For Block F, an additional small business size standard for ''very small business'' was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years. These small business size standards, in the context of broadband PCS auctions, have been approved by the SBA. No small businesses within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 ''small'' and ''very small'' business bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F. On March 23, 1999, the Commission reauctioned 155 C, D, E, and F Block licenses; there were 113 small business winning bidders.

On January 26, 2001, the Commission completed the auction of 422 C and F Broadband PCS licenses in Auction No. 35. Of the 35 winning bidders in this auction, 29 qualified as ''small'' or ''very small'' businesses. Subsequent events, concerning Auction 35, including judicial and agency determinations, resulted in a total of 163 C and F Block licenses being available for grant.

Narrowband Personal Communications Services. The Commission held an auction for Narrowband PCS licenses that commenced on July 25, 1994, and closed on July 29, 1994. A second auction commenced on October 26, 1994 and closed on November 8, 1994. For purposes of the first two Narrowband PCS auctions, ''small businesses'' were entities with average gross revenues for the prior three calendar years of $40 million or less. Through these auctions, the Commission awarded a total of 41 licenses, 11 of which were obtained by four small businesses. To ensure meaningful participation by small business entities in future auctions, the Commission adopted a two-tiered small business size standard in the *Narrowband PCS Second Report and Order.* A ''small business'' is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $40 million. A ''very small business'' is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $15 million. The SBA has approved these small business size standards. A third auction commenced on October 3, 2001 and closed on October 16, 2001. Here, five bidders won 317 (Metropolitan Trading Areas and nationwide) licenses. Three of these claimed status as a small or very small entity and won 311 licenses.

Lower 700 MHz Band Licenses. We adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits. We have defined a ''small business'' as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $40 million for the preceding three years. A ''very small business'' is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $15 million for the preceding three years. Additionally, the lower 700 MHz Service has a third category of small business status that may be claimed for Metropolitan/Rural Service Area (MSA/RSA) licenses. The third category is ''entrepreneur,'' which is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $3 million for the preceding three years. The SBA has approved these small size standards. An auction of 740 licenses (one license in each of the 734 MSAs/RSAs and one license in each of the six Economic Area Groupings (EAGs)) commenced on August 27, 2002, and closed on September 18, 2002. Of the 740 licenses available for auction, 484 licenses were sold to 102 winning bidders. Seventy-two of the winning bidders claimed small business, very small business or entrepreneur status and won a total of 329 licenses. A second auction commenced on May 28, 2003, and closed on June 13, 2003, and included 256 licenses: 5 EAG licenses and 476 Cellular Market Area licenses. Seventeen winning bidders claimed small or very small business status and won 60 licenses, and nine winning bidders claimed entrepreneur status and won 154 licenses.

Upper 700 MHz Band Licenses. The Commission released a Report and Order, authorizing service in the upper 700 MHz band. This auction, previously scheduled for January 13, 2003, has been postponed.

700 MHz Guard Band Licenses. In the *700 MHz Guard Band Order,* we adopted size standards for ''small businesses'' and ''very small businesses'' for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. A small business in this service is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $40 million for the preceding three years. Additionally, a very small business is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $15 million for the preceding three years. SBA approval of these definitions is not required. An auction of 52 Major Economic Area (MEA) licenses commenced on September 6, 2000, and closed on September 21, 2000. Of the 104 licenses auctioned, 96 licenses were sold to nine bidders. Five of these bidders were small businesses that won a total of 26 licenses. A second auction of 700 MHz Guard Band licenses commenced on February 13, 2001, and closed on February 21, 2001. All eight of the licenses auctioned were sold to three bidders. One of these bidders was a small business that won a total of two licenses.

Specialized Mobile Radio. The Commission awards ''small entity'' bidding credits in auctions for Specialized Mobile Radio (SMR) geographic area licenses in the 800 MHz and 900 MHz bands to firms that had revenues of no more than $15 million in each of the three previous calendar years. The Commission awards ''very small entity'' bidding credits to firms that had revenues of no more than $3 million in each of the three previous calendar years. The SBA has approved these small business size standards for the 900 MHz Service. The Commission has held auctions for geographic area licenses in the 800 MHz and 900 MHz bands. The 900 MHz SMR auction began on December 5, 1995, and closed on April 15, 1996. Sixty bidders claiming that they qualified as small businesses under the $15 million size standard won

263 geographic area licenses in the 900 MHz SMR band. The 800 MHz SMR auction for the upper 200 channels began on October 28, 1997, and was completed on December 8, 1997. Ten bidders claiming that they qualified as small businesses under the $15 million size standard won 38 geographic area licenses for the upper 200 channels in the 800 MHz SMR band. A second auction for the 800 MHz band was held on January 10, 2002 and closed on January 17, 2002 and included 23 BEA licenses. One bidder claiming small business status won five licenses.

The auction of the 1,053 800 MHz SMR geographic area licenses for the General Category channels began on August 16, 2000, and was completed on September 1, 2000. Eleven bidders won 108 geographic area licenses for the General Category channels in the 800 MHz SMR band qualified as small businesses under the $15 million size standard. In an auction completed on December 5, 2000, a total of 2,800 Economic Area licenses in the lower 80 channels of the 800 MHz SMR service were sold. Of the 22 winning bidders, 19 claimed small business status and won 129 licenses. Thus, combining all three auctions, 40 winning bidders for geographic licenses in the 800 MHz SMR band claimed status as small business.

In addition, there are numerous incumbent site-by-site SMR licensees and licensees with extended implementation authorizations in the 800 and 900 MHz bands. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of no more than $15 million. One firm has over $15 million in revenues. We assume, for purposes of this analysis, that all of the remaining existing extended implementation authorizations are held by small entities, as that small business size standard is approved by the SBA.

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

There are two distinct types of compliance requirements associated with this *Order.* First, wireless providers that provide wireless messaging service must provide to the Commission a list of all their domain names used for wireless messages. The record indicates that this list for each service provider is thought to be relatively static and of manageable size. We expect service providers to provide this list electronically and do not expect production of such a list by a business, even a small business, to be expensive or time consuming.

As a result of this mandate, businesses wishing to send commercial electronic messages must avoid sending messages to addresses that reference the domain names for wireless devices unless they have obtained the subscriber's express prior authorization. To do this, senders may check the list of domain names. Thus, prior to sending a commercial message to that address, businesses must also obtain express authorization from any subscriber whose e-mail address includes a domain name that appears on the list. This express authorization may be obtained either by oral or written means and must be obtained only once until the subscriber revokes such authorization. Because the list of domain names is expected to be small, we do not anticipate the compliance burden of checking such a list to be great.

Steps Taken To Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered

The RFA requires an agency to describe any significant alternatives that it has considered in developing its approach, which may include the following four alternatives (among others): ''(1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities.''

Initially, we note that the rules are intended to protect subscribers, including small businesses, from unwanted mobile service commercial messages. Congress found these unwanted messages to be costly and time-consuming for wireless subscribers. The rules adopted in this *Order* will benefit small businesses by reducing cost and time burdens on small businesses that receive such messages.

One alternative considered by the Commission was a registry of individual e-mail addresses. This list would have been similar to the national ''do-not-call'' registry; however, after careful consideration of the costs and benefits of creating a national do-not-e-mail registry, including consideration of the burden on small businesses, we believe that the disadvantages of such a system outweigh the possible advantages. We would expect such a system to contain millions of records, which unlike the ''do-not-call'' registry would each be unique in length and type of characters, making searching and scrubbing of such a list difficult and time consuming, perhaps inordinately so for small businesses. Therefore, we instead chose to adopt rules requiring the registering of domain names used for mobile service with the Commission.

Unlike individual e-mail addresses, the list of domain names is limited and manageable. The record indicates that it is already wireless providers' practice to use certain domain names and that the establishment of such a list would not burden carriers, presumably not even small carriers, and would place the burden of complying with the CAN SPAM Act on the senders of commercial messages. No commercial e-mail can be sent to an address that contains one of the domain names that has been on the list for 30 days or the that sender otherwise knows to be for wireless service, unless the sender has obtained express authorization from the subscriber. The list of domain names will be available without cost from the Commission in an electronic format. While senders of commercial messages will not be required to provide proof that they consulted the wireless domain name list or that they consulted it at a particular time, any person or entity may use as a ''safe harbor'' defense the fact that a specific domain name was not on the list more than 30 days before the offending message was initiated. This ''safe harbor'' defense shall not excuse any willful violation—if the sender otherwise know the e-mail address to be protected—of the ban on sending unwanted messages to wireless subscribers. We expect that global searches of senders' electronic mail lists to identify the domain names will be easy and inexpensive.

A second alternative considered by the Commission was in the area of obtaining express authorization. The Commission has declined to require that the express authorization be in writing. Senders, who must obtain this authorization before sending commercial electronic messages, are permitted to obtain such authorization by oral or written means, including electronic methods. Although not alleviating the entire burden on small businesses, the record would suggest that there is less of a burden if authorizations can be made orally instead of in writing. If the authorization is in writing, it may be obtained in a variety of ways—including paper form or electronic mail. By

allowing a variety of methods for authorization, the Commission is allowing senders of commercial messages, including any small businesses, to choose the method that works best for them. It is expected that this ability to choose will result in greater efficiencies and less cost for small businesses while still allowing them to comply with the CAN SPAM Act.

Report to Congress

The Commission will send a copy of the *Order,* including this Final Regulatory Flexibility Analysis (FRFA), in a report to be sent to Congress pursuant to the Congressional Review Act. In addition, the Commission will send a copy of the *Order,* including this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the *Order* and FRFA (or summaries thereof) will also be published in the **Federal Register**.

Ordering Clauses

Accordingly, pursuant to authority contained in sections 1–4, 222, 227 and 303(r) of the Communications Act of 1934, as amended; 47 U.S.C. 151–154, 222, 227, and 303(r); and the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, Public Law 108–187, 117 Statute 2699; 15 U.S.C. 7701–7712, the *Order* in CG Docket Nos. 04–53 and 02–278 *is adopted* and Part 64 of the Commission's rules, 47 CFR Part 64, *is amended* as set forth in Appendix B.

The requirements of this *Order* shall become effective October 18, 2004. The rules in 47 CFR 64.3100 that contain information collection requirements under the PRA are not effective until approved by OMB. Once these information collections are approved by OMB, the Commission will release a public notice and publish a document in the **Federal Register** announcing the effective date of these rules.

The Commission delegates to the Consumer & Governmental Affairs Bureau the authority to amend the rules to reflect any updates in the time-frames adopted under this *Order* that are dependent upon the Federal Trade Commission's rules under the CAN SPAM Act, as discussed herein, and to amend the definitions dependent on the Federal Trade Commission's rules under the CAN SPAM Act, as discussed herein.

The Commission's Consumer & Governmental Affairs Bureau, Reference Information Center, shall send a copy of this *Order,* including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR Part 64

Communications common carriers and Reporting and recordkeeping requirements.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Rule Changes

■ For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 64 as follows:

PART 64—MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

■ 1. The authority citation for part 64 continues to read as follows: 47 U.S.C. 154, 254(k); secs. 403(b)(2)(B), (c), Public Law 104–104, 110 Stat. 56. Interpret or apply 47 U.S.C. 201, 218, 225, 226, 228, and 254(k) unless otherwise noted.

■ 2. Subpart BB is added with the Subpart Heading to read as follows:

Subpart BB—Restrictions on Unwanted Mobile Commercial Service Messages

■ 3. Section 64.3100 is added to read as follows:

§ 64.3100 Restrictions on mobile service commercial messages.

(a) No person or entity may initiate any mobile service commercial message, as those terms are defined in paragraph (c)(7) of this section, unless:

(1) That person or entity has the express prior authorization of the addressee;

(2) That person or entity is forwarding that message to its own address;

(3) That person or entity is forwarding to an address provided that

(i) The original sender has not provided any payment, consideration or other inducement to that person or entity; and

(ii) That message does not advertise or promote a product, service, or Internet website of the person or entity forwarding the message; or

(4) The address to which that message is sent or directed does not include a reference to a domain name that has been posted on the FCC's wireless domain names list for a period of at least 30 days before that message was initiated, provided that the person or entity does not knowingly initiate a mobile service commercial message.

(b) Any person or entity initiating any mobile service commercial message must:

(1) Cease sending further messages within ten (10) days after receiving such a request by a subscriber;

(2) Include a functioning return electronic mail address or other Internet-based mechanism that is clearly and conspicuously displayed for the purpose of receiving requests to cease the initiating of mobile service commercial messages and/or commercial electronic mail messages, and that does not require the subscriber to view or hear further commercial content other than institutional identification;

(3) Provide to a recipient who electronically grants express prior authorization to send commercial electronic mail messages with a functioning option and clear and conspicuous instructions to reject further messages by the same electronic means that was used to obtain authorization;

(4) Ensure that the use of at least one option provided in paragraphs (b)(2) and (b)(3) of this section does not result in additional charges to the subscriber;

(5) Identify themselves in the message in a form that will allow a subscriber to reasonably determine that the sender is the authorized entity; and

(6) For no less than 30 days after the transmission of any mobile service commercial message, remain capable of receiving messages or communications made to the electronic mail address, other Internet-based mechanism or, if applicable, other electronic means provided by the sender as described in paragraph (b)(2) and (b)(3) of this section.

(c) *Definitions.* For the purpose of this subpart:

(1) *Commercial Mobile Radio Service Provider* means any provider that offers the services defined in 47 CFR Section 20.9.

(2) *Commercial electronic mail message* means the term as defined in the CAN SPAM Act, 15 U.S.C. Section 7702. The term is defined as ''an electronic message for which the primary purpose is commercial advertisement or promotion of a commercial product or service (including content on an Internet website operated for a commercial purpose).'' The term ''commercial electronic mail message'' does not include a transactional or relationship message.

(3) *Domain name* means any alphanumeric designation which is registered with or assigned by any domain name registrar, domain name registry, or other domain name registration authority as part of an electronic address on the Internet.

(4) *Electronic mail address* means a destination, commonly expressed as a string of characters, consisting of a unique user name or mailbox and a reference to an Internet domain, whether or not displayed, to which an electronic mail message can be sent or delivered.

(5) *Electronic mail message* means a message sent to a unique electronic mail address.

(6) *Initiate,* with respect to a commercial electronic mail message, means to originate or transmit such messages or to procure the origination or transmission of such message, but shall not include actions that constitute routine conveyance of such message. For purposes of this paragraph, more than one person may be considered to have initiated a message. ''Routine conveyance'' means the transmission, routing, relaying, handling, or storing, through an automatic technical process, or an electronic mail message for which another person has identified the recipients or provided the recipient addresses.

(7) *Mobile Service Commercial Message* means a commercial electronic mail message that is transmitted directly to a wireless device that is utilized by a subscriber of a commercial mobile service (as such term is defined in section 332(d) of the Communications Act of 1934 (47 U.S.C. 332(d)) in connection with such service. A commercial message is presumed to be a mobile service commercial message if it is sent or directed to any address containing a reference, whether or not displayed, to an Internet domain listed on the FCC's wireless domain names list. The FCC's wireless domain names list will be available on the FCC's website and at the Commission headquarters, 445 12th St., SW., Washington, DC 20554.

(8) *Transactional or relationship message* means any electronic mail message the primary purpose of which is:

(i) To facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender;

(ii) To provide warranty information, product recall information, or safety or security information with respect to a commercial product or service used or purchased by the recipient;

(iii) To provide:

(A) Notification concerning a change in the terms or features of;

(B) Notification of a change in the recipient's standing or status with respect to; or

(C) At regular periodic intervals, account balance information or other type of account statement with respect to a subscription, membership, account, loan, or comparable ongoing commercial relationship involving the ongoing purchase or use by the recipient of products or services offered by the sender;

(D) To provide information directly related to an employment relationship or related benefit plan in which the recipient is currently involved, participating, or enrolled; or

(E) To deliver goods or services, including product updates or upgrades, that the recipient is entitled to receive under the terms of a transaction that the recipient has previously agreed to enter into with the sender.

(d) *Express Prior Authorization* may be obtained by oral or written means, including electronic methods.

(1) Written authorization must contain the subscriber's signature, including an electronic signature as defined by 15 U.S.C. 7001 (E–Sign Act).

(2) All authorizations must include the electronic mail address to which mobile service commercial messages can be sent or directed. If the authorization is made through a website, the website must allow the subscriber to input the specific electronic mail address to which commercial messages may be sent.

(3) Express Prior Authorization must be obtained by the party initiating the mobile service commercial message. In the absence of a specific request by the subscriber to the contrary, express prior authorization shall apply only to the particular person or entity seeking the authorization and not to any affiliated entities unless the subscriber expressly agrees to their being included in the express prior authorization.

(4) Express Prior Authorization may be revoked by a request from the subscriber, as noted in paragraph (b)(2) and (b)(3) of this section.

(5) All requests for express prior authorization must include the following disclosures:

(i) That the subscriber is agreeing to receive mobile service commercial messages sent to his/her wireless device from a particular sender. The disclosure must state clearly the identity of the business, individual, or other entity that will be sending the messages;

(ii) That the subscriber may be charged by his/her wireless service provider in connection with receipt of such messages; and

(iii) That the subscriber may revoke his/her authorization to receive MSCMs at any time.

(6) All notices containing the required disclosures must be clearly legible, use sufficiently large type or, if audio, be of sufficiently loud volume, and be placed so as to be readily apparent to a wireless subscriber. Any such disclosures must be presented separately from any other authorizations in the document or oral presentation. If any portion of the notice is translated into another language, then all portions of the notice must be translated into the same language.

(e) All CMRS providers must identify all electronic mail domain names used to offer subscribers messaging specifically for wireless devices in connection with commercial mobile service in the manner and time-frame described in a public notice to be issued by the Consumer & Governmental Affairs Bureau.

(f) Each CMRS provider is responsible for the continuing accuracy and completeness of information furnished for the FCC's wireless domain names list. CMRS providers must:

(1) File any future updates to listings with the Commission not less than 30 days before issuing subscribers any new or modified domain name;

(2) Remove any domain name that has not been issued to subscribers or is no longer in use within 6 months of placing it on the list or last date of use; and

(3) Certify that any domain name placed on the FCC's wireless domain names list is used for mobile service messaging.

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BILLING CODE 6712–01–U

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 04–2844, MB Docket No. 04–189, RM–10962]

Digital Television Broadcast Service; Anchorage, AK

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission, at the request of Alaska Public Telecommunications, Inc., Channel 2 Broadcasting Company, and Smith Television License Holding, Inc., licensees of stations KAKM, KTUU and KIMO, substitutes DTV channels *8c, 10c, and 12c, respectively, at Anchorage, Alaska. *See* 69 FR 30856, June 1, 2004. DTV channels *8c, 10c, and 12c can be allotted to Anchorage, Alaska, in compliance with the principle community coverage requirements of Section 73.625(a) at reference coordinates 61–25–22 N. and 149–52–20 with a power of 50, 21, 41

Federal Register

Wednesday,
October 20, 2010

Part IV

Department of Labor

Employee Benefits Security Administration

29 CFR Part 2550

Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans; Final Rule

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2550

RIN 1210–AB07

Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Final rule.

SUMMARY: This document contains a final regulation under the Employee Retirement Income Security Act of 1974 (ERISA) that requires the disclosure of certain plan and investment-related information, including fee and expense information, to participants and beneficiaries in participant-directed individual account plans (*e.g.,* 401(k) plans). This regulation is intended to ensure that all participants and beneficiaries in participant-directed individual account plans have the information they need to make informed decisions about the management of their individual accounts and the investment of their retirement savings. This document also contains conforming changes to another regulation relating to plans that allow participants to direct the investments of their individual accounts. These regulations will affect plan sponsors, fiduciaries, participants and beneficiaries of participant-directed individual account plans, as well as providers of services to such plans.

DATES: *Effective Date.* December 20, 2010.

Applicability Date. Notwithstanding the effective date, the final rule and amendments will apply to individual account plans for plan years beginning on or after November 1, 2011.

FOR FURTHER INFORMATION CONTACT: Michael Del Conte, Office of Regulations and Interpretations, Employee Benefits Security Administration, (202) 693–8510. This is not a toll-free number.

SUPPLEMENTARY INFORMATION:

A. Background

1. General

According to the Department of Labor's (Department) most recent data, there are an estimated 483,000 participant-directed individual account plans, covering an estimated 72 million participants, and holding almost $3 trillion in assets.[1] With the proliferation of these plans, which afford participants and beneficiaries the opportunity to direct the investment of all or a portion of the assets held in their individual plan accounts, participants and beneficiaries are increasingly responsible for making their own retirement savings decisions. This increased responsibility has led to a growing concern that participants and beneficiaries may not have access to or, if accessible, may not be considering, information critical to making informed decisions about the management of their accounts, particularly information on investment choices, including attendant fees and expenses.

Under ERISA, the investment of plan assets is a fiduciary act governed by the fiduciary standards in ERISA section 404(a)(1)(A) and (B), which require plan fiduciaries to act prudently and solely in the interest of the plan's participants and beneficiaries. When a plan assigns investment responsibilities to the plan's participants and beneficiaries, it is the view of the Department that plan fiduciaries must take steps to ensure that participants and beneficiaries are made aware of their rights and responsibilities with respect to managing their individual plan accounts and are provided sufficient information regarding the plan, including its fees and expenses and designated investment alternatives, to make informed decisions about the management of their individual accounts. To some extent, disclosure of such information already is required by plans that elect to comply with the requirements of ERISA section 404(c) (*see* section 2550.404c–1(b)(2)(i)(B)). However, compliance with section 404(c)'s disclosure requirements is voluntary and does not extend to participants and beneficiaries in all participant-directed individual account plans.

The Department believes that all participants and beneficiaries with the right to direct the investment of assets held in their individual plan accounts should have access to basic plan and investment information. For this reason, the Department is issuing this regulation under ERISA section 404(a), with conforming amendments to regulations under section 404(c). This regulation under ERISA section 404(a) establishes uniform, basic disclosures for such participants and beneficiaries, without regard to whether the plan in which they participate is a section 404(c) plan. In addition, the regulation requires participants and beneficiaries to be provided investment-related information in a form that encourages and facilitates a comparative review among a plan's investment alternatives.

2. Request for Information and Proposed Regulation

To facilitate development of the regulation, the Department first published, on April 25, 2007, a Request for Information (RFI) in the **Federal Register**[2] requesting suggestions, comments and views from interested persons on a variety of issues relating to the disclosure of plan and investment-related fee and expense and other information to participants and beneficiaries in participant-directed individual account plans. Following its review of over 100 public comment letters submitted in response to the RFI, the Department next published a notice of proposed rulemaking in the **Federal Register** on July 23, 2008.[3] Interested persons were again invited to submit comments on the proposal, and, in response to this invitation, the Department received over 90 written comments from a variety of parties, including plan sponsors and fiduciaries, plan service providers, financial institutions, and employee benefit plan and participant representatives. These comments are available for review under "Public Comments" on the "Laws & Regulations" page of the Department's Employee Benefits Security Administration Web site at *http://www.dol.gov/ebsa.*

In addition to publishing an RFI and a proposed regulation, the Department engaged ICF International (ICF) to conduct a series of focus group studies concerning how participants generally make choices among their employee benefit plan's investment alternatives, and, specifically, how participants would react to the Model Comparative Chart for plan investment alternatives that was published as an appendix to proposed section 2550.404a–5. ICF issued a report to the Department concerning the results of these focus group studies, and these results, where appropriate, have been incorporated below in the Department's discussion of comments on the proposed regulation and Model Comparative Chart.

Set forth below is an overview of the final regulations and a discussion of the public comments received on the proposal.

[1] 2007 Form 5500 Data, U.S. Department of Labor. The estimated 483,000 plans include plans that permit participants to direct the investment of all or a portion of their individual accounts.

[2] 72 FR 20457 (April 25, 2007).

[3] 73 FR 43014 (July 23, 2008).

B. Final Rule § 2550.404a–5 Concerning Fiduciary Requirements for Disclosure

In general, the final regulation retains the basic structure of the proposal. Paragraph (a) of § 2550.404a–5 sets forth the general principle that, where documents and instruments governing an individual account plan provide for the allocation of investment responsibilities to participants and beneficiaries, a plan fiduciary, consistent with ERISA section 404(a)(1)(A) and (B), must take steps to ensure that such participants and beneficiaries, on a regular and periodic basis, are made aware of their rights and responsibilities with respect to the investment of assets held in, or contributed to, their accounts and are provided sufficient information regarding the plan, including plan fees and expenses, and regarding the designated investment alternatives available under the plan, including fees and expenses attendant thereto, to make informed decisions with regard to the management of their individual accounts. Paragraph (b) addresses the disclosure requirements that must be met by plan fiduciaries for plan years beginning on or after the applicability date. Under this paragraph, plan fiduciaries must comply with the requirements of paragraph (c), dealing with plan-related information, and paragraph (d), dealing with investment-related information. Paragraph (e) describes the form in which the required information may be disclosed, such as via the plan's summary plan description, a quarterly benefit statement, or the use of the provided model, depending on the specific information. Paragraph (e) recognizes the various acceptable means of disclosure; it does not preclude other means for satisfying the disclosure duties under this final regulation. Fiduciaries that meet the requirements of paragraphs (c) and (d) will have satisfied the duty to make the regular and periodic disclosures described in paragraph (a) of this section. As indicated in the preamble to the proposal, the Department believes, as an interpretive matter, that ERISA section 404(a)(1)(A) and (B) impose on fiduciaries of all participant-directed individual account plans a duty to furnish participants and beneficiaries information necessary to carry out their account management and investment responsibilities in an informed manner. In the case of plans that elected to comply with section 404(c) before the applicability of this final rule, the requirements of section 404(a)(1)(A) and (B) typically would have been satisfied by compliance with the disclosure requirements set forth at 29 CFR Sec. 2550.404c–1(b)(2)(i)(B). However, the Department expresses no view with respect to plans that did not comply with section 404(c) and the regulations thereunder as to the specific information that should have been furnished to participants and beneficiaries at any time before this regulation is finalized and applicable.

Pursuant to Executive Order 12866, the Department evaluated the benefits and costs of the final regulation, and concludes that the net present value of the rule's benefits is estimated at nearly $12.3 billion. The Department estimates that the regulation will affect 72 million participants in 483,000 participant-directed individual account plans containing assets valued at nearly $3.0 trillion.[4] Over the ten-year period 2012–2021, the Department estimates that the present value of the benefits provided by the final rule will be approximately $14.9 billion and the present value of the costs will be approximately $2.7 billion.[5] A significant benefit of this regulation is that it will reduce the amount of time participants spend collecting fee and expense information and organizing the information in a format that allows key information to be compared; this time savings is estimated to total nearly 54 million hours valued at nearly $2 billion in 2010 (2010 dollars). The anticipated cost of the regulation is $425 million in 2012 (2010 dollars), arising from legal compliance review, time spent consolidating information for participants, creating and updating Web sites, preparing and distributing annual and quarterly disclosures, and material and postage costs to distribute the disclosures. A more detailed discussion of the need for this regulatory action, consideration of regulatory alternatives, and assessment of benefits and costs is included in Section E of this preamble, entitled "Regulatory Impact Analysis."

1. General; Satisfaction of Duty To Disclose

As proposed, the obligation to disclose the required information was imposed generally on a plan fiduciary (paragraph (a) of proposed § 2550.404a–5). Commenters, however, requested guidance as to which fiduciary is responsible for satisfying the duty to disclose. The proposal described the party responsible for providing disclosures as "a fiduciary (or a person or persons designated by the fiduciary to act on its behalf)[.]" Commenters explained that any given plan might have many fiduciaries involved in its operation and requested clarification as to which fiduciary must provide the rule's required disclosures. Accordingly, consistent with other disclosure obligations under ERISA, the Department has clarified in paragraph (a) of the final rule that the plan administrator, as defined in ERISA section 3(16), is responsible for complying with the rule's disclosure requirements.

Paragraph (b) of the final rule, consistent with the proposal, addresses the disclosure requirements plan administrators must satisfy. Paragraph (b) has been modified from the proposal to clarify, at paragraph (b)(1), that a plan administrator will not be liable for the completeness and accuracy of information used to satisfy these disclosure requirements when the plan administrator reasonably and in good faith relies on information received from or provided by a plan service provider or the issuer of a designated investment alternative. A footnote to the proposal included the following statement: "[F]iduciaries shall not be liable for their reasonable and good faith reliance on information furnished by their service providers with respect to those disclosures required by paragraph (d)(1)."[6] Although commenters generally were supportive of this reliance relief for plan administrators required to comply with the rule's disclosure requirements, many comments asked the Department to make this relief more prominent by including it in the text of the final rule, rather than as a mere footnote to the Department's preamble. The Department was persuaded that this relief should be more prominent, and the provision therefore has been added to the text of the final rule. Further, this provision has been expanded to enable reliance on information received from or provided by both service providers to the plan and, as applicable, issuers of plan designated investment alternatives (*e.g.,* mutual funds).

Some commenters requested that the final rule clarify whether IRA-based plans are subject to the disclosure rule. Commenters argued that IRA-based plans under the Internal Revenue Code of 1986 (Code) such as Code sections 408(k) simplified employee pensions (SEPs) and 408(p) simple retirement accounts (SIMPLEs) are already subject to disclosure regimes under the Code

[4] This estimate is based on 2007 Form 5500 data, which is the latest available data.

[5] This calculation uses a seven percent discount rate. The $14.9 billion of benefits and $2.7 billion of costs are valued in 2010 dollars.

[6] 73 FR 43014 at 43018, n. 7 (July 23, 2008).

and relevant securities laws. It also was argued that application of the disclosure rules would add administrative complexity to arrangements that, by their very nature, were intended to be simple and that complicating administration of such plans may serve to discourage employers from establishing or continuing such arrangement for their employees. Taking into account the foregoing arguments, as well as the fact that participants in IRA-based plans generally have considerable flexibility in the choice of their IRA provider or the ability to roll over their balances to an IRA provider of their choice, the Department has determined not to extend the application of this rule to such plans. To clarify the scope of the final rule, a new paragraph (b)(2) has been added defining the types of arrangements that constitute a "covered individual account plan" for purposes of the rule. In this regard, paragraph (b)(2) provides that a "covered individual account plan" is any participant-directed individual account plan, as defined in section 3(34) of ERISA, except that such term shall not include plans involving individual retirement accounts or individual retirement annuities described in sections 408(k) ("simplified employee pension") or 408(p) ("simple retirement account") of the Internal Revenue Code of 1986 (Code).

A few commenters suggested the rule be expanded to cover defined contribution plans that do not allow for participant direction. The Department did not adopt this suggestion. While it may be appropriate to review the disclosure rules applicable to such plans, the Department does not believe it has sufficient information at this time to fully evaluate and address potential disclosure gaps in the context of this rulemaking.

One commenter suggested that the Department exclude small plans (for example those with fewer than 100 participants) from the scope of the final rule. The Department did not adopt this suggestion. The Department believes that participants in smaller plans face the same challenges as participants in larger plans when it comes to understanding the operations of their plans and the investment options offered thereunder. For this reason, the Department has determined that the final rule should apply to covered participant-directed individual account plans without regard to size.

Several commenters suggested that the Department clarify, and in some cases modify, the scope of the proposal as to the specific participants and beneficiaries of covered plans to which the rule applies. The proposed rule required disclosures to each participant and beneficiary of the plan that "pursuant to the terms of the plan, has the right to direct the investment of assets held in, or contributed to his or her individual account." The question presented by the commenters was whether disclosures must be furnished to all eligible employees or only those who actually participate in the plan. Consistent with the definition of "participant" under section 3(7) of ERISA, disclosures must be made to all employees that are eligible to participate under the terms of the plan, without regard to whether the participant has actually become enrolled in the plan. One commenter recommended that the proposal be modified to require initial disclosures to all eligible employees, but limit annual disclosures only to those that actually enroll, make contributions, and direct their investments. The Department has not adopted this recommendation. The Department believes that, with regard to employees that have not enrolled in their plan, the annual notice will serve as an important reminder of their eligibility to participate in the plan. With regard to notification of beneficiaries, however, the obligation to disclose extends only to those beneficiaries that, in accordance with the terms of the plan, have the right to direct the investment of assets held in, or contributed to, their accounts. Such rights might arise as a result of the death of a participant or pursuant to a qualified domestic relations order.

2. Plan-Related Information

As noted above, paragraph (c) of the final rule addresses plan-related information that must be disclosed to participants and beneficiaries. Like the proposal, paragraph (c) sets forth three general categories of plan-related information that must be disclosed to participants and beneficiaries—general operational and identification information (paragraph (c)(1)), administrative expenses (paragraph (c)(2)), and individual expenses (paragraph (c)(3)). The required disclosures must be based on the latest information available to the plan.

a. General Operational and Identification Information

Paragraph (c)(1)(i), like the proposal, requires that certain operational and identification information be disclosed to participants and beneficiaries. Specifically, this paragraph requires that participants and beneficiaries be provided: (A) An explanation of the circumstances under which participants and beneficiaries may give investment instructions; (B) An explanation of any specified limitations on such instructions under the terms of the plan, including any restrictions on transfer to or from a designated investment alternative; [7] (C) A description of or reference to plan provisions relating to the exercise of voting, tender and similar rights appurtenant to an investment in a designated investment alternative as well as any restrictions on such rights; (D) An identification of any designated investment alternatives offered under the plan; (E) An identification of any designated investment managers; and (F) A description of any "brokerage windows," "self-directed brokerage accounts," or similar plan arrangements that enable participants and beneficiaries to select investments beyond those designated by the plan. Subparagraph (F) was added to the final rule in response to comments requesting a clarification as to what, if anything, has to be disclosed about brokerage windows and similar arrangements that permit participants to invest their assets in other than designated investment alternatives offered by the plan. It should be noted that in addition to the general brokerage window information required by paragraph (F), other provisions of this rule require disclosure of any fees and expenses that participants will be expected to pay when utilizing the brokerage window or similar arrangement (*see* paragraph (c)(3)(i)(A)).

A number of commenters expressed concern about the requirement(s) that information be furnished to participants and beneficiaries "on or before the date of plan eligibility and at least annually thereafter." Specifically, the concerns focused on the compliance challenges posed by this disclosure requirement on plans that provide for plan eligibility as of the first day of employment, noting that employers may not be able to furnish the required disclosure in advance of employment and, therefore, may be required to modify their eligibility rules to avoid noncompliance with this disclosure obligation. Commenters suggested various

[7] Some commenters asked whether this requirement included limitations that are imposed at the investment or fund level. The Department intends that the disclosure pursuant to this paragraph would include only plan-based limitations and restrictions on a participant's ability to direct investments or transfer to or from designated investment alternatives. To the extent any limitations or restrictions are imposed at the investment, fund or portfolio level, those limitations or restrictions must be described as part of the investment-related information required by the final rule. *See* paragraph (d)(1)(iv) of the final regulation.

alternatives, such as requiring disclosure on or before enrollment in the plan or the first investment. The Department believes that the commenters make a valid point and, accordingly, has modified the rule to provide more flexibility. The final rule provides in this regard that participants and beneficiaries must be furnished the required information on or before the date on which they can first direct their investments. While not requiring disclosures as early as the date of plan eligibility, the provision does operate to ensure that participants are furnished the information either before or in connection with their first investment direction under the plan. The same timing issues exists with respect to those plan-related disclosures required by paragraphs (c)(2)(i)(A), (c)(3)(i)(A) and (d)(1) and, therefore, the Department has made identical changes to the timing requirements of those paragraphs in the final rule.

b. Changes to General Information

The proposal required in paragraph (c)(1)(ii) that participants or beneficiaries be furnished, not later than 30 days after the date of adoption of any material change to the general plan information described in paragraph (c)(1)(i), a description of such change. The Department received several comments requesting that the timing for furnishing a description of such a material change be determined with reference to the effective date of the change, rather than the date of its adoption. Commenters noted that the adoption date of a change sometimes precedes its effective date by as much as a year or more, and also that in some instances the date of adoption may be unclear. Several commenters also suggested that the required description of the change be furnished at least 30 days, but not more than 90 days, before the effective date of the material change, in order to apprise participants and beneficiaries of the change close to the time that it will be useful to them. In addition, questions were raised concerning what constitutes a "material" change in the required information.

With regard to the question as to what constitutes a "material" change, the Department is now of the view that, given the significance of the information that has to be disclosed under paragraph (c)(1)(i), virtually any change in the information would be a "material" change because of its importance to participants and beneficiaries. Accordingly, the Department has decided to drop the concept of "material" from the requirement to update plan participants and beneficiaries of changes in the required disclosures.

The Department also decided to amend the timing requirements in response to comments on the proposal. In this regard, the Department agrees with commenters that suggested that participants and beneficiaries should be notified of plan changes on the earliest possible date and, where practical, in advance of the effective date of the changes. In this regard, paragraph (c)(1)(ii) of the final rule provides that if there is a change to the information described in paragraph (c)(1)(i)(A) through (F), a description of such change(s) must be furnished to participants and beneficiaries at least 30 days, but not more than 90 days, in advance of the effective date of the change(s). The final rule, however, also recognizes that there may be circumstances when changes must be made within a time frame that precludes compliance with the 30-day advance notice requirement, such as the immediate elimination of an investment option when it is determined to be no longer a prudent investment alternative. In such cases, the rule requires that information be furnished as soon as reasonably practicable.

In connection with the development of the final rule, the Department also reviewed the information required to be disclosed under paragraph (c)(2)(i)(A) (relating to administrative expenses) and paragraph (c)(3)(i)(A) (relating to individual expenses) and concluded that an updating rule should apply to those disclosures as well, given the importance of the required information to participants and beneficiaries. These new updating requirements appear at paragraphs (c)(2)(i)(B) and (c)(3)(i)(B) of the final rule.

c. Administrative Expenses

Paragraph (c)(2)(i) of the final rule, like the proposal, requires that participants and beneficiaries be provided an explanation of any fees and expenses for general plan administrative services (*e.g.,* legal, accounting, recordkeeping) that may be charged against their individual accounts (whether by liquidating shares or deducting dollars), and the basis on which such charges will be allocated (pro rata, per capita). The provision makes clear that such charges do not include charges that are included in the annual operating expenses of designated investment alternatives. As noted above, this paragraph (c)(2) has been modified to establish disclosure timing and update requirements that conform with the requirements of paragraph (c)(1). *See* paragraph (c)(2)(i)(A) and (B).

Paragraph (c)(2)(ii), also like the proposal, requires that expenses described in paragraph (c)(2)(i) that are actually charged against a participant's or beneficiary's account be disclosed to participants and beneficiaries at least quarterly, along with a description of the service(s) to which the charge or charges relate.[8] However, in response to commenters' requests for specificity as to which services and charges are covered by this quarterly disclosure requirement, paragraph (c)(2)(ii)(A) both includes an explicit cross reference to the fees and expenses for administrative services described in paragraph (c)(2)(i) and a parenthetical noting that the disclosed charges arise from either the liquidation of shares or the deduction of dollars from individual accounts in compliance with paragraph (c)(2)(i)'s requirement that such charges are not included in the total annual operating expense of any designated investment alternative.

In a further effort to bring clarity to the disclosures provided to participants and beneficiaries, the Department has added a new subparagraph (C) to paragraph (c)(2)(ii) of the final rule. This new subparagraph is intended to provide those participants in plans with revenue sharing arrangements that serve to reduce plan administrative costs with a better picture as to how those costs are underwritten, at least in part, by fees and expenses attendant with investment alternatives offered under their plans. Specifically, paragraph (c)(2)(ii)(C) provides that, if applicable, the statement required to be furnished pursuant to paragraph (c)(2)(ii), must include an explanation that, in addition to the expenses reported on the statement, some of the plan's administrative expenses for the preceding quarter were paid from the annual operating expenses of one or more of the plan's designated investment alternatives (*e.g.,* through revenue sharing arrangements, Rule 12b–1 fees, sub-transfer agent fees). This required statement has been included in the final rule in response to many comments received by the Department on the provision in the proposal that administrative expenses must be disclosed pursuant to this paragraph

[8] Some commenters requested that the Department reiterate its position, discussed in the preamble to the proposed rule, that administrative charges do not need to be broken out into service-by-service detail on the quarterly statement. The Department continues to agree with commenters on the proposal and the RFI who believe that such a breakdown is not necessary, or particularly useful, to participants and beneficiaries; the final rule therefore also allows for "aggregate" disclosure of administrative expenses, as proposed. *See* 73 FR 43014, 43016 (July 23, 2008).

only "to the extent not otherwise included in investment-related fees and expenses[.]" Some commenters expressed concern that participants and beneficiaries may be misled into believing that there is little or no administrative expense associated with their participation in the plan when a significant portion of the cost of administrative services is actually paid out of investment-related charges. Other commenters disagreed and believed that, because any such administrative services would be paid for from the total annual operating expenses of the designated investment alternatives in which participants invest and because such annual operating expenses are required to be separately disclosed, participants and beneficiaries will receive comprehensive information about the total charges, for administration and investment, that will be assessed against their accounts. These commenters also argue that the burden associated with attempting to attribute some portion of total annual operating expenses to plan administrative services would be significant and vastly outweigh any potential benefit to participants and beneficiaries of such attribution. Most commenters, however, agreed that it is appropriate to inform participants, when applicable, that administrative expenses are paid from investment-related fees and are not reflected in the reported administrative expense amount. The Department was persuaded that some information, even if general, would help participants to better understand the fees and expenses attendant to operating their plan and of the fact that some fees and expenses might be underwritten by the investment alternatives offered by their plans.

Some commenters argued that administrative expenses charged to participant accounts should be reported on an annual, rather than a quarterly, basis. These commenters argued that the amounts reported as deducted during any given quarter have the potential to both mislead and confuse participants because such amounts are often subsequently reduced or restored by offsets or credits from revenue sharing and similar arrangements as part of year-end or periodic reconciliations. The commenters further argue that eliminating this information from quarterly disclosures will not affect the information available to participants because participants typically have access to Web sites where they can review the status of their account, including charges to their accounts, on a daily basis. Other commenters supported the quarterly disclosure requirement, noting that there is no other formal requirement for the disclosure of such information to participants and beneficiaries on a regular basis. After careful consideration of the various views on this requirement, the Department has decided to retain the requirement for quarterly disclosures of plan administrative expenses. While the Department recognizes that some participants may have questions concerning the debiting of charges and crediting of offsets to their accounts during the plan year, the Department is not persuaded that the potential for confusion and questions that might result from the requirement outweighs the benefits of participants and beneficiaries being informed on a regular basis of the actual amounts taken from (or credited to) their account during the quarter and the identification of services, albeit general, to which those amounts relate.

d. Individual Expenses

As noted above, paragraph (c)(3) requires the disclosure of those expenses charged against a participant's or beneficiary's account on an individual, rather than plan-wide basis. Examples of such charges include: Fees attendant to the processing of plan loans or qualified domestic relations orders; fees for investment advice; front or back-end loads or sales charges; redemption fees; and investment management fees attendant to a participant's or beneficiary's investment that are charged directly against the individual account of the participant or beneficiary, rather than included in the annual operating expenses of the investment (as might be the case, for example, with certain unregistered designated investment alternatives, such as bank collective investment funds). In addition to clarifying changes, paragraph (c)(3), like paragraphs (c)(1) and (c)(2), incorporates new disclosure timing and update requirements, which are discussed in detail above.

A few commenters requested clarification about the quarterly disclosure requirement for individual expenses. These commenters explained that some individual expenses currently are disclosed by a confirmation statement or other similar notice that is provided at the time the charge actually is assessed to the individual participant's or beneficiary's account; these commenters argued that the Department should avoid duplication, and potential confusion to participants and beneficiaries, that would result from requiring that these expenses also be disclosed on a quarterly statement. The Department does not intend such duplicative disclosure; the rule requires that this information be provided "at least quarterly," and the Department anticipates that actual charges may be disclosed more frequently than quarterly. To the extent such a charge is otherwise disclosed during a particular quarter, for example by a confirmation statement after a charge is deducted from an account, that charge would not have to be disclosed again on the subsequent quarterly statement. No quarterly statement in compliance with this paragraph (or with paragraph (c)(2)(ii) concerning quarterly disclosure of administrative expenses) must be furnished if there were no charges to a participant's or beneficiary's account during the preceding quarter.

e. Disclosures On or Before First Investment

In an effort to clarify the scope of the updating requirements and ensure that new participants were provided at least the same information that had been provided to existing participants prior to their participation, paragraph (d)(1)(v) of the proposal provided, for purposes of the disclosure of investment-related information to new participants, plan administrators could satisfy their obligation by furnishing the most recent annual disclosure along with any required updates furnished to participants and beneficiaries. The Department received no objections to this provision and, accordingly, is adopting it as proposed, with the exception of a paragraph re-designation and changes necessary to conform to the new timing requirements applicable to the annual disclosures. *See* paragraph (d)(1)(viii) of § 2550.404a–5. A question was raised, however, whether a similar clarification was needed for the plan-level disclosures required to be furnished to new participants and beneficiaries under the regulation. The Department found no basis for not providing similar guidance in the context of the required plan-level disclosures and, therefore, has added to the final rule a new paragraph (c)(4). Paragraph (c)(4) provides that for purposes of the requirements under paragraphs (c)(1)(i), (c)(2)(i)(A), and (c)(3)(i)(A) that plan administrators furnish information on or before the date on which a participant or beneficiary can first direct his or her investments, plan administrators may satisfy their obligations by furnishing to the participant or beneficiary the most recent annual disclosure furnished to participants and beneficiaries pursuant

those paragraphs and any changes to the information furnished to participants and beneficiaries pursuant to paragraphs (c)(1)(ii), (c)(2)(i)(B) and (c)(3)(i)(B) of the final rule.

3. Investment-Related Information

The Department received a number of comments relating to the disclosure of investment-related information pursuant to paragraph (d) of the proposal, and the related definitional section in paragraph (h). Many of the comments raised questions concerning the proposed application of mutual fund-type disclosures to non-registered investment vehicles. The Department has made a number of changes to this section of the final rule (and the related definitional section in paragraph (h)), in an effort to address the problems raised by the commenters, while, at the same time, attempting to maintain a reasonably uniform regime for the disclosure of investment-related information, a disclosure regime that would enable participants to compare competing mutual fund, insurance and banking products on a reasonably consistent and uniform basis. In considering these issues, the Department, in addition to considering comments and input from financial industry representatives, consulted with other appropriate regulators, including the Securities and Exchange Commission (Commission), the Office of the Comptroller of the Currency, and the Financial Industry Regulatory Authority (FINRA). The Department also employed focus groups, as discussed above, to learn more about how participants make investment decisions and whether the Department's proposed Model Comparative Chart would in fact assist such decisions. The Department believes that the investment-related disclosure requirements of the final rule, discussed below, strike an appropriate balance between accommodating, on one hand, the increasing innovation and complexity of the types of investments that are available to plan participants and beneficiaries and, on the other hand, participants' and beneficiaries' need for complete, but concise and user-friendly, information about their plan investment alternatives.

a. Information To Be Provided Automatically

Paragraph (d)(1) of the final rule, consistent with the proposal, describes the investment-related information that must be provided automatically, with respect to each designated investment alternative, to participants and beneficiaries on or before the date they first have the ability to direct their investments and at least annually thereafter. The specific information that must be disclosed pursuant to this paragraph is set forth below, as well as a discussion of how this required information has been modified in response to commenters' concerns. Additionally, paragraph (i) of the final rule provides special disclosure requirements for certain types of designated investment alternatives, which modify the requirements of paragraph (d)(1) of the final.

b. Identifying Information

The proposed regulation, in paragraph (d)(1)(i), required that certain identifying information be furnished with respect to each designated investment alternative offered under the plan. The first required piece of information, in subparagraph (A), is the name of the designated investment alternative. This straight-forward requirement did not generate any public comment and has been retained in the final rule.

Subparagraph (B) of paragraph (d)(1)(i) of the proposal required the furnishing of an Internet Web site address relating to each designated investment alternative. The Web site requirements of the final rule, as well as related comments on the proposal, are discussed below in this preamble under the heading "f. Internet Web site address."

Like the proposal, the final rule, at paragraph (d)(1)(i)(B), requires identification of the type or category of the investment (*e.g.,* money market fund, balanced fund (stocks and bonds), large-cap stock fund, employer stock fund, employer securities). This requirement is unchanged from the proposal, although the examples of types or categories in the parenthetical, which are set forth for illustrative purposes, have been expanded in response to questions from commenters about investment alternatives that did not clearly fall within the list of examples included in the proposal. One commenter suggested that fiduciaries should be permitted to utilize various commercial services to classify the type or category of a plan's designated investment alternatives. While the Department has not modified the proposal in response to this suggestion, the Department anticipates that plan administrators typically will rely on the investment issuer's classification of the type or category of an investment alternative.

Finally, paragraph (d)(1)(i)(D) of the proposal, which required disclosure of the type of management utilized by the investment (*e.g.,* actively managed, passively managed), has been eliminated from the final rule. Many commenters requested that this requirement be eliminated, arguing that they do not believe this information will be useful to most participants and beneficiaries; that some funds may not clearly fall within either one of these two categories, either because they have features of both or because neither category applies (for example, an employer stock fund); and, that it may even mislead participants and beneficiaries about the risks of a particular designated investment alternative. Other commenters argued that this requirement may be redundant; for example, a fund that lists its "type or category" as an index fund is by definition passively managed. Finally, the results of the Department's focus groups support the notion that this information is not necessarily helpful, and is potentially confusing, to participants. One focus group participant, for example, stated that without knowing what is meant by active or passive management, she would choose active management because it "sounds" better. The Department was persuaded by commenters that providing this information, especially as required in a comparative format, may not be meaningful to participants and beneficiaries. Accordingly, the final rule no longer requires plan administrators to furnish, as a separate piece of identifying information, the type of management utilized with respect to a designated investment alternative. The Department notes that, for participants who wish to obtain more information about the management of a designated investment alternative, the narrative description of an investment's objectives or goals, and of the investment's principal strategies and principal risks, is likely to convey more meaningful and contextual information concerning the style of management used with respect to a designated investment alternative.

c. Performance Data

The proposed rule, in paragraph (d)(1)(ii), required that performance data be disclosed for designated investment alternatives with respect to which the return is not fixed. Specifically, this paragraph required disclosure of the average annual total return (percentage) of the investment for the following periods, if available: 1-year, 5-years, and 10-years, measured as of the end of the applicable calendar year, as well as a statement indicating that an investment's past performance is not

necessarily an indication of how the investment will perform in the future.

This provision, paragraph (d)(1)(ii), is being adopted generally as proposed. Several commenters raised issues regarding the "if available" language, suggesting that participants and beneficiaries could be deprived of as much as nearly five years of valuable return information in situations where the designated investment alternative has been in existence for a period of time just shy of the 5- or 10-year marks. These commenters noted that Commission rules require performance for the "life of the fund" to address this issue. In order to avoid the information gap identified by the commenters, and to maintain appropriate consistency with Commission requirements, the final regulation, at (d)(1)(ii)(A), requires disclosure of the average annual total return of the investment for 1-, 5-, and 10-calendar year periods ending on the date of the most recently completed calendar year (or for the life of the designated investment alternative, if shorter).

In the case of designated investment alternatives with respect to which the return is fixed for the term of the investment, paragraph (d)(1)(ii) of the proposal required disclosure of both the fixed rate of return and the term of the investment. While no commenters opposed the proposed requirement, some commenters did request a clarification as to how the disclosure requirement applied to contracts with respect to which there is no "term of investment." The commenters explain that certain contracts, while often having a minimum guaranteed rate for the life of the contract, permit the fixed rate to change upon notice, but never below the minimum guaranteed rate. One commenter suggested that, for such contracts, the pertinent information for participants and beneficiaries is the most recent rate of return, the minimum rate guaranteed under the contract, if any, and an explanation that the insurer may adjust the rate of return prospectively. The Department agrees. The most essential information for participants who choose to invest in fixed investment alternatives is the contractual interest rate paid to their accounts and the term of the investment during which their monies are shielded from market price fluctuations and reinvestment risks. The Department believes that, with respect to such contracts, it is particularly important that participants and beneficiaries be clearly advised of the issuer's ability to modify the rate of return and be able to readily determine the most current rate of return applicable to such investment. In this regard, the Department has modified the proposal, at paragraph (d)(1)(ii)(B) of the final, to require the disclosure of the current rate of return, the minimum rate guaranteed under the contract or agreement, if any, and a statement advising participants and beneficiaries that the issuer may adjust the rate of return prospectively and how to obtain (*e.g.,* telephone or Web site) the most recent rate of return information available.

One commenter asked whether designated investment alternatives such as stable value funds and money market mutual funds are to be treated as fixed return or variable return investments for purposes of the regulation. The fixed return provisions of the regulation are limited to designated investment alternatives that provide a fixed or stated rate of return to the participant, for a stated duration, and with respect to which investment risks are borne by an entity other than the participant (*e.g.,* insurance company). Examples of fixed return investments include certificates of deposit, guaranteed insurance contracts, variable annuity fixed accounts, and other similar interest-bearing contracts from banks or insurance companies. While money market mutual funds and stable value funds generally aim to preserve principal, they are not free of investment risk to the investor. Accordingly, such investments are subject to the variable return provisions of the regulation, even though they routinely hold fixed-return investments.

Several commenters requested clarification on the relationship, if any, between the disclosure requirements in the proposal and the Securities and Exchange Commission's and FINRA's advertising rules. The primary concern of commenters seemed to be in connection with the requirement to disclose annually the performance data specified in paragraph (d)(1)(ii) of the proposal and the timeliness requirements in the Commission's advertising rules. The Department has consulted with the staff of the Commission and FINRA on this issue. The Commission's staff has advised that it expects to communicate its position to the Department in a staff no-action letter, which will be issued before the applicability date of this final rule. FINRA staff has stated that it will apply the Commission's advertising rules in a manner that is consistent with the Commission's staff position published in the no-action letter. The Department and the Commission will, in turn, make the letter available to the public on their respective Web sites.

d. Benchmarks

Paragraph (d)(1)(iii) of the proposal required, for each designated investment alternative with respect to which the return is not fixed, the disclosure of "the name and returns of an appropriate broad-based securities market index over the 1-year, 5-year, and 10-year periods * * *" for which performance data must be disclosed. The proposal also provided that the benchmark could not be administered by an affiliate of the investment provider, its investment adviser, or a principal underwriter, unless the index is widely recognized and used.

Some commenters suggested that the Department eliminate this requirement, while others called for permitting or requiring multiple benchmarks for each designated investment alternative. Some commenters suggested permitting composite or customized benchmarks. Those commenters who favored an ability to include multiple benchmarks for each designated investment option noted the existence of such flexibility under SEC rules, specifically Item 22(b)(7) of Form N–1A.[9] (*See, e.g.,* Instruction 6 to Item 22(b)(7), encouraging, in addition to a required broad-based securities market index, narrowly based indexes that reflect the market sectors in which a fund invests.) Commenters who advocated composite benchmarks stated that a fund that invests in both stocks and bonds (*e.g.,* lifecycle fund or balanced fund) should be permitted to compare itself to a benchmark consisting of a weighted average of both an equities index and a bond index. The commenters who favored eliminating the benchmark requirement stated that certain investment strategies are not managed to a benchmark, and therefore, providing benchmark information could be misleading. Supporters of the proposal, however, maintained that participants would benefit more from having a single recognizable benchmark for each designated investment alternative under the plan, rather than multiple or blended indices for each.

The Department continues to believe that appropriate benchmarks may be helpful tools for participants to use in assessing the various investment options available under their plans and, therefore, has retained this requirement in the final rule. However, benchmarks are more likely to be helpful when they are not subject to manipulation and are recognizable and understandable to the average plan participant, as is the case with broad-based indices contemplated

[9] Now Item 27 of Form N–1A, as revised February 2010.

by Instruction 5 to Item 27(b)(7) of Form N–1A. For this reason, the final rule retains the proposed requirement that a benchmark must be a broad-based securities market index and it may not be administered by an affiliate of the investment issuer, its investment adviser, or a principal underwriter, unless the index is widely recognized and used. The Department, however, notes that paragraph (d)(2)(ii) of the final regulation permits the disclosure of information that is in addition to that which is required by this final regulation, so long as the additional information is not inaccurate or misleading. Thus, in the case of designated investment alternatives that have a mix of equity and fixed income exposure (*e.g.,* balanced funds or target date funds), a plan administrator may, pursuant to paragraph (d)(2)(ii) of the final rule, blend the returns of more than one appropriate broad-based index and present the blended returns along with the returns of the required benchmark, provided that the blended returns proportionally reflect the actual equity and fixed-income holdings of the designated investment alternative. For example, where a balanced fund's equity-to-bond ratio is 60:40, the returns of an appropriate bond index and an appropriate equity index may be blended in the same ratio and presented along with the benchmark returns mandated by paragraph (d)(1)(iii) of the final rule. Presenting blended returns that do not proportionally reflect the holdings of the designated investment alternative would, in the view of the Department, be misleading and, therefore, not permitted pursuant to paragraph (d)(2)(ii) of the final regulation.

e. Fee and Expense Information

Paragraph (d)(1)(iv) of the proposal required disclosure of fee and expense information for designated investment alternatives. This requirement has been retained in the final rule, with a few modifications in response to public comments. Paragraph (d)(1)(iv) also has been restructured so that subparagraph (A) addresses the fee and expense disclosure requirements for designated investment alternatives with respect to which the return is not fixed, and subparagraph (B) addresses such requirements for designated investment alternatives with respect to which the return is fixed for the term of the investment.

Consistent with the proposal, paragraph (d)(1)(iv)(A)(*1*) requires disclosure of the amount and a description of each shareholder-type fee (fees charged directly against a participant's or beneficiary's investment, such as commissions, sales loads, sales charges, deferred sales charges, redemption fees, surrender charges, exchange fees, account fees, and purchase fees). No substantive changes were made to this provision from that which was proposed. Clarifying language, however, was added to the existing parenthetical language in order to distinguish shareholder-type fees from other investment-related fees and expenses. The new language provides that a fee or expense is a shareholder-type fee to the extent it is "not included in the total annual operating expenses of any designated investment alternative." Thus, the key distinction is how the fee is ultimately being paid by the participant or beneficiary. If the fee or expense is charged directly against participant's or beneficiary's individual investment or account, as is typically the case with sales loads, account fees, and the other items delineated in the parenthetical, then the fee or expense is to be disclosed as a shareholder-type fee. If, on the other hand, the fee or expense is paid from the operating expenses of a designated investment alternative, then the fee or expense is to be included in the total annual operating expenses of a designated investment alternative. The requirement to disclose the total annual operating expenses of each designated investment alternative is discussed below.

The Department recognizes that in some instances there will be an overlap in disclosures between shareholder type fees described in paragraph (d)(1)(iv)(A)(*1*), and individual expenses described in paragraph (c)(3) of the final rule, which are discussed in detail above under the heading "d. Individual expenses." For example, a front-end sales load imposed in connection with investing in a specific designated investment alternative that is charged (either by share or dollar deduction) directly against a participant's or beneficiary's individual account would properly be covered by and require disclosures under both paragraphs. The consequence of this overlap is that participants and beneficiaries will not only receive general information regarding the sales load before investing, but pursuant to paragraph (c)(3)(ii) of the final rule, will also receive a statement after investing showing the dollar amount actually charged against their individual accounts.

Some commenters asked whether only fees and expenses must be disclosed, or whether plan administrators also should notify participants and beneficiaries of other limitations or restrictions concerning the designated investment alternative, such as trading restrictions or limitations on how amounts liquidated from the designated investment alternative may be reinvested. In the Department's view, it is appropriate in this context to inform participants and beneficiaries of these restrictions and limitations so that they are fully aware of the consequences of their investment decisions. Accordingly, paragraph (d)(1)(iv)(A)(*1*) of the final rule has been expanded from the proposal to require a description of any restriction or limitation that may be applicable to a purchase, transfer, or withdrawal of the investment in whole or in part (such as round trip, equity wash, or other restrictions).

Paragraph (d)(1)(iv)(A)(*2*) requires disclosure of the total annual operating expenses of the investment expressed as a percentage (*e.g.,* expense ratio), calculated in accordance with paragraph (h)(5) of the final rule. This requirement is unchanged from the proposal, although, as discussed below, the definition of "total annual operating expenses" has been revised in the final rule.

Paragraph (d)(1)(iv)(A)(*3*) of the final rule includes a new requirement for an example illustrating the effect in dollars of each designated investment alternative's total annual operating expenses. Specifically, this paragraph requires disclosure of the total annual operating expenses of the investment for a one-year period expressed as a dollar amount for a $1,000 investment (assuming no returns and based on the total annual operating expenses percentage disclosed for paragraph (d)(1)(iv)(A)(*2*)). A significant number of commenters felt that a dollar-based disclosure would be more useful to participants, who cannot always convert operating expense ratios into dollars, which commenters argue is a more helpful way for participants to understand the significance of fees. The results of the Department's focus group studies also support the notion that examples in dollars will help participants to better understand how fees impact retirement savings. The Department was persuaded by the large number of commenters supporting inclusion of dollar-based disclosure in the context of investment fees and, accordingly, expanded the requirements of the final rule to provide for the disclosure of a designated investment alternative's total annual operating expenses in dollars.

Paragraph (d)(1)(iv)(A)(*4*) of the final rule requires a statement indicating that

fees and expenses are only one of several factors that participants and beneficiaries should consider when making investment decisions. The Department did not receive any comments opposing this requirement; in fact, this required statement is consistent with the concern raised by commenters that participants and beneficiaries should not be encouraged to focus "only" on fees and expenses, since fee and expense information must be considered in context with other information about a plan's designated investment alternatives. This required statement has been retained, unchanged from the proposal.

Paragraph (d)(1)(iv)(A)(*5*) of the final rule includes a new required statement that the cumulative effect of fees and expenses can substantially reduce the growth of a participant's or beneficiary's retirement account and that participants and beneficiaries can visit the Internet Web site of the Employee Benefits Security Administration for information and an example demonstrating the long-term effect of fees and expenses. This statement has been added in response to the suggestion of commenters that participants and beneficiaries would benefit from an understanding that, over time, fees and expenses may substantially reduce the growth of their retirement accounts.

Finally, paragraph (d)(1)(iv)(B) of the final rule provides the fee and expense information that must be disclosed for designated investment alternatives with respect to which the return is fixed for the term of the investment. Consistent with the proposal, plan administrators must disclose the amount and a description of any shareholder-type fees, and a description of any restrictions or limitations that may be applicable to a purchase, transfer or withdrawal of the investment in whole or in part. For examples of fixed-return investments, *see* the discussion above in this preamble under the heading "c. Performance data."

f. Internet Web Site Address

The proposed rule contained a requirement that plan fiduciaries provide an "Internet Web site address that is sufficiently specific to lead participants and beneficiaries to supplemental information regarding the designated investment alternative, including the name of the investment's issuer or provider, the investment's principal strategies and attendant risks, the assets comprising the investment's portfolio, the investment's portfolio turnover, the investment's performance and related fees and expenses[.]"

The Department received a number of comments concerning this Web site requirement. Some commenters supported the requirement, but requested clarifications such as who would be responsible for maintaining the Web site address and whether participants and beneficiaries could be referred to the Web site of a service provider or investment issuer. Other commenters argued that the requirement should be eliminated because Web site information is not currently provided for all designated investment alternatives in the participant-directed plan marketplace; for example, Web site information often is not provided for bank collective investment funds, certain insurance products, and employer stock.

After careful consideration of these comments, the Department has decided to retain the Web site approach to disclosing investment-related information. *See* paragraph (d)(1)(v) of the final rule. The Department believes, in this regard, that the availability of information via a Web site reduces the amount of information required to be directly provided to participants and beneficiaries, without compromising a participant's or beneficiary's access to the additional information. While a critical objective of this rulemaking is to ensure that all participants and beneficiaries in participant-directed individual account plans are furnished the information they need to make informed investment decisions, the Department remains sensitive to the possibility that too much information may only serve to overwhelm, rather than inform, participants and beneficiaries. The Department believes that the Web site approach to disclosure strikes an appropriate balance in this context, accommodating different levels of participant interest in more detailed investment-related disclosures. While the Department recognizes, based on the comments, that the required Web sites may not currently be available for all investment vehicles offered by individual account plans in today's marketplace, the Department is not persuaded that the costs and burdens attendant to establishing and maintaining a Web site that will satisfy the disclosure requirements of this final rule will outweigh the benefits of improved disclosure and ready access to more detailed and current information by participants and beneficiaries.

Under the final rule, the responsibility for ensuring the availability of a Web site address falls upon the plan administrator. However, whether, and to what extent, the plan administrator is responsible for establishing and maintaining the Web site itself will depend on the responsibilities assumed by either the issuer of the designated investment alternative(s) or a service provider to the plan. That is, as provided in paragraph (b)(1) of the final rule, a plan administrator will not be liable for the completeness and accuracy of information used to satisfy the disclosure requirements of this regulation when the plan administrator reasonably and in good faith relies on information received from or provided by a plan service provider or the issuer of a designated investment alternative.

In addition to the general comments discussed above, some commenters expressed concern about the specific items of information required to be made available on the Web site. Several commenters, for example, asked whether the list of items in the proposed rule was intended to be exclusive, or whether plans may be required, or be permitted, to provide additional information.[10] The final rule, at paragraph (d)(1)(v), has been revised to make clear that the supplemental information identified in the regulation is the only information that is required to be contained on the Web site; this clarification was accomplished by deleting the word "including" which had been used in the proposed regulation before the list of content items. Nonetheless, there is nothing in this final rule that precludes a plan administrator, service provider or the issuer of a designated investment alternative from including on the Web site additional information that may assist participants and beneficiaries in assessing the appropriateness of the designated investment alternative for their plan accounts.

Paragraph (d)(1)(v)(A) of the final retains the requirement from the proposal that the Web site include the name of the investment's issuer. The Department did not receive any comments on this provision.

Paragraph (d)(1)(v)(B) contains a new content requirement for supplemental information that is required to be contained on the Web site. Several commenters requested that the Department add, as another item of supplemental information available at a designated investment alternative's Web

[10] Paragraph (d)(1)(i)(B) of the proposal required disclosure of "supplemental information regarding the designated investment alternative, *including* * * *" (emphasis added). Some commenters argued that use of the word "including" could be read as "including, but not limited to." In that case, plans would be uncertain as to whether additional information must be provided and, if so, what information must be provided.

site, a description of the designated investment alternative's objectives or goals. These commenters felt that merely disclosing the "type or category" of investment, as required by subparagraph (d)(1)(i)(C) of the proposal, was not sufficient and that participants or beneficiaries would benefit from a narrative statement of the alternative's basic objectives or goals. The Department agrees with these commenters that participants and beneficiaries should be apprised of a designated investment alternative's objectives or goals and that this information will be helpful in understanding how the alternative's principal strategies are intended to achieve those objectives or goals. Commenters did not demonstrate that requiring this information would be problematic or burdensome; rather, it seems clear that investment issuers generally already disclose this information. The final rule has been modified from the proposal to explicitly require, in paragraph (d)(1)(v)(B), disclosure of the investment's objectives or goals in a manner consistent with Securities and Exchange Commission Form N–1A or N–3, as appropriate.

Although commenters generally were not opposed to the requirement in the proposal that the Web site for a designated investment alternative include information about the investment's "principal strategies and attendant risks," some commenters requested clarification as to the nature of the information that must be disclosed in order to satisfy this requirement. For example, some commenters asked if the Department intended to model this requirement after the requirement in securities laws that investment companies disclose their "principal investment strategies" and "principal risks." [11] The Department believes that the "strategies" and "risks" associated with an investment alternative should be well-understood concepts in the plan investment marketplace, and the Department does not anticipate that plan administrators or the parties providing the Web sites will have difficulty in satisfying this requirement. In response to the commenters, the Department has clarified that paragraph (d)(1)(v)(C) of the final rule requires disclosure of the investment's "principal strategies (including a general description of the types of assets held by the investment) and principal risks in a manner consistent with Securities and Exchange Commission Form N–1A or N–3, as appropriate" of the designated investment alternative. The Department believes that the standards for narrative disclosure contained in the Commission's requirements are general enough that this information can be furnished with respect to all designated investment alternatives.[12]

Several commenters requested clarification of the requirement in paragraph (d)(1)(i)(B) of the proposal to disclose the "assets comprising the investment's portfolio." Specifically, commenters asked whether this requirement mandates disclosure of every individual asset or security held by the investment alternative, which commenters argue will not be helpful to most participants, or, more simply, disclosure of the type or types of assets or securities held by the investment alternative. Some commenters also recommended eliminating this requirement, since investment alternatives that are not subject to Commission registration do not currently compile and disclose this information, and because the burden of compiling this information, especially for complex investments, would not justify its benefit. The Department did not intend that the Web site include a detailed list of all assets and securities that comprise the investment alternative's portfolio. The reference to "assets comprising the investment's portfolio" has not been included in the final rule. In addition, paragraph (d)(1)(v)(C) of the final rule, inside the parenthetical, now clarifies that a discussion of the investment's principal strategies includes "a general description of the types of assets held" by the investment.[13] This narrative description is supplemented by more specific information that is available on request to participants under paragraph (d)(4) of the final rule.

Some commenters raised concerns with the proposal's requirement that the Web site include information concerning a designated investment alternative's portfolio turnover. These commenters questioned what exactly must be disclosed about an investment's portfolio turnover; for example, whether a ratio or turnover rate would suffice. Other commenters recommended elimination of the requirement, because investment alternatives that are not subject to Commission registration are not currently required to disclose portfolio turnover information. The Department was not persuaded that this requirement should be eliminated for all designated investment alternatives. An investment alternative's portfolio turnover indicates the frequency with which the investment alternative is buying and selling securities. An investment that is frequently buying and selling securities may be generating higher trading costs. Trading costs are not included in an alternative's expense ratio, yet the cost of trading on a portfolio level does have an effect, in some cases a large effect, on the alternative's rate of return. The Department, therefore, believes that such information may be helpful to participants and beneficiaries in assessing the appropriateness of their investment options.

While the Department recognizes that not all designated investment alternatives available to plan participants and beneficiaries calculate portfolio turnover rates, the Department understands that such investment alternatives should be able to do so without significant difficulty or costs. The final rule, at paragraph (d)(1)(v)(D), therefore, has been revised to require that, unless expressly exempted elsewhere in the rule, the information on the Web site must include the investment's portfolio turnover rate in a manner consistent with Securities and Exchange Commission Form N–1A or N–3, as appropriate.[14] The Department has exempted certain designated investment alternatives, such as fixed-return and employer stock alternatives, from the portfolio turnover requirement where the Department has concluded that turnover rates are irrelevant to the participants and beneficiaries. *See* paragraph (i) of the final rule for special

[11] *See* Item 4(a) and (b) of Securities and Exchange Commission Form N–1A or Item 5(c) and (e) of Securities and Exchange Commission Form N–3.

[12] *See, e.g.,* Securities and Exchange Commission Form N–1A Item 4(a) (requiring a summary of how the mutual fund intends to achieve its investment objectives by identifying the fund's principal investment strategies, including the type or types of securities in which the fund will principally invest and any policy to concentrate in securities issuers in a particular industry or group of industries) and Item 4(b)(1) (requiring a summary of the principal risks of investing in the fund, including risks to which the fund's portfolio as a whole is subject and the circumstances reasonably likely to affect adversely the fund's net asset value, yield, or total return; Item 4(b)(1) also requires special disclosure for money market-type funds, investments sold through insured depository institutions, and non-diversified investments).

[13] This clarification is consistent with a requirement in the Department's 404(c) regulation, prior to its amendment herein, to disclose "information relating to the type and diversification of assets comprising the portfolio"). *See* 29 CFR 2550.404c–1(b)(2)(i)(B)(1)(ii).

[14] Consistent with Instruction 4(c) to Item 13(a) of Form N–1A and Instruction 11(e) to Item 4 of Form N–3, money market funds (and other investment products with similar investment objectives) may omit a portfolio turnover rate.

rules for certain designated investment alternatives and annuity options.

A few commenters requested clarification about what information must be disclosed on the Web site concerning "the investment's performance and related fees and expenses" as required by paragraph (d)(1)(i)(B) of the proposal. Specifically, these commenters ask to what extent this requirement is redundant given the performance and fee and expense information that is otherwise required to be disclosed on the annual disclosure document; if it is not redundant, commenters question what additional performance and fee and expense information must be provided on the Web site. The intent of this provision was to make available more recent information than what was provided to participants on an annual basis. In responses to these comments, the Department has modified the proposal to split this requirement into two separate provisions and has clarified the updating obligation for all supplemental information. Paragraph (d)(1)(v)(E) of the final rule addresses the performance data that must be displayed by reference to the return information specified in paragraph (d)(1)(ii) and requires that such information be updated on at least a quarterly basis (as defined in paragraph (h)(2) of the final rule), or more frequently if required by other applicable law. Other than providing the revised performance information on the Web site in compliance with this updating requirement, plan administrators are not obligated to provide any additional or different information concerning an investment's performance. Paragraph (d)(1)(v)(F) of the final rule addresses the fee and expense information that must be displayed by reference to the fee and expense information specified in paragraph (d)(1)(iv). This information must be updated in accordance with the general updating requirement for supplemental information discussed below. Corresponding to the content parameters for updating performance information, plan administrators are not obligated to provide any additional or different information concerning an investment's fees and expenses than that required by paragraph (d)(1)(iv) of the final rule.

Commenters also requested guidance as to how often the Web site supplemental information must be updated; the proposal did not provide an updating requirement. In view of the fact that participants will have continuing access to Web sites, it is the expectation that the information made available via the Web site will be accurate and updated by the plan administrator, service provider or the issuer of a designated investment alternative as soon as reasonably possible following a change, or notification thereof.

Recognizing that some participants may not have ready access to the information required to be made available on an Internet Web site, the final rule, at paragraph (d)(2)(i)(C), requires that participants and beneficiaries be furnished, as part of the required comparative format disclosure document, information about how to request, and obtain free of charge, a paper copy of the information required to be maintained on a Web site pursuant to paragraph (d)(1)(v) or paragraph (i), as applicable.

g. Glossary

Although not part of the proposed rule, a number of commenters suggested that participants and beneficiaries would benefit from a glossary of investment and financial terms relevant to the designated investment alternatives under the plan. Indeed, the lack of a glossary of investment terminology in the proposed regulation was perceived as a key weakness of the proposal by some of these commenters. One of these commenters, for example, commissioned a nationally representative online survey of 2,106 participants in 401(k) plans to gather feedback on the proposal's model comparative chart. A conclusion of that survey is that providing clear definitions of financial terminology and using vocabulary that is not perceived as complicated may help to improve participants' understanding of the disclosure. ICF's report to the Department following their focus group studies further supported the commenters and the conclusion of the online survey. The Department was persuaded that the furnishing of a glossary or access to a glossary of terms relevant to plan investments would be helpful to participants and, accordingly, has included such a requirement in the final rule. *See* paragraph (d)(1)(vi). Specifically, paragraph (d)(1)(vi) provides for the furnishing of a general glossary of terms to assist participants and beneficiaries in understanding the designated investment alternatives, or an Internet Web site address that is sufficiently specific to provide access to such a glossary along with a general explanation of the purpose of the address. The Department anticipates a number of ways to satisfy this furnishing requirement. For example, a plan administrator could satisfy this furnishing requirement either by including an appropriate glossary in the comparative disclosure document or, in lieu thereof, by including an Internet Web site address at which such a glossary may be accessed. Alternatively, the Web site address for each designated investment alternative, required pursuant paragraphs (d)(1)(v) and (i) of the final rule, may contain its own glossary of terms relevant to that specific alternative, or link to such a glossary.

Some commenters suggested that the Department prepare or make available such a glossary. At this juncture, the Department believes that plan administrators, in conjunction with their service providers and issuers of investment alternatives, are in the best position to determine the glossary (or glossaries) appropriate for their participants, taking into consideration the investment options made available under the plan. Nonetheless, the Department is interested in further exploring whether the Department should develop or identify general investment glossaries that could be utilized by plan administrators in satisfying their obligations under the final rule. Specifically, the Department invites interested persons to share their views as to what terminology should be addressed in a general investment glossary and whether, or to what extent, such glossaries currently exist that could serve as a resource for relatively unsophisticated participant-investors. Suggestions and views on the development and availability of one or more such glossaries should be addressed to *e-ORI@dol.gov,* subject: Participant Investment Glossary.

h. Annuity Options

The Department received a number of comments relating to the disclosure of information with respect to investment products that consist, in whole or in part, of annuities or annuitization guarantees. These commenters maintain that core concepts in the proposal, such as "average annual total return," "benchmarks," and "total annual operating expenses," while entirely appropriate for designated investment alternatives with respect to which returns can and do vary, such as mutual funds, collective investment funds, and portfolio operating companies within variable annuity contracts, are irrelevant to annuities or annuitization guarantees. The commenters, therefore, requested that the Department revise the proposal to require disclosure of information more appropriate to annuity contracts, funds or products. Some of the commenters emphasized that plan administrators need the flexibility to

explain the benefits of these products which may provide annuities or annuitization guarantees along with exposure to the equities market and requested that the final rule allow for such explanations in the disclosure.

In response to these comments, the Department has added two new provisions to the final rule. The first new provision, at paragraph (d)(1)(vii) of the final rule, is intended to address commenters' concerns with annuity features that are contained within variable annuity contracts, under which participants and beneficiaries have a right to purchase an annuity with their accumulated plan savings at a rate specified in the contract ("variable annuity"). The information that must be disclosed pursuant to this paragraph (d)(1)(vii) for the variable annuity complements the investment-related information disclosed pursuant to paragraph (d)(1) for the related portfolio operating companies. Paragraph (d)(1)(vii) is applicable to any designated investment alternative consisting in part of a contract, fund or product that affords participants or beneficiaries the option to allocate contributions toward the future purchase of a stream of retirement income payments guaranteed by an insurance company. When applicable, paragraph (d)(1)(vii) of the final rule incorporates by cross reference the requirements of the second new provision, a special rule, at paragraph (i)(2)(i) through (vii) of the final regulation. This provision requires the disclosure of information relating to the variable annuity itself to the extent that the information is not otherwise disclosed pursuant to paragraph (d)(1)(iv). Through the combination of these two provisions, the Department intends for participants and beneficiaries to receive comprehensive disclosure of investment and annuity information pertaining to both portfolio operating companies within a variable annuity contract and the variable annuity itself. The special rule at paragraph (i)(2)(i) through (vii) of the final regulation is discussed more fully below.

i. Disclosures On or Before First Investment

As discussed above, paragraph (d)(1)(v) of the proposal provided, for purposes of the disclosure of investment-related information to new participants, that plan administrators could satisfy this obligation by furnishing the most recent annual disclosure along with any required updates furnished to participants and beneficiaries. The Department received no objections to this provision and, accordingly, is adopting it as proposed, except that it has been re-designated as paragraph (d)(viii) in the final rule and modified to conform with the new timing requirements (*i.e.,* to reflect the change from "on or before the date of plan eligibility" to "on or before the date on which the participant or beneficiary can first direct his or her investment").

j. Comparative Format Requirement

Paragraph (d)(2) of the proposed regulation provided that the investment-related information required pursuant to paragraph (d)(1) must be furnished in a chart or similar format that is designed to facilitate comparison of such information for each designated investment alternative offered under the plan. The Department also included as an Appendix to the proposal a Model Comparative Chart that could be used to satisfy this requirement. Several commenters on the proposal specifically noted their support for the requirement that investment-related information be disclosed in a comparative format. Further, participants in the Department's focus group studies believe that the Model Comparative Chart would make it easier to choose among a plan's designated investment alternatives; these individuals felt that the Chart is an improvement over the manner in which plan investment information currently is made available to them and that the Chart would encourage them, in some cases, to obtain additional information about plan designated investment alternatives.

The Department has retained this requirement in paragraph (d)(2) of the final rule, subject to a few minor modifications, and has also published with the final rule a revised Model Comparative Chart which reflects conforming changes to the final rule's disclosure requirements. Paragraph (d)(2)(i) of the final rule requires that the information described in paragraph (d)(1) and, if applicable, paragraph (i), must be furnished in a chart or similar format that is designed to facilitate a comparison of such information for each designated investment alternative available under the plan. This paragraph of the final rule also requires that the date of the chart be prominently displayed. As proposed, the final rule requires in paragraphs (d)(2)(i)(A) and (B) a statement indicating the name, address, and telephone number of the plan administrator (or the plan administrator's designee) to contact for the provision of the information that must be made available upon request pursuant to paragraph (d)(4) of the final rule and a statement that additional investment-related information (including more current performance information) is available at the listed Internet Web site addresses.

As noted above, a new subparagraph (C) has been added to paragraph (d)(2)(i) of the final rule. This new subparagraph requires that the comparative disclosure include information about how participants and beneficiaries can request, and obtain, free of charge, paper copies of the information required to be maintained on a Web site pursuant to paragraph (d)(1)(v) of the final rule. This new disclosure requirement will help to ensure that participants and beneficiaries who do not have access to the Internet, nonetheless, can, if they so choose, obtain supplemental information contained on the Web sites, in order to facilitate a comprehensive consideration of the available investment choices under the plan. Because the final rule includes special Web site disclosure rules for certain designated investment alternatives and annuity options (paragraph (i)(2) for annuity options and paragraph (i)(3) for fixed-return alternatives), the new the subparagraph (C) includes explicit references to these special rules in order to eliminate any ambiguity as to whether the rights provided by new subparagraph (C) extend to such investment choices. In this regard, the Department notes that although paragraph (i)(1) contains a special rule for qualifying employer securities, certain requirements of paragraph (d)(1)(v) are not modified by the special rule and remain applicable to qualifying employer securities; consequently, the rights provided by new subparagraph (C) extend to qualifying employer securities via the reference to paragraph (d)(1)(v) in subparagraph (C).

Paragraph (d)(2)(ii), like the proposal, provides that nothing in the final rule precludes a plan administrator from including additional information that the plan administrator determines appropriate for such comparisons, provided such information is not inaccurate or misleading. The Department believes that the technical concerns raised by commenters on the Model Comparative Chart have been addressed in revisions to the operative provisions of the final rule.

One procedural question raised by commenters, for example on behalf of Code section 403(b) plans, was whether each issuer of designated investment alternatives could prepare its own comparative chart for distribution and send it directly to participants and beneficiaries, such that, for example, a participant in a plan with three investment issuers would receive three

charts, stating that this would greatly simplify the plan administrator's task in meeting the comparative format requirement. It is the view of the Department that nothing in the final regulation precludes plan administrators from combining multiple documents for purposes of satisfying their obligation to provide the information required by this rule in a comparative form. For example, a chart could be divided such that one part presented stock funds while another part presented bond funds, as in the Department's model format. Similarly, a chart could group investment alternatives by issuer. On the other hand, the Department also is of the view that permitting individual investment issuers, or others, to separately distribute comparative charts reflecting their particular investment alternatives would not be furnishing information in a form that would facilitate a comparison of the required investment information and, therefore, would not comply with the requirements of paragraph (d)(2).

k. Information To Be Provided Subsequent to Investment

Paragraph (d)(3) of the final rule requires that, when a plan provides for the pass-through of voting, tender, and similar rights, the plan administrator must furnish participants and beneficiaries who have invested in a designated investment alternative with these features any materials about such rights that have been provided to the plan. This provision, which is unchanged from the proposal, is similar to the requirement currently applicable to ERISA section 404(c) plans.[15]

l. Information To Be Provided Upon Request

Paragraph (d)(4) of the final rule requires a plan administrator to furnish certain identified information either automatically or upon request by participants and beneficiaries, based on the latest information available to the plan. This provision, which also is unchanged from the proposal, is modeled on the requirements currently applicable to ERISA section 404(c) plans with respect to information to be furnished upon request.[16]

4. Form of Disclosure

Paragraph (e) of the final rule, like the proposal, specifically addresses the form in which the required disclosures may be made. Commenters on the proposal generally supported the ability of plan administrators to coordinate the requirements of this rule with other disclosure materials. The Department notes that, like the proposal, paragraph (e) merely recognizes various acceptable means of disclosure; it does not preclude other means for satisfying disclosure obligations under the final rule.

Specifically, paragraph (e)(1) makes clear that plan-related information required to be disclosed pursuant to paragraphs (c)(1)(i), (c)(2)(i)(A) and (c)(3)(i)(A) of this section may be provided as part of the plan's summary plan description furnished pursuant to ERISA section 102 or as part of a pension benefit statement furnished pursuant to ERISA section 105(a)(1)(A)(i), if such summary plan description or pension benefit statement is furnished at a frequency that comports with the time frames prescribed by paragraph (c) of this section. Paragraph (e)(2) of the final rule, like the proposal, makes clear that the information required to be disclosed pursuant to paragraphs (c)(2)(ii) and (c)(3)(ii) may be included as part of a pension benefit statement furnished pursuant to ERISA section 105(a)(1)(A)(i).

Paragraph (e)(3) provides that a plan administrator that uses and accurately completes the model in the Appendix, taking into account each plan's specific provisions and each designated investment alternative offered under the plan, will be deemed to have satisfied the requirements of paragraph (d)(2) of this section.

Paragraph (e)(4) further clarifies that, except as otherwise explicitly required herein, fees and expenses may be expressed in terms of a monetary amount, formula, percentage of assets, or per capita charge. Finally, paragraph (e)(5) generally requires that the information required to be prepared by the plan administrator for disclosure under the regulation must be written in a manner calculated to be understood by the average plan participant.

5. Selection and Monitoring

Paragraph (f) of the final rule continues to make clear that nothing in the regulation would relieve a fiduciary of its responsibilities to prudently select and monitor providers of services to the plan or designated investment alternatives offered under the plan.[17] This paragraph is unchanged from the proposal.

6. Manner of Furnishing

Paragraph (g) of the proposal addressed the "manner of furnishing" the disclosures required by the regulation. Specifically, paragraph (g) of the proposal provided that the required disclosure shall be furnished in any manner consistent with the requirements of 29 CFR 2520.104b–1, including paragraph (c) of that section relating to the use of electronic media.

This proposal produced significant comments. A number of commenters recommended that the Department expand the permissibility of electronic disclosure beyond that currently addressed in the Department's safe harbor regulation, at § 2520.104b–1(c). They argued that such forms of disclosure would be more efficient, less burdensome, and less costly for plans and, therefore, participants. Other commenters cautioned against broadening the electronic disclosure standards, arguing that many workers do not have Internet access or prefer paper over electronically disclosed materials. Important questions involve the extent of the cost savings from expanded use of electronic disclosure and the number of workers who would be disadvantaged from such an expansion (which could itself take various forms, perhaps including "opt out" electronic disclosure).

In light of these differing views and the significance of the issues surrounding the use of electronic disclosure, the Department has decided to reserve paragraph (g) of the regulation while further exploring whether, and possibly how, to expand or modify the standards applicable to the electronic distribution of required plan disclosures. To ensure a full review of the issue, the Department will, in the near future, be publishing a **Federal Register** notice requesting public comments, views, and data relating to the electronic distribution of plan information to plan participants and beneficiaries. Pending the completion of this review and the issuance of further guidance, the Department notes that the general disclosure regulation at 29 CFR

[15] *See* 29 CFR 2550.404c–1(b)(2)(i)(B)(1)(ix).

[16] *See* 29 CFR 2550.404c–1(b)(2)(i)(B)(2).

[17] Also, with regard to ERISA's general fiduciary standards, as noted in the preamble to the proposal, 73 FR 43014 at 43018, n. 8, it should be noted that there may be extraordinary situations when fiduciaries will have a disclosure obligation beyond those addressed by the final rule. For example, if a fiduciary knew that, due to a fraud, information contained in a public financial report would mislead investors concerning the value of a designated investment alternative, the fiduciary would have an obligation to take appropriate steps to protect the plan's participants, such as disclosing the information or preventing additional investments in that alternative by plan participants until the relevant information is made public. *See also Varity Corp.* v. *Howe,* 516 U.S. 489 (1996) (plan fiduciary has a duty not to misrepresent to participants and beneficiaries material information relating to a plan).

§ 2520.104b–1 applies to material furnished under this regulation, including the safe harbor for electronic disclosures at paragraph (c) of that regulation. It is anticipated, however, that resolution of this issue will occur in advance of the compliance date for this regulation, so as to ensure for appropriate notice for plans.

7. Definitions

The proposed rule contained, in section (h), a series of definitions for some of the terms used in the rule. These definitions of technical terms were intended to assist plan administrators, their service providers, and issuers of designated investment alternatives in complying with the requirements of the rule. In response to comments and clarifications requested by commenters, the Department made some additions and modifications to the definitions contained in section (h), which are discussed below in this section. One commenter suggested that the Department should address potential changes to the cross-references contained in the rule's definitions, which refer to rules under the Securities and Exchange Commission's jurisdiction, for example by referencing the Commission's Form N–1A. Absent further guidance, it is the Department's intention that these cross-references will refer, as appropriate, to successor rules and instructions.

The Department also received comments requesting that the rule define some of the terms used in the Model Comparative Chart, but these commenters appeared to focus on defining terms for the benefit of participants and beneficiaries, for example suggesting that a glossary or other index of terms, with "plain English" definitions, be provided. In response to these commenters, and in response to participants in the Department's focus group studies, who similarly supported the inclusion of definitions for investment and financial terms, the Department, at paragraph (d)(1)(vi) of the final rule, now requires the furnishing of or access to a general glossary of terms appropriate to assist participants and beneficiaries in understanding their designated investment alternatives. This glossary requirement is discussed above with the other investment-related information requirements.

The Department did not receive any comments or questions concerning the definitions of "at least annually thereafter" or "at least quarterly;" accordingly, those phrases continue to be defined, as proposed, in the final rule.

a. Average Annual Total Return

The proposal, in paragraph (h)(2), defined "average annual total return" to mean the average annual profit or loss realized by a designated investment alternative at the end of a specified period, calculated in the same manner as average annual total return is calculated under Item 21 of Securities and Exchange Commission Form N–1A [18] with respect to an open-end management investment company registered under the Investment Company Act of 1940 (1940 Act). In general, the commenters strongly supported the concept of providing participants with this type of performance data. However, in response to several technical comments as to how this definition would be applied to products other than those that register using the Form N–1A, the final rule, in paragraph (h)(3), contains a revised definition. As revised, the term "average annual total return" means the "average annual compounded rate of return that would equate an initial investment in a designated investment alternative to the ending redeemable value of that investment calculated with the before tax methods of computation prescribed in Securities and Exchange Commission Form N–1A, N–3, or N–4, as appropriate, except that such method of computation may exclude any front-end, deferred or other sales loads that are waived for the participants and beneficiaries of the covered individual account plan." The new references to Form N–3 and N–4 are to provide additional guidance with respect to designated investment alternatives that consist of separate accounts offering variable annuity contracts which are registered under the 1940 Act. The sales loads exception responds to commenters' concerns that the proposed definition, specifically the reference to Item 21 of the Form N–1A (now Item 26 in Form N–1A, as revised), might result in participants and beneficiaries receiving inaccurate information about actual returns in cases where the designated investment alternative waives sales loads; under this exception, plan administrators may disregard any requirement under Commission Forms to assume sales loads if they are not actually charged to plan participants and beneficiaries. The use of this definition is intended to assure that all participants and beneficiaries will, taking into account the variety of investments available through ERISA plans, receive the most uniform and comparable performance information available for their investment options, without regard to whether the designated investment alternative is a product registered under the 1940 Act.

[18] Now item 26 of Form N–1A, as revised, February 2010.

b. Designated Investment Alternatives

Several commenters expressed concern with the Department's definition of "designated investment alternatives" in paragraph (h)(1) of the proposal. Specifically, commenters questioned the definition's exclusion of "brokerage windows," "self-directed brokerage accounts," or similar plan arrangements that enable participants and beneficiaries to select investments beyond those designated by the plan. Commenters argued that the proposal was not clear as to what information would in fact have to be disclosed concerning participants' and beneficiaries' investments through such an arrangement. The final rule retains the proposed definition of "designated investment alternatives," although re-designated as paragraph (h)(4) in the final, and therefore continues to exclude brokerage windows and similar arrangements from the definition. However, as discussed earlier, it is important that participants and beneficiaries understand how brokerage windows operate and the expenses attendant thereto when they are offered as part of the investment platform of a plan. For this reason, the final rule includes more specific requirements than the proposal concerning the information that must be disclosed about brokerage windows or similar arrangements. *See* paragraph (c)(1)(i)(F) of the final rule.

c. Total Annual Operating Expenses

The proposed regulation defined the term "total annual operating expenses" as "annual operating expenses of the designated investment alternative (*e.g.,* investment management fees, distribution, service, and administrative expenses) that reduce the rate of return to participants and beneficiaries, expressed as a percentage, calculated in the same manner as total annual operating expenses is calculated under Instruction 3 to Item 3 of the Commission's Form N–1A with respect to an open-end management investment company registered under the Investment Company Act of 1940." The Department invited comments on what, if any, problems the proposed definition presented for investment funds and products that are not subject to the 1940 Act and, any suggestions for alternative definitions or approaches.

Some commenters questioned whether it is appropriate for the Department to model its disclosure requirement for calculating expenses for all designated investment alternatives in ERISA plans on a mutual fund methodology. These commenters suggested the Department might instead consider developing multiple methodologies that take into account the unique characteristics of the many different types of investment options in participant-directed individual account plans, particularly those that are not registered under the 1940 Act. The Department considered this suggestion and has accordingly modified the expense calculation as discussed more fully below. A core objective of the regulation is to ensure that participants receive uniform and reliable information about their plan's investment options whether or not such options are registered or unregistered under Commission requirements. The Department believes that the final rule's revised definition will achieve this result and produce a comparable expense calculation across the different types of investment options offered under ERISA plans.

Specifically, one commenter, representing the insurance industry, noted that certain insurance products are required to be registered under the Securities Act of 1933, 1940 Act, or both and that such registrants must file their registration statements on the Commission's Forms N–3 or N–4. The commenter pointed out that both of these forms set forth a methodology for reporting the total annual expenses of the insurance product. This commenter suggested that the Department should consider utilizing these established methodologies with respect to designated investment alternatives offered through variable annuity contracts, rather than the methodology in the Commission's Form N–1A, where appropriate, in order to reduce direct and indirect compliance costs. The Department reviewed the methodologies in the Forms N–3 and N–4 and concluded that while they require substantially the same methodology as the Form N–1A, the suggested methodologies and language offer more precision with respect to certain annual expenses unique to variable annuity contracts ("mortality and expense risk fees"), which are not addressed in the Form N–1A. Therefore, paragraph (h)(5)(i) of the final rule has been revised to accommodate this commenter's request.

Other commenters, representing the banking industry, were concerned that the proposed definition with its reliance on Commission standards may not work well when applied to a designated investment alternative that consists of a bank collective investment fund because these alternatives typically are not registered under the 1940 Act. These commenters stated that, unlike a mutual fund, a bank collective investment fund is not required to deduct all of its operating expenses from the fund's assets, and may instead charge some or all of its operating expenses directly to the plans investing in the fund. These commenters asserted that the proposed definition would not capture such expenses and emphasized their unfamiliarity with the required expense calculation as well as its impact on bank collective investment funds. The Department found these comments persuasive and, in the final rule, added paragraph (h)(5)(ii), a separate definition of total annual operating expenses for these unregistered alternatives. The Department believes that this new definition will produce an expense calculation that is substantially the same as the expense calculation for registered alternatives while capturing the different ways that unregistered alternatives charge plans.

Paragraph (h)(5)(ii) of the final rule defines the term "total annual operating expenses" as "the sum of the fees and expenses described in paragraphs (h)(5)(ii)(A) through (C) of this section before waivers and reimbursements, for the alternative's most recently completed fiscal year, expressed as a percentage of the alternative's average net asset value for that year." [19] Paragraph (h)(5)(ii)(A) requires the inclusion of all "management fees as described in the Securities and Exchange Commission Form N–1A that reduce the alternative's rate of return." Paragraph (h)(5)(ii)(B) requires the inclusion of any "distribution and/or servicing fees as described in the Securities and Exchange Commission Form N–1A that reduce the alternative's rate of return." Paragraph (h)(5)(ii)(C) requires the inclusion of any "other fees or expenses not included in subparagraph (A) or (B) that reduce the alternative's rate of return" such as externally negotiated investment management fees charged by bank collective investment funds, but excludes "brokerage costs as described in Item 21 of Securities and Exchange Commission Form N–1A." [20]

The following example illustrates the requirements of paragraphs (h)(5)(ii) of the final rule. Plan A offers Designated Investment Alternative One (DIA 1) which invests $125 million in bank collective investment fund XYZ, an unregistered investment alternative, with assets of $1.2 billion. XYZ investment management fees of .22% are deducted directly from the fund's assets. Additional investment management fees of XYZ of .16% are invoiced directly to Plan A, which pays the expense and then proportionately reduces the value of the shares of Plan A participants and beneficiaries who are invested in DIA 1. Recordkeeping expenses of XYZ of $15,000 are invoiced directly to Plan A which allocates this charge proportionally to the accounts of Plan A participants and beneficiaries that are invested in DIA 1. XYZ also charges a servicing fee of .10% for marketing materials it makes available to Plan A participants and beneficiaries. These fees are deducted directly from the fund's assets.

The provisions of paragraph (h)(5)(ii) of the final rule require these four expenses to be included in the total annual operating expenses of DIA 1 because they reduce the alternative's rate of return to participants and beneficiaries. In other words, the sum of these expenses is subtracted from the alternative's gross returns, which indirectly reduces the value of a participant's investment in DIA 1. In this example, the total annual operating expenses of DIA 1 are the sum of these four expenses or .492% (represented as .49% after rounding to the nearest hundredth of a percent). The investment management fee of .22% and the servicing fee of .10% are included by virtue of paragraph (h)(5)(ii)(A) and paragraph (h)(5)(ii)(B), respectively. The additional investment management fee of .16% is included by virtue of paragraph (h)(5)(ii)(C), and so is the recordkeeping fee of .012% (calculated as: $15,000/$125,000,000). Thus, the annual cost to the participants and beneficiaries who invest in DIA 1 is $4.92 for every $1,000 invested.

Under paragraph (h)(5)(ii) of the final rule, if a fee or expense does not reduce a designated investment alternative's

[19] The Department intends to achieve as much symmetry between registered and unregistered designated investment alternatives as is possible. For that reason, consistent with Instructions 3(d)(i) and 6(a) to Item 3 Form N–1A, paragraph (h)(5)(ii) of the final regulation directs the calculation of total annual operating expenses before any waivers or reimbursements.

[20] Brokerage costs are not included in a mutual fund's expense ratio because, under generally accepted accounting principles, they are either included as part of the cost basis of securities purchased or subtracted from the net proceeds of securities sold and ultimately are reflected as changes in the realized and unrealized gain or loss on portfolio securities in the fund's financial statements. *See* 68 FR 74820.

rate of return, the fee or expense is not to be included in the total annual operating expense of that alternative. Thus, if the recordkeeping expenses of $15,000 in the above example were paid from plan assets by liquidating shares of DIA 1 from participants' accounts, rather than reducing the value of their shares, the total annual operating expenses of DIA 1 would be .48% rather than .492%. In such circumstances, the recordkeeping fee would instead be covered by paragraph (c)(3) of the final regulation, not paragraph (h)(5)(ii), and would have to be disclosed on the statement required by paragraph (c)(3)(ii) of the final regulation.

8. Special Rules for Certain Designated Investment Alternatives

Many commenters expressed concern that the framework of the proposed regulation as it related to investment-related information could not be meaningfully applied to certain types of investment options. Specifically, these commenters argued that many of the pieces of information that the proposal mandates must be disclosed do not apply to certain designated investment alternatives, such as employer securities or investments that include annuity or annuitization guarantee features, and that it would be difficult to disclose the unique characteristics of these investment alternatives within the framework of the proposal. Accordingly, the Department expanded the final rule to include special rules, described below, to address these concerns and require that plan administrators and their service providers disclose relevant information concerning these investment options.

a. Special Rules for Designated Investment Alternatives That Consist of Employer Securities

Several commenters stated that investments in employer securities should warrant separate treatment from other designated investment alternatives under the final rule because many of the required investment-related disclosures fail to correspond with investment characteristics of company stock. Some commenters even argued that investments in employer securities should be completely excluded from the definition of designated investment alternatives. Another commenter claimed that the proposal would create a cause of action under ERISA section 502 for disclosure regulated by the securities laws, permitting litigants to evade the provisions of the Private Securities Litigation Reform Act of 1995 ("PSLRA") and the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"). However, in the Department's view, this rule does nothing to impair the disclosure requirements of the securities laws, which remain in full force and effect. Causes of action under ERISA section 502 are limited to remedying violations of ERISA and plan provisions. This section does not allow plaintiffs to bring suits for violations of securities law or with respect to securities not belonging to an ERISA plan. Plaintiffs bringing suit for violations of the securities laws continue to be subject to the PSLRA and SLUSA.

The Department has been persuaded to modify several aspects of the proposal for investments in employer securities rather than creating a complete exclusion from the investment-related disclosures. The Department has rejected a complete exclusion under the final rule because, as stated by one commenter to the proposal, 20 million Americans invest in stock in their companies through 401(k) plans, based on the 2006 General Social Survey.[21] The Department's 5500 data for 2007 indicates that there are approximately 72.2 million participants in individual account plans, of whom 17 million were participants in plans that offered employer securities. In terms of magnitude, this means approximately one fourth of all participants in individual account plans could have invested in company stock. The Department believes that these participants and beneficiaries are entitled to the investment-related information for employer securities required by paragraph (d) as modified under paragraph (i) of the final rule.

Consequently, the Department has developed a special provision for investments in, or primarily in, employer securities as defined in section 407 of ERISA, and has also exempted these investments from certain aspects of the final rule. In making these modifications to the proposal, the Department recognized that while certain designated investment alternatives consist primarily of investments in employer securities that are held as shares, other alternatives that invest primarily in employer securities may also hold cash management investments for liquidity purposes, so that participants and beneficiaries acquire units of participation in a fund (*i.e.,* a unitized fund) rather than actual shares when they allocate their contributions to this investment alternative.

With regard to the supplemental information that must be provided to participants and beneficiaries through an Internet Web site address, the Department has modified the proposed rule to exempt these qualifying employer securities from the requirements of paragraph (d)(1)(v)(C) concerning the disclosure of an investment's principal strategies and risks, and instead is requiring an explanation under paragraph (i)(1)(i) of the final rule as to the importance of a well-balanced and diversified investment portfolio. The Department expects that plan administrators will use the language provided in the Department's Field Assistance Bulletin 2006–03 (FAB 2006–03) to satisfy this requirement. The FAB language provides: "To help achieve long-term retirement security, you should give careful consideration to the benefits of a well-balanced and diversified investment portfolio. Spreading your assets among different types of investments can help you achieve a favorable rate of return, while minimizing your overall risk of losing money. This is because market or other economic conditions that cause one category of assets, or one particular security, to perform very well often cause another asset category, or another particular security to perform poorly. If you invest more than 20% of your retirement savings in any one company or industry, your savings may not be properly diversified. Although diversification is not a guarantee against loss, it is an effective strategy to help you manage investment risk."

As stated in paragraph (i)(1)(ii) of the final rule, the Department is also exempting these qualifying employer securities from the Internet Web site requirements relating to portfolio turnover required under paragraph (d)(1)(v)(D).

Many commenters also pointed to the proposal's fee and expense information requirement, which is preserved in paragraph (d)(1)(iv)(A)(*2*) of the final rule, to disclose an investment's total annual operating expenses, expressed as a percentage, as problematic; essentially, these commenters maintained that an expense ratio is irrelevant or non-calculable for investments consisting primarily of employer securities. The Department has considered these comments and has exempted, in paragraph (i)(1)(iv) of the final rule, qualifying employer

[21] Davis, James Allan; Smith, Tom W.; and Marsden, Peter V. *General social surveys, 1972–2006: cumulative codebook/*Principal Investigator, James A. Davis; Director and Co-Principal Investigator, Tom W. Smith; Co-Principal Investigator, Peter V. Marsden.—Chicago: National Opinion Research Center, 2007. 2,552 pp., 28 cm.—(National Data Program for the Social Sciences Series, no. 18).

securities from the requirement to disclose an expense ratio, provided such designated investment alternative is not a unitized fund. As a corollary to this exemption, these investments are also relieved, under paragraphs (i)(1)(iii) and (v), respectively, of the final rule, from the requirements of paragraph (d)(1)(iv)(A)(*2*) relating to fee and expense information and the requirements of paragraph (d)(1)(iv)(A)(*3*) relating to the expense ratio expressed as a dollar amount per $1,000 invested.

Some commenters expressed concern with the requirement that such investments disclose performance data expressed as average annual total return for specified periods. The Department has determined to modify the definition of average annual total return, which is otherwise applicable under paragraph (h)(3) of the final rule, for qualifying employer securities that are publicly traded on a national exchange or generally recognized market, provided such designated investment alternative is not a unitized fund, in paragraph (i)(1)(vi) of the final rule. For this purpose, average annual total return is defined in paragraph (i)(1)(vi)(B) to mean the change in value of an investment in one share of stock on an annualized basis over a 1, 5, or 10 year period, assuming dividend reinvestment; such a return measurement is commonly referred to as total shareholder return. This return is calculated by taking the sum of the dividends paid during the measurement period, plus the difference between a stock price (consistent with section 3(18) of ERISA) at the end and the beginning of the measurement period divided by the stock price at the beginning of the measurement period. For example, and ignoring the reinvestment of dividends for simplicity, if a share is $100 at the beginning of the measurement period and $115 at the close, and dividends paid totaled $5 over the period, the disclosed return would be 20% (5 + 115 − 100/100).

Similarly, in paragraph (i)(1)(vi)(C) of the final rule, the Department is modifying the definition of average annual total return for qualifying employer securities that are not publicly traded on a national exchange or generally recognized market, provided such designated investment alternative is not a unitized fund, to require disclosure of return information calculated using principles similar to those for the return calculation of publicly traded securities under paragraph (i)(1)(vi)(B). The Department anticipates that in many cases dividends will not have been paid on such securities and that the plan administrators will use Form 5500 plan valuation data in calculating this return. The new reference to ERISA section 3(18) expresses the Department's intent that the "stock price" used in these calculations be consistent with the fair market value methodologies that the plan administrator is already using under current law with respect to the value of employer stock held by the plan.

b. Special Rules for Annuities

As discussed above, the Department, in response to comments, has made two changes to the final rule to better ensure the disclosure of both investment and annuity related information to plan participants and beneficiaries. These changes appear in the final rule at paragraphs (d)(1)(vii) and (i)(2). Paragraph (i)(2) of the final rule sets forth the information that must be disclosed about annuity options. Paragraph (i)(2) applies to any designated investment alternative consisting of a contract, fund or product that affords participants or beneficiaries the option to allocate contributions toward the current purchase of a stream of retirement income payments guaranteed by an insurance company. Paragraph (i)(2) addresses commenters' concerns with stand-alone annuity options under which current participant contributions purchase a fixed-dollar stream of income commencing at a future point in time, typically at retirement age ("fixed-deferred annuity"). Paragraph (d)(1)(vii), as discussed more fully above, addresses commenters' concerns with annuity options that are contained within variable annuity contracts, under which participants and beneficiaries have a right to purchase an annuity with their accumulated plan savings at a rate specified in the contract ("variable annuity"). Moreover as noted above, the requirements in paragraph (i)(2) of the final rule explicitly apply to variable annuities as required by the cross reference in paragraph (d)(1)(vii) of the final rule.

When applicable, the paragraph (i)(2) special rule provides that the plan administrator must, in lieu of the investment-related information described in paragraph (d)(1)(i) through (vi) of the final rule, provide each participant or beneficiary basic information about the benefits and costs of the annuity, as well as an Internet Web site address to lead participants and beneficiaries to additional information. Since both variable and fixed-deferred annuities are subject to the comparative format requirement in paragraph (d)(2) of the final rule, the plan administrator must furnish the content information described in paragraph (i)(2)(i) through (vi) of this special rule in a comparative chart or similar format. The Department believes that maintaining the comparative chart requirement will enable participants to undertake a comparison of annuity options when a plan includes two or more annuity options as designated investment alternatives.

c. Special Web Site Rules for Fixed-Return Investments

As discussed above, the proposal, in paragraph (d)(1)(i)(B), required disclosure of an Internet Web site for each designated investment alternative offered under the plan. In response to concerns about this Web site requirement, which were discussed earlier in this preamble, the final rule, at paragraphs (d)(1)(v)(A) through (F), has been revised to clarify the specific items of information that must be made available at the required Web site address. In developing these revisions, however, the Department concluded that many of the revised content requirements in paragraphs (d)(1)(v)(A) through (F) simply do not apply to designated investment alternatives with respect to which the return is fixed for the term of the investment, *e.g.,* portfolio turnover rate. The final rule, therefore, includes special rules that clarify and limit the information that that must be made available at the required Web site address for each designated investment alternative with respect to which the return is fixed for the term of the investment. These special rules, at paragraph (i)(3) of the final regulation, require disclosure of, among other things, name of the investment's issuer; objectives or goals (*e.g.,* to provide stability of principal and guarantee a minimum rate of interest); performance data updated on at least a quarterly basis (or more frequently if required by other applicable law); and fee and expense information.

d. Special Rules for Target Date or Similar Funds

The Department intends to publish a separate notice of proposed rulemaking that would supplement the otherwise applicable disclosures in this rule for designated investment alternatives that are target date-type funds. Accordingly, the Department has reserved paragraph (i)(4) for inclusion of such guidance.

C. Final Amendment to § 2550.404c–1

This notice also includes a final amendment to the regulation under section 404(c) of ERISA, 29 CFR 2550.404c–1. This amendment generally is unchanged from the proposal, except for the minor modification discussed below. This amendment to section 2550.404c–1(b), (c), and (f) integrates the disclosure requirements in the amended section 404(c) regulation with the disclosure requirements in the final regulation section 2550.404a–5 to avoid having different disclosure rules for plans intended to comply with the ERISA section 404(c) requirements. Similar to the proposal, this amendment eliminates references to disclosures that are now encompassed in section 2550.404a–5 and incorporates in paragraph (b)(2)(i)(B)(*2*) of the 404(c) regulation a cross-reference to the final rule, thereby establishing a uniform disclosure framework for all participant-directed individual account plans.

The final 404(c) regulation has been modified in one respect from the proposal. Specifically, the Department eliminated the reference to "[i]dentification of any designated investment managers" previously required in paragraph (b)(2)(i)(B)(*2*) of the proposed amendment. Commenters noted that identification of designated investment managers also was required pursuant to paragraph (c)(1)(i)(E) of proposed section 2550.404a–5. The Department did not intend to create a duplicative requirement and has therefore eliminated the requirement from the 404(c) regulation; identification of any designated investment managers will be continue to be required for 404(c) plans because (pursuant to paragraph (b)(2)(i)(B)(*2*) of the final 404(c) regulation, published herein) such plans must satisfy all of the disclosure requirements of the new regulation under section 404(a), which includes identification of any designated investment managers.

Finally, as discussed further in the preamble to the proposal, at 73 FR 43018, the Department reiterates its view that a fiduciary breach or an investment loss in connection with the plan's selection or monitoring of a designated investment alternative is not afforded relief under section 404(c) because it is not the result of a participant's or beneficiary's exercise of control.[22] The Department has added, in paragraph (d)(2)(iv) of the final 404(c) amendment, a statement that "paragraph (d)(2)(i) of this section does not serve to relieve a fiduciary from its duty to prudently select and monitor any designated investment manager or designated investment alternative offered under the plan."

D. Effective and Applicability Dates; Transition Issues

A significant number of commenters expressed concern about the establishment of an effective date that would not allow plans sufficient time to review and implement the new disclosure requirements. Commenters suggested that the Department should allow affected persons twelve to eighteen months to revise their recordkeeping and other systems to ensure that the required information is being captured and to prepare all of the necessary disclosure materials, including any coordination of these new requirements with existing disclosures. In an effort to balance the importance of the required information to plan participants with the practical burdens and costs attendant to compliance with a new disclosure regime, the Department is adopting these final rules with a 60-day effective date, but deferring the application of the new rules for at least 12 months. In this regard, the final rule will be applicable as of the beginning of the first plan year which starts on or after the first day of the thirteenth month following the date of publication. The Department believes that the delayed applicability date will afford plans sufficient time to ensure an efficient and effective implementation of the new rules. *See* paragraph (j)(1) and (2).

The Department also provided transition relief, in paragraph (j)(3) of the final rule, to assist parties in complying with the final rule. Specifically, paragraph (j)(3)(i) provides that notwithstanding the effective and applicability dates for the final rule, the initial disclosures required on or before the date on which a participant or beneficiary can first direct his or her investment must be furnished no later than 60 days after the rule's applicability date to participants and beneficiaries who had the right to direct the investment of assets held in, or contributed to, their individual accounts, on the applicability date.

Representatives of the banking industry indicated that transitional relief from the requirement to disclose 5- and 10-year performance may be needed for some plans that contain unregistered bank products as designated investment alternatives, if the final regulation were to adopt the "total annual operating expenses" and "average annual total return" definitions set forth in paragraph (h) of the proposed regulation. This is because the methodologies behind these definitions depend on certain data that neither plans nor bank funds were compelled to maintain before this final rule.

Since the final rule contains definitions similar to those in the proposal, the Department was persuaded that transitional relief is necessary. The final regulation, at paragraph (j)(3)(ii), therefore, provides that for plan years beginning before October 2021, if a plan administrator reasonably determines that it does not have the information on expenses attributable to the plan that is necessary to calculate, in accordance with paragraph (h)(3), the 5-year and 10-year average annual total returns for a designated investment alternative that is not registered under the Investment Company Act of 1940, the plan administrator may use a reasonable estimate of such expenses. For this purpose, the plan administrator may use the most recently reported total annual operating expenses of the designated investment alternative as a substitute for the actual annual expenses during the 5-year and 10-year periods if the plan administrator reasonably determines that doing so will result in a reasonably accurate estimate of the average annual total returns. Nothing in this paragraph (j)(3)(ii) requires disclosure of returns for periods before the commencement of the alternative.

E. Regulatory Impact Analysis

As discussed earlier in this preamble, this final rule establishes a uniform basic disclosure regime for participant-directed individual account plans. Many of the disclosures required by the final rule are similar to those required for participant-directed individual account plans that currently comply with ERISA section 404(c) and the Department's regulations issued thereunder. The Department is uncertain regarding the information that is provided to participants in plans that are not ERISA section 404(c) compliant. Therefore, for purposes of this regulatory impact analysis (RIA), the Department assumes that the final rule's requirements are new for plans that are not ERISA section 404(c) compliant.

Based on the foregoing assumptions, the Department estimates that the average incremental costs and benefits for participants in ERISA section 404(c) compliant plans will be smaller than for those plans that are not. Also, participants in ERISA section 404(c) compliant plans or plans providing similar information only will receive an incremental benefit from the rule's new disclosure requirements, because they

[22] *See also* 57 FR 46906, n. 27 (preamble to § 2550.404c–1) (Oct. 13, 1992).

already receive some of the information required to be disclosed under the final rule.

1. Executive Order 12866 Statement

Under Executive Order 12866, the Department must determine whether a regulatory action is "significant" and therefore subject to the requirements of the Executive Order and subject to review by the Office of Management and Budget (OMB). Under section 3(f) of the Executive Order, a "significant regulatory action" is an action that is likely to result in a rule (1) having an effect on the economy of $100 million or more in any one year, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or Tribal governments or communities (also referred to as "economically significant"); (2) creating serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. The Department has determined that this action is "economically significant" under section 3(f)(1) because it is likely to have an effect on the economy of more than $100 million in any one year.

Accordingly, the Department has undertaken, as described below, an analysis of the costs and benefits of the final regulation. The Department continues to believe that the final regulation's benefits justify its costs. The present value of the benefits over the ten-year period 2012–2021 is expected to be about $14.9 billion, with a low estimate of $7.2 billion and a high estimate of $29.9 billion. The present value of the costs over the same time period is expected to be $2.7 billion, with a low estimate of $2.0 billion and a high estimate of $3.3 billion. Overall, the Department estimates that the final regulation will generate a net present value (or net present benefit) of almost $12.3 billion. Table 1 shows the annualized monetized benefits and cost of the regulations and also provides a summary of the benefits and costs. The Department also expects the regulation to produce substantial additional benefits, in the form of improved investment decisions, but the Department was not able to quantify this effect.

TABLE 1—ACCOUNTING TABLE

	Primary estimate	Low estimate	High estimate	Year dollar	Discount rate	Period covered
Benefits:						
Annualized	1,986.1	952.3	3,973.9	2010	7%	2012–2021
Monetized ($millions/year)	1,986.1	952.3	3,973.9	2010	3	2012–2021
Explanation of Monetized Benefits	The regulation's disclosure requirements are expected to reduce participants' time otherwise used for searching for fee and other investment information.					
Qualitative	The Department expects the regulation to produce substantial additional benefits, in the form of improved investment decisions, but the Department was not able to quantify this effect.					
Costs:						
Annualized	353.8	265.5	442.2	2010	7	2012–2021
Monetized ($millions/year)	352.3	264.9	439.7	2010	3	2012–2021
Explanation of Monetized Costs	Plans are likely to incur administrative burdens and costs in order to comply with the requirements of the regulation. The quantified cost estimate includes costs due to legal review of the regulation, consolidation of fee information, creation and maintenance of a Web site, record keeping, production and distribution of disclosures, and material and postage costs.					

2. Need for Regulatory Action

Understanding and comparing investment options available in a 401(k) plan can be complicated and confusing for many participants. The magnitude of complexity and confusion may be defined by reference to the number of available investment options and the materials utilized for communicating investment-related information. Moreover, the process of gathering and comparing information may itself be time consuming. For example, the U.S. Government Accountability Office noted in a recent report that "it is hard for participants to make comparisons across investment options because they have to piece together the fees that they pay, and assessing fees across investment options can be difficult because data are not typically presented in a single document that facilitates comparison." [23]

The final rule's new disclosure requirements will help a large number of plan participants by placing investment-related information in a format that facilitates comparison of investment alternatives. This simplified format will make it easier and less time consuming for participants to find and compare investment-related information. As a result, plan participants should make better investment decisions which will enhance their retirement income security.

Table 2 below shows the number of entities affected by the rule. According to the 2007 Form 5500 data, the latest complete data available, approximately 318,000 participant-directed individual account plans covering over 58.2 million participants reported compliance with ERISA 404(c). Approximately 165,000 participant-directed individual account plans covering about 13.9 million participants reported that they are not ERISA section 404(c) compliant. In total, the rule will impact 483,000 participant-directed individual account plans covering 72 million participants.

[23] U.S. General Accounting Office, *Private Pensions: Information That Sponsors and Participants Need to Understand 401(k) Plan Fees,* p. 15, fn 20. This report may be accessed at *http://www.gao.gov/new.items/d08222t.pdf.*

TABLE 2—NUMBER OF AFFECTED ENTITIES

Plans:	
Number of 404(c) Compliant Plans	318,000
Number of Non-404(c) Compliant Plans	165,000
Number of Participant-directed Plans	483,000
Participants:	
404(c) Plans	58,195,000
Non-404(c) Plans	13,916,000
Number of Participants in Participant-directed Plans	72,111,000

Note: The displayed numbers are rounded and therefore may not add up to the totals.

3. Benefits

The Department believes the final rule will provide two primary benefits: (1) Reduced time for plan participants to collect investment-related information and organize it into a format that allows the information to be compared; and (2) improved investment results for plan participants due to the enhanced disclosures available to them. Each benefit is discussed in further detail below; however, the Department only was able to quantify the search time reduction benefit.

a. Reduction in Participant Search Time

As discussed above, the Department assumes that the final rule's new disclosure requirements will benefit plan participants by reducing the time they spend searching for and compiling fee and expense information into a comparative format. In the RIA of the proposal, the Department estimated that 29 percent of all participants would experience time savings due to the easier access to information and the unified format. However, a commenter pointed out that the Department significantly underestimated the number of participants that will experience time savings. The commenter suggested that all participants who believe that fee, expense and performance information is important for making investment decisions and read materials provided to them most likely will experience time savings. The commenter suggested using a result from the EBRI's 2007 Retirement Confidence Survey [24] which indicates that 73 percent (plus or minus 3 percent) of workers saving for retirement used written materials received at work as a source of information when making retirement savings and investment decisions.[25] The Department agrees with the commenter and has revised its estimates to reflect that out of the 72 million participants affected by the rule, 70 to 76 percent, or nearly 50 to 55 million participants, will benefit from reduced search costs.

Although the Department sought to anchor its analysis on empirical evidence, there are a number of variables that are subject to uncertainty. In particular, although the Department is confident that the new disclosure format will reduce search costs, the Department does not have empirical evidence on the magnitude of these savings. Search time savings will vary widely depending on the type of investment options available through the plan, the completeness of baseline routine voluntary disclosures, the participant's sophistication, among other factors. To illustrate the potential benefits, the Department assumes that participants who are not receiving ERISA section 404(c) compliant disclosures, on average, will save one-and-a-half hours, while participants receiving such disclosures will save one hour on average. The Department also provides a range assuming half the time savings on the low and double the time savings on the high end.

The benefits estimate uses an average wage of $37 for private sector workers participating in a pension plan to estimate how much the average participants would value the time saved. It is based on hourly wages from Panel 4 of the 2004 wave from the Survey of Income Program Participation (SIPP) and on wage growth data for private-sector workers that participate in a pension plan with individual accounts from the Bureau of Labor Statistics (BLS). In the proposal the Department had additionally adjusted the wage rate to account for the difference that plan participants attribute to leisure versus work time. The Department received a comment that the estimate used may not have been representative of participants' value of leisure time and suggested that the Department simply use the average wage rate. The Department agrees and for the purpose of estimating a dollar value of the time uses an average wage rate of about $37.

These assumptions result in annual time savings of approximately 26 to 112 million hours valued at $1.0 to $4.0 billion in 2012. The total present value of this benefit is $7.2 to $29.9 billion using a seven percent discount rate.

b. Reduction in Fees and Expenses

By reducing participants' time required to collect information and organize fee and performance information, the final rule should increase the amount of investment-related information participants consider and the attention devoted to and efficiency of such consideration. This will help participants pick appropriate investment options that will provide the best value to them. Moreover, the increased transparency could strengthen competition between investment products and drive down fees.

In its RIA of the proposal, the Department estimated that fees and expenses are higher than necessary by 11.3 basis points on average. Some commenters on the proposal, as well as some commenters on the Department's proposed exemptions relating to the provision of investment advice by a fiduciary advisor to participants and beneficiaries in participant-directed individual account plans and beneficiaries of individual retirement accounts,[26] dispute this estimate. The commenters point to evidence that the pricing of investment products and related services is competitive and efficient, and contend that there is no credible evidence to the contrary.

The commenters raised several specific challenges to the Department's analysis. First, they contend that the Department's estimate relies inappropriately on dispersion in mutual fund expenses as evidence that such expenses are sometimes higher than necessary and as a basis for estimating the degree to which this is so. Dispersion in expenses reflects differences among the investment products or the services bundled with them, the commenters say, and therefore such dispersion is consistent with competitive, efficient pricing. Second, the commenters argue that the analysis draws incorrect inferences about fees and expenses in DC plans. The analysis overlooks the role of DC plan fiduciaries

[24] Employee Benefit Research Institute Issue Brief #304, April 2007. The survey found that 73 percent of workers saving for retirement used written material received at work as a source of information when making retirement savings and investment decisions.

[25] The survey notes: "In theory, each sample of 1,252 yields a statistical precision of plus or minus 3 percentage points (with 95 percent certainty) of what the results would be if all Americans age 25 and older were surveyed with complete accuracy. There are other possible sources of error in all surveys, however, that may be more serious than theoretical calculations of sampling error. These include refusals to be interviewed and other forms of nonresponse, the effects of question wording and question order, and screening. While attempts are made to minimize these factors, it is impossible to quantify the errors that may result from them."

[26] *See* 73 FR 49895 (August 22, 2008) and 73 FR 49924 (August 22, 2008).

in choosing reasonably priced investments and relies too much on research that examined retail rather than DC plan experience, they say. Third, the commenters highlight what they maintain are technical flaws in some of the research that the Department cited as supporting the conclusion that fees and expenses are sometimes higher than necessary, and they take issue with the Department's interpretation of this research.

In response to these commenters, the Department undertook to refine and strengthen its analysis. First, the Department agrees that the RIA of the proposal relied too heavily on mere dispersion of fees and expenses as a basis for estimating whether and to what degree they might be higher than necessary. The estimate that they are on average 11.3 basis points higher than necessary lacks adequate basis and should be disregarded. Second, the Department agrees that fees and expenses paid by DC plan participants can differ from those paid by retail investors. Any evidence of higher than necessary expenses in the retail sector might suggest similar circumstances in DC plans, but would not demonstrate it. Third, the Department reviewed available research literature in light of the commenters, and refined its analysis and conclusions accordingly, as summarized immediately below.

Expense Sensitivity—Surveys and studies strongly suggest gaps in awareness of and sensitivity to expenses.[27] Other studies consider whether investors with different levels of sophistication make different decisions about fees. If more sophisticated investors are more sensitive to fees, less sophisticated ones might be paying more than would be optimal. Alternatively, they might be paying more in order to obtain sophisticated help. Much literature suggests a negative relationship between sophistication and expenses paid,[28] but some does not.[29] Overall this literature leaves open the question of whether investment prices are sometimes inefficiently high, but suggests that even if prices are efficient investors may make poor purchasing decisions. The Department believes that many individual investors, including DC plan participants, historically have not factored expenses optimally into their investment choices.

Sector Differences—Some studies lend insight to the question of whether investment prices are efficient by comparing prices paid or performance in different market segments.[30] The Department believes that taken together, this literature suggests that there are unexplained differences in prices and performance across sectors but fails to demonstrate conclusively whether such differences are systematically attributable to inefficiently high investment prices.

Market Power—At least one study suggests that mutual funds may wield market power to mark up prices to inefficient levels.[31]

What Expenses Buy—A number of studies consider the degree to which expense dispersion is a function of product features and bundled services, and if it is, whether that dispersion is justified by differences in observable attendant financial benefits such as performance. Some of this literature also considers the degree to which investors choose investments where expenses are so justified. In the Department's view this literature taken together suggests that a substantial portion of expense dispersion is attributable to distribution expenses, including compensation of intermediaries and advertising.[32] It casts doubt on whether such expenses are duly offset by observable financial benefits. Most studies are consistent with the possibility that such expenses are at least partly offset by unobserved benefits such as reduced search costs and other support for novice and unsophisticated investors, but most are also consistent with the possibility that some expenses are not so offset and that investors, especially unsophisticated ones, sometimes pay inefficiently high prices.[33] The authors of some studies expressly interpret their failure to identify offsetting financial benefits as evidence that prices are inefficiently high. Some suggest that conflicted intermediaries may serve their own and

[27] *See e.g.,* James J. Choi *et al., Why Does the Law of One Price Fail? An Experiment on Index Mutual Funds,* National Bureau of Economic Research Working Paper W12261 (May 2006); Jeff Dominitz *et al., How Do Mutual Funds Fees Affect Investor Choices? Evidence from Survey Experiments* (May 2008) (unpublished, on file with the Department of Labor); and John Turner & Sophie Korczyk, *Pension Participant Knowledge About Plan Fees,* AARP Pub ID: DD–105 (Nov. 2004). Commenters point out that net flows are concentrated in mutual funds with low expenses. However it is unclear whether this reflects investor fee sensitivity or brand name recognition and successful marketing by large, established funds whose low fees are attributable to economies of scale.

[28] Sebastian Müller & Martin Weber, *Financial Literacy and Mutual Fund Investments: Who Buys Actively Managed Funds?,* Social Science Research Network Abstract 1093305 (Feb. 14, 2008) find that more financially literate investors pay lower front-end loads but similar management fees, and suggest that investors who know about management fees appear not to care about them. Jeff Dominitz *et al., How Do Mutual Funds Fees Affect Investor Choices? Evidence from Survey Experiments* (May 2008) (unpublished, on file with the Department of Labor) find that financially literate individuals are better able to estimate fees, and better estimates are associated with more optimal investment choices. Brad M. Barber *et al., Out of Sight, Out of Mind, The Effects of Expenses on Mutual Fund Flows,* Journal of Business, Volume 79, Number 6, 2095–2119 (2005) find that repeat investors are more sensitive to load fees than expense ratios, but commenters point out that this finding may be an artifact of industry load setting practices.

[29] Mark Grinblatt *et al., Are Mutual Fund Fees Competitive? What IQ–Related Behavior Tells Us,* Social Science Research Network Abstract 1087120 (Nov. 2007) find that investors with different IQs pay similar fees, which "suggests that fees are set competitively."

[30] John P. Freeman & Stewart L. Brown, *Mutual Fund Advisory Fees: The Cost of Conflicts of Interest,* The Journal of Corporate Law, Volume 26, 609–673 (Spring 2001) found that the price paid by mutual funds for equity fund management is higher than that paid by pension funds. Based on this and other evidence they argue that mutual fund fees are often excessive. John C. Coates & R. Glenn Hubbard, *Competition in the Mutual Fund Industry: Evidence and Implications for Policy,* Social Science Research Network Abstract 1005426 (Aug. 2007) challenge Freeman and Brown's methods and conclusions, arguing that these differences in prices are attributable to differences in services for which Freeman and Brown did not account. They offer evidence that fees are competitive. Alicia H. Munnell *et al., Investment Returns: Defined Benefits* vs. *401(k) Plans,* Center for Retirement Research Issue Brief Number 52 (Sept. 2006) find higher returns in DB plans than in DC plans and offer that "part of the explanation may rest with higher fees" that are paid by DC plan participants. Rob Bauer & Rik G.P. Frehen, *The Performance of U.S. Pension Funds,* Social Science Research Network Abstract 965388 (Jan. 2008) find that DC and DB plans both perform close to benchmarks while mutual funds underperform, and point to hidden costs in mutual funds as the most likely reason. Diane Del Guercio & Paula A. Tkac, *The Determinants of the Flow of Funds of Managed Portfolios: Mutual Funds vs. Pension Funds,* The Journal of Financial and Quantitative Analysis, Volume 37, Number 4, 523–557 (Dec. 2002) find that "in contrast to mutual fund investors, pension clients punish poorly performing managers by withdrawing assets under management and do not flock disproportionately to recent winners."

[31] Guo Ying Luo, *Mutual Fund Fee-Setting, Market Structure and Mark-Ups,* Economica, Volume 69, Number 274, 245–271 (May 2002) exploits differences in market concentration across different narrow mutual funds categories, and finds that mark-ups average 30 percent of fees across all categories of no load funds and more than 70 percent across load funds (assuming a 5-year holding period).

[32] The literature also attributes much expense dispersion to differences in the cost of managing different types of funds. For example, active equity management is more expensive than passive and management of foreign or small cap equity funds is more expensive than management of large cap domestic equity funds. Investors therefore might optimally diversify across funds with different levels of investment management expense. Some studies question whether active management delivers observable financial benefits commensurate to the associate expense. For example, Kenneth R. French, *The Cost of Active Investing,* Social Science Research Network Abstract 1105775 (Apr. 2008) finds that investors spend 0.67 percent of aggregate U.S. stock market value each year searching for superior return, and characterizes this as society's cost of price discovery.

[33] Both of these hypotheses are also consistent with literature finding a negative link between sophistication and expenses.

fund managers' interests, thereby generating inefficiently high profits for either or both. Others disagree, believing that investors efficiently derive a combination of financial and intangible benefits for their expense dollars.[34]

In light of this literature and public commenters, the Department believes that the available research provides an insufficient basis to confidently determine whether or to what degree participants pay inefficiently high investment prices. Market conditions that may lead to inefficiently high prices—namely imperfect information, search costs and investor behavioral biases—certainly exist in the retail IRA market and likely exist to some degree in particular segments of the DC plan market. The Department believes there is a strong possibility that at least some participants pay inefficiently high investment prices. If so, the Department would expect these actions to reduce that inefficiency. This would increase participants' welfare by transferring surplus from producers of investment products and services to them and by reducing dead weight loss. The Department additionally believes that even where investment prices are efficient, participants often make bad investment decisions with respect to expenses—that is, they buy investment products and services whose marginal cost exceed the associated marginal benefit to them.[35] The Department expects these actions to reduce such investment errors, improving participant and societal welfare. However, the Department has no basis

[34] The following is a sampling of findings and interpretations reported in various studies that the Department reviewed. The Department observes that some of these studies have been published in peer-reviewed journals, while others have not. Some are working papers subject to later revision. Some research is visibly supported by industry or other interests, and some may be independent. Very little of this research separately examines DC plan investing. Nearly all of it examines mutual fund markets to the exclusion of certain competing insurance company or bank products. Some of it examines foreign experience. The Department believes it must be cautious in drawing inferences from this research as to whether investment prices paid by participants are efficient.

Daniel B. Bergstresser *et al., Assessing the Costs and Benefits of Brokers in the Mutual Fund Industry,* Social Science Research Network Abstract 616981 (Sept. 2007) find that investors who pay to purchase funds via intermediaries realize inferior returns, and say this result is consistent with either intangible benefits for investors or inefficiently high prices due to conflicts.

Ralph Bluethgen *et al., Financial Advice and Individual Investors' Portfolios,* Social Science Research Network Abstract 968197 (Mar. 2008) find that advisers (who are mostly compensated by commission) improve diversification and allocation across classes while increasing fees and turnover. They say these findings are consistent with "honest advice."

Susan Christoffersen *et al., The Economics of Mutual-Fund Brokerage: Evidence from the Cross Section of Investment Channels,* Science Research Network Abstract 687522 (Dec. 2005) identify some financial benefits reaped by investors who pay to invest through intermediaries.

Sean Collins, *Fees and Expenses of Mutual Funds, 2006,* Investment Company Institute Research Fundamentals, Volume 16, Number 2 (June 2007) reports that mutual fund fees and expenses are declining.

Sean Collins, *Are S&P 500 Index Mutual Funds Commodities?,* Investment Company Institute Perspective, Volume 11, Number 3 (Aug. 2005) argues that S&P 500 index funds are not uniform commodities. For example, they are distributed in different ways. He finds that 91 percent of the variation in these funds' expense ratios can be explained by a combination of fund asset size, investor account size, fee waivers and separate fees, and investor advice that is bundled into expense ratios. He argues that these funds competitively pass economies of scale along to investors, and reports that assets and flows are concentrated in low-cost funds.

Henrik Cronqvist, *Advertising and Portfolio Choice,* Social Science Research Network Abstract 920693 (July 26, 2006) finds that fund advertising steers investors toward "portfolios with higher fees, more risk, more active management, more 'hot' sectors, and more home bias." He suggests that "with the use of advertising, funds can differentiate themselves and therefore charge investors higher fees than the lowest-cost supplier in the industry."

Daniel N. Deli, *Mutual Fund Advisory Contracts: An Empirical Investigation,* The Journal of Finance, Volume 57, Number 1, 109–133 (Feb. 2002) finds that differences in investment advisers' marginal compensation reflect differences in their marginal product, difficulty in measuring adviser performance, control environments, and scale economies. Based on this finding, he suggests that investment prices are efficient and recommends caution in any regulatory effort to influence such prices.

Edwin J. Elton *et al., Are Investors Rational? Choices Among Index Funds,* The Journal of Finance, Volume 59, Number 1, 261–288 (Feb. 2004) find that flows into high expense (and therefore predictably low performance) S&P 500 index mutual funds are higher than would be expected in an efficient market. They conclude that because investors are not perfectly informed and rational, inferior products can prosper. Commenters, however, contend that because the authors scaled flows by fund size and smaller funds have higher expenses, these findings exaggerate the degree to which flows are directed to high expense funds.

Javier Gil-Bazo & Pablo Ruiz-Verdú, *Yet Another Puzzle? Relation Between Price and Performance in the Mutual Fund Industry,* Social Science Research Network Abstract 947448 (March 2007) find that "funds with worse before-fee performance charge higher fees." They hypothesize that lower performing funds lose sophisticated investors to higher performing funds, then are left with relatively unsophisticated investors who are not as responsive to price.

John A. Haslem *et al., Performance and Characteristics of Actively Managed Retail Equity Mutual Funds with Diverse Expense Ratios,* Financial Services Review, Volume 17, Number 1, 49–68 (2008) find that funds with lower expenses have superior returns. John A. Haslem *et al., Identification and Performance of Equity Mutual Funds with High Management Fees and Expense Ratios,* Journal of Investing, Volume 16, Number 2 (2007) find that certain performance measures vary negatively with fees and, on that basis, suggest that mutual funds do not compete strongly on price and that expenses are too high.

Sarah Holden & Michael Hadley, *The Economics of Providing 401(k) Plans: Services, Fees and Expenses 2006,* Investment Company Institute Research Fundamentals, Volume 16, Number 4 (Sept. 2007) report that 401(k) mutual fund investors tend to pay lower than average expenses and that 401(k) assets are concentrated in low cost funds.

Ali Hortacsu & Chad Syverson, *Product Differentiation, Search Costs, and Competition in the Mutual Fund Industry: A Case Study of S&P 500 Index Funds,* Quarterly Journal of Economics, 403 (May 2004) document dispersion in S&P 500 Index Fund expense ratios, and report that low-cost funds have a dominant, but falling, market share. They conclude that an influx of novice investors who must defray search costs explains dispersion in expenses and flows to high expense funds.

Todd Houge & Jay W. Wellman, *The Use and Abuse of Mutual Fund Expenses,* Social Science Research Network Abstract 880463 (Jan. 2006) find that load funds charge higher 12b–1 and management fees. They attribute this to abusive market segmentation that extracts excessive fees from unsophisticated investors.

Giuliano Iannotta & Marco Navone, *Search Costs and Mutual Fund Fee Dispersion,* Social Science Research Network Abstract 1231843 (Aug. 2008) analyze the effect of search costs on mutual fund fees with data on broad U.S. domestic equity funds. They estimate the portion of the expense ratio that is not justified by the quality of service provided, by the cost structure of the investment company, or by the specificities of the clientele served by the fund and find that its dispersion is lower for highly visible funds and for funds that invest heavily in marketing. In the case of the U.S. mutual fund market, they argue, the dispersion of this residual demonstrates the extent to which some firms can charge a "non-marginal" (that is higher than competitive) price.

Marc M. Kramer, *The Influence of Financial Advice on Individual Investor Portfolio Performance,* Social Science Research Network Abstract 1144702 (Mar. 2008) finds that advised investors take less risk and thereby reap lower returns. Risk-adjusted performance is similar. Adjusting further for investor characteristics, advised investors perform slightly worse.

Erik R. Sirri & Peter Tufano, *Costly Search and Mutual Fund Flows,* The Journal of Finance, Volume 53, Number 5, 1589–1622 (Oct. 1998) find that investors are "fee sensitive in that lower-fee funds and funds that reduce fees grow faster." Investors' fee sensitivity is not symmetric, however.

Edward Tower & Wei Zheng, *Ranking Mutual Fund Families: Minimum Expenses and Maximum Loads as Markers for Moral Turpitude,* Social Science Research Network Abstract 1265103 (Sept. 2008) find a negative relationship between expense ratios and gross performance.

The *Division of Investment Management: Report on Mutual Fund Fees and Expenses,* U.S. Securities and Exchange Commission (Dec. 2000), at *http://www.sec.gov/news/studies/feestudy.htm* describes mutual fund fees and expenses and identifies major factors that influence fee levels but does not assess whether prices are efficient.

Xinge Zhao, *The Role of Brokers and Financial Advisors Behind Investment Into Load Funds,* China Europe International Business School Working Paper (Dec. 2005), at *http://www.ceibs.edu/faculty/zxinge/brokerrole-zhao.pdf* finds that funds with higher loads receive higher flows, and suggests that conflicted intermediaries enrich themselves at investors' expense.

[35] It is possible that the converse could sometimes occur: Participants might fail to buy efficiently priced products and services whose marginal cost lags the associated marginal benefit to them. In that case advice, by correcting this error, might lead to higher expenses, but would still improve welfare. Because research suggests that participants are insensitive to fees rather than excessively sensitive to them the Department believes that this converse situation is likely to be rare.

on which to quantify such errors or improvements.

In addition to the benefits that participants will derive from the disclosure of investment-related information in a comparative format, they also will benefit from a retrospective disclosure of plan administrative fees actually charged to their accounts in the prior quarter. Previous RFI comments from participant advocates, plan sponsors and service providers support such a disclosure requirement.[36] However, one comment to the contrary on behalf of service providers was received by the Department in response to the proposal. The commenter expressed concern that "the value of quarterly statements to the participant does not justify the cost of providing the data."[37] The Department continues to believe, as it did in connection with the proposal, that participants who are trying to plan for retirement are entitled to a comprehensive disclosure that includes not only information about fee and expenses that may occur depending on investment options selected, but also information on other fees that were actually assessed against their accounts in the previous quarter. Information about actual charges to participants' accounts may, among other things, help participants understand their current reported account balance, detect errors in prior charges by the plan, handle general household budgeting and retirement planning, and insure that the charges are reasonable. In addition, this information already should be available in some form as part of ordinary plan recordkeeping that tracks participant account balances.

4. Costs

The Department estimates that the regulation may result in the following additional administrative burdens and costs[38] for plans (or plan sponsors).[39]

a. Costs Due to Upfront Review and Updating of Plan Documents

In the RIA of the proposal, the Department estimated costs of about $30.3 million for participant-directed individual accounts plans to review the regulation upfront and to prepare the disclosures. Using updated in-house labor rates for professional and clerical employees, the Department has increased the estimated costs to about $35.0 million in 2012. Costs to update plan documents to take into account plan changes, such as new investment alternatives, changes in general plan administrative expenses, and changes in individual expenses are estimated to be approximately $20.3 million in subsequent years.

b. Costs Due to Production of Quarterly Dollar Amount Disclosures

The final regulation will require plan administrators to send out disclosures about administrative charges to participants' accounts and engage in recordkeeping on both a plan-wide as well as a participant-specific basis. The Department estimates that the cost to produce the actual dollar disclosure is approximately $30.5 million for 2012[40] and $10.7 million in subsequent years.

c. Costs Due to Assembling Required Information for Chart and Web Site

Additional administrative burdens and costs are likely to arise because of the need for plans to consolidate information from more than one source to prepare the required comparative chart. In the proposal, the Department estimated that it takes a person with a financial background about one hour per plan to consolidate the information from multiple sources for the comparative chart. The Department acknowledges that some plans with non-mutual fund designated investment alternatives may require more time to prepare the required information for the chart and the Web site. Therefore, the Department has quintupled the time estimate to five hours per plan, on average, for the first year and quadrupled the time estimate to four hours per plan, on average, for subsequent years. This results in estimated costs for the consolidation of fee information from multiple sources of approximately $151.5 million in 2012 and $121.2 million in subsequent years.[41]

d. Costs Due to the Web Site Requirement

The regulation does not require plans to create and maintain a Web site. Rather, paragraph (d)(1)(v) of the rule requires plan administrators to disclose on the required comparative chart an Internet Web site address that is sufficiently specific to lead participants to supplemental information about each investment option offered under the plan. The Department received comments that many non-mutual fund products may not presently maintain a Web site, therefore additional costs will be incurred. In response to these comments, the Department has quantified the cost of creating and maintaining a Web site, below as an upper bound.

For purposes of quantifying the cost of creating and maintaining a Web site, the Department assumes that about 50 percent of plans, or employers sponsoring such plans, already maintain a Web site where plan information may be found.[42] For these plans, some information will likely be required to be added to existing Web sites, which will have to be updated periodically. The Department assumes that 241,000 plans, or employers sponsoring such plans, already maintain Web sites with plan-related information and that for each such plan on average, an IT professional will spend one hour updating the Web site for the required information. In addition, the Department assumes that the plan will update the information about three additional times during the year, which will require one-half hour of an IT professional's time for each update. The estimated 241,000 plans that do not currently maintain a Web site with plan information will require, on average, two hours of an IT professional's time to create a basic Web site and one-half hour to update the information on the Web site three times in the first year.[43] In addition, the 241,000 plans presently without Web sites will have to rent server space. This is estimated to cost plans, on average, $240 a year, resulting in an aggregate cost of $159.4 million in the first year to create and update Web sites.

In subsequent years, only new plans will incur the cost of developing a Web

[36] These comments on the RFI can be found under *http://www.dol.gov/ebsa/regs/cmt-feedisclosures.html.*

[37] Comments on the proposal can be found under *http://www.dol.gov/ebsa/regs/cmt-fiduciaryrequirements.html.*

[38] The Department's estimate of these costs are highly uncertain, discussed in more detail in the Uncertainty section, reflecting especially uncertainty about the average time plans will spend on performing their task.

[39] For purposes of this analysis the Department assumes that these costs are borne by plans, even though they might be initially incurred by service providers.

[40] The Department did not account for additional paper costs, given that no additional pages need be added as long as this information is included as part of the quarterly benefit statement.

[41] This number also includes a small update of the in-house wage rate for a financial professional.

[42] The Department lacks representative survey information on the number of plans that have a Web site, but believes that an average rate of 50 percent is reasonable. In estimating this rate, the Department has taken into account that plans that offer only non-mutual fund options might not have Web sites currently and that plans that offer a combination of mutual funds and non-mutual fund investment options are less likely to have Web sites than plans offering only mutual funds. In addition, commenters estimated that about half of plans use a third party administrator or independent record keeper. Due to this uncertainty, the Department's estimate of the resulting costs is also highly uncertain.

[43] The hourly labor cost of an IT professional is assumed to be $70.

site. Existing plans are assumed to update the information on the Web site four times per year requiring one-half hour of an IT professional's time for each update. Plans also will incur server space rental cost estimated at $240 per plan, resulting in a total cost in each subsequent year of $142.6 million.

e. Costs of Distribution and Materials for Disclosures

The final rule's required disclosures, as well as any materials the plan receives regarding voting, tender or similar rights ("pass-through materials"), are usually sent to plan participants on an annual or quarterly basis.[44] Using updated in-house wage rates, this leads to an estimate of about $39.2 million in labor costs.[45] Plans will also bear materials and postage costs of about $9.0 million in 2012. The Department believes that plans have pass-through materials readily available for participants who must receive such disclosures; therefore, it has attributed no cost to gather this information.

In total, the Department estimates that in 2012, participant-directed individual account plans will incur increased administrative costs of approximately $424.6 million.

f. Discouragement of Some Employers From Sponsoring a Retirement Plan

Increased administrative burdens may discourage some employers, particularly small employers, from sponsoring a retirement plan. For small plan sponsors, the administrative burden is felt disproportionately because of their limited resources. Small business owners who do not have the resources to analyze plan fees or to hire an analyst may be discouraged from offering a plan at all.

Regulatory burden is one among many reasons small businesses do not to sponsor a retirement plan. According to the 2000, 2001, and 2002 Employee Benefit Research Institute (EBRI)'s Small Employer Retirement Surveys, about 2.7 percent of small employers cited "too many government regulations" as the most important reason they do not offer a retirement plan.[46] A commenter on the proposed rule supported this assertion, but did not provide a specific estimate of its impact. Due to very limited data on this issue, the Department is not able to quantify its impact.[47]

g. Summary of Costs

The quantified total costs are shown in Table 3 below. Column (A) reports the estimated costs of up-front review of the regulation, Column (B) reports the costs to update plan documents, and Column (C) reports the cost to produce quarterly dollar amounts for administrative fees charged to participant accounts. The cost to assemble the required information, create and update Web sites, and associated distribution and material costs are reported in columns (D), (E), (F) and (G). The total present value of these costs is estimated at $2.7 billion over the ten year period 2012 to 2021. As discussed in more detail in the uncertainty section below, a range of possible cost estimates was constructed by decreasing and increasing key cost assumptions by 50 percent. This led to a range for the cost estimates of $2.0 to $3.3 million.

TABLE 3—TOTAL DISCOUNTED COSTS OF PROPOSAL REPORTED IN $MILLIONS/YEAR

Year	Up-front review cost	Update plan documents	Production of quarterly dollar amount disclosures	Assembling the required chart and Web site information	Creation/ updating of Web site	Distribution materials costs	Staff cost to distribute disclosures	Total costs
	(A)	(B)	(C)	(D)	(E)	(F)	(G)	A+B+C+D+E+F+G
2012	35.0	0.0	30.5	151.5	159.4	9.0	39.2	424.6
2013	5.1	13.8	10.0	113.3	133.3	8.4	36.6	320.5
2014	4.8	12.9	9.3	105.9	124.6	7.9	34.2	299.6
2015	4.5	12.1	8.7	99.0	116.4	7.4	32.0	280.0
2016	4.2	11.3	8.1	92.5	108.8	6.9	29.9	261.7
2017	3.9	10.5	7.6	86.4	101.7	6.4	27.9	244.5
2018	3.7	9.8	7.1	80.8	95.0	6.0	26.1	228.5
2019	3.4	9.2	6.6	75.5	88.8	5.6	24.4	213.6
2020	3.2	8.6	6.2	70.6	83.0	5.2	22.8	199.6
2021	3.0	8.0	5.8	65.9	77.6	4.9	21.3	186.6
Total with 7% Discounting								2,659.2
Total with 3% Discounting								3,095.1

Note: The displayed numbers are rounded and therefore may not add up to the totals.

h. Uncertainty in the Cost Estimates

Although the Department made adjustments to the analysis in response to comments, the Department remains uncertain regarding the exact magnitude of the costs of these changes. The variables with the most uncertainty in the cost estimates are:

[44] As in the RIA of the proposal, this section does not include distribution or material costs for the disclosures of administrative fees charged to participants' accounts as the Department assumes that this information can be included as part of the quarterly benefit statement.

[45] Some of this information is already required for 404(c) compliant plans and by the Department's Qualified Default Investment Alternative regulation. In addition, a large majority of plans voluntarily provide this information to its participants. As a result, the Department estimates that only 577,000 participants will receive this information for the first time because of the final regulation, and 38% percent of participants will receive the information electronically.

[46] The survey defines small employers as those having up to 100 full-time workers. Other reasons small employers do not offer a retirement plan are that workers prefer wages or other benefits, that a large portion of employees are seasonal, part-time, or high turnover, and that revenue is too low or uncertain. *See http://www.ebri.org/surveys/sers* for more detail.

[47] It also is possible that rather than discouraging employers from sponsoring or continuing to sponsor a retirement plan, increased administrative burden could instead influence some employers to offer less investment options in their participant-directed individual account plans.

- The time required for legal professionals, clerical professionals [48] and accountants to perform their tasks;
- The cost to obtain the actual dollar amounts of participant's administrative and individual expenses; and
- The labor cost to create and maintain Web sites.

To estimate the influence of these variables on the analysis, the Department re-estimated the costs of the final regulation under different assumptions for these uncertain variables. Increasing the variables of concern by 25 percent resulted in a present value of $3.0 billion. Increasing the variables by 50 percent resulted in a present value of $3.3 billion. Increasing the key variables by 75 percent results in a $3.6 billion present value for the final regulation.

5. Net Benefits

As the analysis above shows, our low end benefit estimate of $7.2 billion exceeds our high end cost estimate of $3.3 billion. Thus, the Department remains highly confident in its conclusion expressed in the RIA for the proposal that increased fee disclosure can induce changes in participant behavior and reductions in plan fees. Several public comments on the proposal reinforce these conclusions.

6. Comments and Revisions

The Department received several comments questioning various assumptions on which its estimates of the benefits were based and suggesting that it had underestimated the costs of the proposal. In response to these comments, as discussed above, the Department reevaluated the quantified benefits resulting from a reduction of fees and increased its estimate of the costs to account for the creation and updating of Web sites and the complexity of retrieving the information needed to produce the comparative chart and obtain required supplemental information. In addition, the Department updated its estimates of labor costs.

7. Alternatives

In formulating this final rule, the Department considered several alternative approaches, which are discussed in detail in the RIA of the proposal. The Department did not adopt any of the alternatives discussed in the RIA of the proposal, because it did not receive any sufficiently persuasive comments suggesting that it should. Some commenters suggested alternatives the Department had not considered. For example, a commenter suggested that plans should be allowed to provide supplemental information required to be disclosed by the rule in a written document rather than on a Web site, because many companies do not have access to a Web site. Another, commenter asked the Department to clarify whether the proposal applies to IRAs that provide for employer contributions—that is, "Simplified Employee Pension Retirement Account" (SEP) and "Savings Incentive Match Plan for Employees" (SIMPLE) plans. The Department did not adopt the first commenter's suggestion, but it did clarify in the final rule that SEP and SIMPLE IRAs are excluded from the rule. The Department's decisions regarding these regulatory alternatives are discussed earlier in this preamble.

8. Final Regulatory Flexibility Analysis

The Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*) (RFA) imposes certain requirements with respect to Federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C. 551, *et seq.*) and which are likely to have a significant economic impact on a substantial number of small entities. At the proposed rule stage, the Department prepared an initial RFA analysis, because it did not have enough information to certify that the rule would not have a significant effect on a substantial number of small entities, although the Department stated that it considered it unlikely that the proposed rule would significantly affect such entities.

In connection with the final rule, the Department has prepared a final RFA in compliance with section 604 of the RFA. For purposes of this analysis, EBSA continues to consider a small entity to be an employee benefit plan with fewer than 100 participants. The basis of this definition is found in section 104(a)(2) of ERISA, which permits the Secretary to prescribe simplified annual reports for pension plans that cover fewer than 100 participants. The Department used this standard in the proposed rule and consulted with the Small Business Administration Office of Advocacy concerning its use of this standard for RFA purposes and requested public comments on this issue. The Department did not receive any comments that addressed its use of the participant count standard.

The following subsections address specific requirements of the RFA.

a. Need for and Objectives of the Rule

With the proliferation of participant-directed individual account plans, such as 401(k) plans, which afford participants and beneficiaries the opportunity to direct the investment of all or a portion of the assets held in their individual plan accounts, participants and beneficiaries are increasingly responsible for making their own retirement savings decisions. This increased responsibility has led to a growing concern that participants and beneficiaries may not have access to, or if accessible, may not be considering information critical to making informed decisions about the management of their accounts, particularly information on investment choices, including attendant fees and expenses. This rule requires participants and beneficiaries to be provided investment-related information in a form that encourages and facilitates a comparative review among investment options. The Department believes that the rule will provide beneficial information to participants and beneficiaries that will allow them to make informed decisions with regard to investing assets in their individual accounts.

The reasons for and objectives of this final regulation are discussed in detail in Section A of this preamble, "Background," and in section "Need for Regulatory Action" of the Regulatory Impact Analysis (RIA) above. The legal basis for the rule is set forth in the "Authority" section of this preamble, below.

b. Public Comments

A public comment on the proposed rule suggested that the Department underestimated the cost to small service providers to comply with the proposed rule. Specifically, the commenter stated that the Department underestimated the time required for an attorney or other legal professional to review the rule and the disclosures, and the hourly rate for an attorney to perform this service. In response to the first comment, the Department would like to clarify that the time estimate for legal review is an average estimate spread across all plans that must comply with the rule and is not the time estimate that is applicable only to small plans. With regard to the second issue, the Department would like to clarify that the estimated hourly wage rate is not a billable rate; it is an in-house wage rate that includes profit or overhead and is based on the National Occupational Employment Survey (May 2008, Bureau of Labor Statistics) and the Employment Cost Index (June, 2009, Bureau of Labor

[48] The clerical time to distribute disclosures remains unchanged in this sensitivity analysis.

Statistics), which is the most reliable data the Department has to support its cost estimates. The commenter also stated that the Department underestimated the time small plan sponsors will have to spend gathering information to comply with the disclosure requirements of the final rule. As further discussed under the Cost section of the RIA, the Department has increased its estimate of the hours it will to take to gather and consolidate information required for the disclosure from one hour to four hours.

Finally, the commenter implored the Department to apply a delayed effective date for small plans of at least one year following the effective date for large plans in order to allow such plans to develop the systems necessary to comply with the disclosure requirements of the final rule. While the Department did not adopt the commenter's suggestion, as stated above in the preamble, the Department has set January 1, 2012, as the applicability date for calendar year plans to comply with the rule, which should provide plans with sufficient time to develop the necessary systems for compliance.

c. Affected Small Entities

The Department estimates that the final rule will apply to approximately 419,000 small plans covering approximately 9.5 million participants.

d. Estimating Compliance Requirements for Small Entities/Plans

The Department continues to believe that the effects of this final rule will be to increase retirement savings by providing participants and beneficiaries with enhanced information about their plans, which is expected to allow them to make more informed investment decisions. The Department also believes that small plans will benefit from the rule, because it will clarify the information that must be disclosed to plan participants in order for plan fiduciaries to meet their fiduciary duty under ERISA.

While small and large plans will incur administrative costs due to the final rule, these costs are reasonable compared to the benefits and will probably be borne by the participants who will also receive the benefits under the rule. From industry comments, the Department inferred that participants in larger plans, more often than participants in smaller plans, have access to needed investment information. The Department continues to believe that participants in small plans need as much information about their plan investments as participants in larger plans.

Assuming that the plan incurs the average costs for all disclosure activities that are considered in the RIA section above, the following calculation illustrates how large the costs of the disclosures would be for a very small plan (one-participant plan). As can be seen in Table 4, the total cost of compliance for a one-participant plan amounts to less than $873 in the first year and less than that amount in the subsequent years. The costs in 2012 include a review cost of about $73 per plan (one-half hour of a legal professional's time plus one-half hour of a clerical professional's time), labor costs of $314 for consolidating the information for the comparative chart (five hours), costs of, on average, $485 for the creation and maintenance of a Web site, $0.40 per participant for recordkeeping and disclosure of information, additional annual labor cost for distribution of $0.90 in section 404(c) compliant plans or plans that already provide similar information ($1.50 in plans that do not already provide section 404(c) compliant or similar information), and material and postage costs of $0.15 in 404(c) compliant plans or plans that already provide similar information ($2.40 in plans that do not already provide section 404(c) compliant or similar information).

These cost estimates should be considered an estimate of the upper bound on plan expenses. To the extent that small plans rely on third party administrators or independent record keepers that have economies of scale, plan costs could be lower. To the extent that plans use record keepers that already provide plan Web sites changes by the record keeper to comply with the final rule will likely impose few, if any, additional costs for plans. In addition, if plans use investment alternatives like mutual funds that already provide much of the required information, Web site costs would be less, as would the cost to gather information for the Web site and the comparative chart.

Small plans may be able to find lower cost options to comply with the rule. If, for example, server space for the Web site is provided by the service provider at almost no cost and the plan is not required to spend as much time gathering the required information because it chose plan options for which the information is more readily available, a one-participant plan could experience first year costs of $310 and $240 in subsequent years.

TABLE 4—COSTS FOR ONE-PARTICIPANT PLAN (UNDISCOUNTED)

Type of cost	404(c) plans and plans with similar information		Non-404(c) plans without similar information	
	Initial year	Subsequent year	Initial year	Subsequent year
Plan Review	73	36	73	36
Consolidation of Information	314	251	314	251
Cost of Web site	485	380	486	381
Actual Dollar Disclosure	0.40	0.15	0.40	0.15
Labor Cost for Distribution	0.90	0.90	1.50	1.50
Material Cost	0.15	0.15	2.40	2.40
Total	$873	$669	$876	$672

The displayed numbers are rounded and therefore may not add up to the totals.

e. Duplicative, Overlapping, and Conflicting Rules

ERISA section 404(c) and the regulations thereunder contain disclosure requirements for plan fiduciaries of certain participant-directed account plans that are to some extent similar to the ones that are contained in the proposed regulation. As explained in more detail in the Background section of this preamble, the Department amended the regulations under section 404(c) in order to establish a uniform set of basic disclosure requirements and to ensure

that all participants and beneficiaries in participant-directed individual account plans have access to the same investment-related information.

In addition, the Department has consulted with the Securities and Exchange Commission to avoid duplicative, overlapping, or conflicting requirements. The Department is unaware of any additional relevant Federal rules for small plans that duplicate, overlap, or conflict with this final rule.

9. Paperwork Reduction Act

In accordance with the requirements of the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)), the proposed rule solicited comments on the information collections included therein. The Department also submitted an information collection request (ICR) to OMB in accordance with 44 U.S.C. 3507(d), contemporaneously with the publication of the proposal for OMB's review. No public comments were received that specifically address the paperwork burden analysis of the information collections.

The Department submitted an ICR to OMB for its request of a new information collection. OMB approved the ICR on October 5, 2010, under OMB Control Number 1210–0090, which will expire on October 31, 2013.

The final rule requires plan- and investment-related fee and expense information to be disclosed to participants and beneficiaries in participant-directed individual account plans. This ICR pertains to two categories of information that are required to be disclosed: "Plan-related" and "investment-related" information. The information collection provisions of the rule are intended to ensure that fiduciaries provide participants and beneficiaries with sufficient information regarding plan fees and expenses and designated investment alternatives to make informed decisions regarding the management of their individual accounts. The calculation of the estimated hour and cost burden of the ICR were discussed in detail in the proposed rule and are summarized below.

The Department estimates that disclosing and distributing plan- and investment-related information to participants and beneficiaries as required by the rule will require approximately 6.6 million burden hours with an equivalent cost of approximately $347 million and a cost burden of approximately $221 million in the first year. In each subsequent year, the total labor burden hours are estimated to be approximately 5.5 million hours with an equivalent cost of approximately $275 million and the cost burden is estimated at approximately $201 million per year.

The Department's estimate of the total burden in the final rule has increased from the proposal due to four factors: (1) Counts of plans and participants were updated to account for more recent data; (2) wage rates were updated to account for more recent data; (3) the hour and cost burden associated with creating and maintaining a Web site to comply with the regulatory requirements was added; and (4) the estimate of the average hour burden to gather information for the comparative chart and Web site was increased. The first two changes resulted only in a slightly higher burden, while the other two changes increased the burden significantly as discussed in more detail below.

Increased burden due to Web site requirement: The estimated burden includes 1.4 million burden hours ($101 million in equivalent costs) in the first year, and 1.1 million burden hours ($76 million equivalent costs) in subsequent years for plans to engage an information technology professional to comply with the rule's requirement for plans to provide a Web site to disclose supplemental information to participants and beneficiaries. The estimated annual cost of the Web site is approximately $116 million. This hour and cost burden associated with providing a plan Web site was not estimated at the proposed rule stage.

Increased burden due to increase in average hour burden estimate of gathering information for the comparative chart and Web site: The estimated burden reported above also includes 1.9 million in added burden hours in the first year ($121 million in added equivalent costs) to consolidate information from multiple sources for the comparative chart and Web site. In the proposal, the Department estimated that this requirement could take, on average, one hour per plan; in response to comments, the final RIA uses an estimate of five hours, on average, per plan in the first year, and four hours, on average in subsequent years.

These paperwork burden estimates are summarized as follows:

Type of Review: New collection (Request for new OMB Control Number).

Agency: Employee Benefits Security Administration, Department of Labor.

Titles: Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans.

Affected Public: Business or other for-profit, not-for-profit institutions.

Estimated Number of Respondents: 483,000.

Estimated Number of Annual Responses: 738,207,000.

Frequency of Response: Initially, Annually, Upon Request, Updating.

Estimated Total Annual Burden Hours: 6,583,000 hours in the first year; 5,520,000 in each subsequent year.

Estimated Total Annual Burden Cost: $221,040,000 for the first year; $201,225,000 for each subsequent year.

10. Congressional Review Act

The final rule is subject to the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*) and will be transmitted to Congress and the Comptroller General for review. The final rule is a "major rule" as that term is defined in 5 U.S.C. 804, because it is likely to result in an annual effect on the economy of $100 million or more.

11. Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), as well as Executive Order 12875, the final rule does not include any Federal mandate that may result in expenditures by State, local, or Tribal governments in the aggregate of more than $100 million, adjusted for inflation, or increase expenditures by the private sector of more than $100 million, adjusted for inflation.

12. Federalism Statement

Executive Order 13132 (August 4, 1999) outlines fundamental principles of federalism, and requires the adherence to specific criteria by Federal agencies in the process of their formulation and implementation of policies that have substantial direct effects on the States, the relationship between the national government and States, or on the distribution of power and responsibilities among the various levels of government. The final rule does not have federalism implications because it has no 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. Section 514 of ERISA provides, with certain exceptions specifically enumerated, that the provisions of Titles I and IV of ERISA supersede any and all laws of the States as they relate to any employee benefit plan covered under ERISA.

List of Subjects in 29 CFR Part 2550

Employee benefit plans, Fiduciaries, Investments, Pensions, Disclosure,

Reporting and recordkeeping requirements, and Securities.

■ For the reasons set forth in the preamble, the Department is amending Subchapter F, Part 2550 of Title 29 of the Code of Federal Regulations as follows:

Subchapter F—Fiduciary Responsibility Under the Employee Retirement Income Security Act of 1974

PART 2550—RULES AND REGULATIONS FOR FIDUCIARY RESPONSIBILITY

■ 1. The authority citation for part 2550 continues to read as follows:

Authority: 29 U.S.C. 1135; sec. 657, Pub. L. 107–16, 115 Stat.38; and Secretary of Labor's Order No. 1–2003, 68 FR 5374 (Feb. 3, 2003). Sec. 2550.401b–1 also issued under sec. 102, Reorganization Plan No. 4 of 1978, 43 FR 47713 (Oct. 17, 1978), 3 CFR, 1978 Comp. 332, effective Dec. 31, 1978, 44 FR 1065 (Jan. 3, 1978), 3 CFR, 1978 Comp. 332. Sec. 2550.401c–1 also issued under 29 U.S.C. 1101. Sections 2550.404c–1 and 2550.404c–5 also issued under 29 U.S.C. 1104. Sec. 2550.407c–3 also issued under 29 U.S.C. 1107. Sec. 2550.408b–1 also issued under 29 U.S.C. 1108(b)(1) and sec. 102, Reorganization Plan No. 4 of 1978, 3 CFR, 1978 Comp. p. 332, effective Dec. 31, 1978, 44 FR 1065 (Jan. 3, 1978), and 3 CFR, 1978 Comp. 332. Sec. 2550.412–1 also issued under 29 U.S.C. 1112.

■ 2. Add § 2550.404a–5 to read as follows:

§ 2550.404a–5 Fiduciary requirements for disclosure in participant-directed individual account plans.

(a) *General.* The investment of plan assets is a fiduciary act governed by the fiduciary standards of section 404(a)(1)(A) and (B) of the Employee Retirement Income Security Act of 1974, as amended (ERISA), 29 U.S.C. 1001 *et seq.* (all section references herein are references to ERISA unless otherwise indicated). Pursuant to section 404(a)(1)(A) and (B), fiduciaries must discharge their duties with respect to the plan prudently and solely in the interest of participants and beneficiaries. When the documents and instruments governing an individual account plan, described in paragraph (b)(2) of this section, provide for the allocation of investment responsibilities to participants or beneficiaries, the plan administrator, as defined in section 3(16), must take steps to ensure, consistent with section 404(a)(1)(A) and (B), that such participants and beneficiaries, on a regular and periodic basis, are made aware of their rights and responsibilities with respect to the investment of assets held in, or contributed to, their accounts and are provided sufficient information regarding the plan, including fees and expenses, and regarding designated investment alternatives, including fees and expenses attendant thereto, to make informed decisions with regard to the management of their individual accounts.

(b) *Satisfaction of duty to disclose.* (1) In general. The plan administrator of a covered individual account plan must comply with the disclosure requirements set forth in paragraphs (c) and (d) of this section with respect to each participant or beneficiary that, pursuant to the terms of the plan, has the right to direct the investment of assets held in, or contributed to, his or her individual account. Compliance with paragraphs (c) and (d) of this section will satisfy the duty to make the regular and periodic disclosures described in paragraph (a) of this section, provided that the information contained in such disclosures is complete and accurate. A plan administrator will not be liable for the completeness and accuracy of information used to satisfy these disclosure requirements when the plan administrator reasonably and in good faith relies on information received from or provided by a plan service provider or the issuer of a designated investment alternative.

(2) *Covered individual account plan.* For purposes of paragraph (b)(1) of this section, a "covered individual account plan" is any participant-directed individual account plan as defined in section 3(34) of ERISA, except that such term shall not include plans involving individual retirement accounts or individual retirement annuities described in sections 408(k) ("simplified employee pension") or 408(p) ("simple retirement account") of the Internal Revenue Code of 1986.

(c) *Disclosure of plan-related information.* A plan administrator (or person designated by the plan administrator to act on its behalf) shall provide to each participant or beneficiary the plan-related information described in paragraphs (c)(1) through (4) of this section, based on the latest information available to the plan.

(1) *General.* (i) On or before the date on which a participant or beneficiary can first direct his or her investments and at least annually thereafter:

(A) An explanation of the circumstances under which participants and beneficiaries may give investment instructions;

(B) An explanation of any specified limitations on such instructions under the terms of the plan, including any restrictions on transfer to or from a designated investment alternative;

(C) A description of or reference to plan provisions relating to the exercise of voting, tender and similar rights appurtenant to an investment in a designated investment alternative as well as any restrictions on such rights;

(D) An identification of any designated investment alternatives offered under the plan;

(E) An identification of any designated investment managers; and

(F) A description of any "brokerage windows," "self-directed brokerage accounts," or similar plan arrangements that enable participants and beneficiaries to select investments beyond those designated by the plan.

(ii) If there is a change to the information described in paragraph (c)(1)(i)(A) through (F) of this section, each participant and beneficiary must be furnished a description of such change at least 30 days, but not more than 90 days, in advance of the effective date of such change, unless the inability to provide such advance notice is due to events that were unforeseeable or circumstances beyond the control of the plan administrator, in which case notice of such change must be furnished as soon as reasonably practicable.

(2) *Administrative expenses.* (i)(A) On or before the date on which a participant or beneficiary can first direct his or her investments and at least annually thereafter, an explanation of any fees and expenses for general plan administrative services (*e.g.,* legal, accounting, recordkeeping), which may be charged against the individual accounts of participants and beneficiaries and are not reflected in the total annual operating expenses of any designated investment alternative, as well as the basis on which such charges will be allocated (*e.g.,* pro rata, per capita) to, or affect the balance of, each individual account.

(B) If there is a change to the information described in paragraph (c)(2)(i)(A) of this section, each participant and beneficiary must be furnished a description of such change at least 30 days, but not more than 90 days, in advance of the effective date of such change, unless the inability to provide such advance notice is due to events that were unforeseeable or circumstances beyond the control of the plan administrator, in which case notice of such change must be furnished as soon as reasonably practicable.

(ii) At least quarterly, a statement that includes:

(A) The dollar amount of the fees and expenses described in paragraph (c)(2)(i)(A) of this section that are

actually charged (whether by liquidating shares or deducting dollars) during the preceding quarter to the participant's or beneficiary's account for such services;

(B) A description of the services to which the charges relate (*e.g.,* plan administration, including recordkeeping, legal, accounting services); and

(C) If applicable, an explanation that, in addition to the fees and expenses disclosed pursuant to paragraph (c)(2)(ii) of this section, some of the plan's administrative expenses for the preceding quarter were paid from the total annual operating expenses of one or more of the plan's designated investment alternatives (*e.g.,* through revenue sharing arrangements, Rule 12b–1 fees, sub-transfer agent fees).

(3) *Individual expenses.* (i)(A) On or before the date on which a participant or beneficiary can first direct his or her investments and at least annually thereafter, an explanation of any fees and expenses that may be charged against the individual account of a participant or beneficiary on an individual, rather than on a plan-wide, basis (*e.g.,* fees attendant to processing plan loans or qualified domestic relations orders, fees for investment advice, fees for brokerage windows, commissions, front- or back-end loads or sales charges, redemption fees, transfer fees and similar expenses, and optional rider charges in annuity contracts) and which are not reflected in the total annual operating expenses of any designated investment alternative.

(B) If there is a change to the information described in paragraph (c)(3)(i)(A) of this section, each participant and beneficiary must be furnished a description of such change at least 30 days, but not more than 90 days, in advance of the effective date of such change, unless the inability to provide such advance notice is due to events that were unforeseeable or circumstances beyond the control of the plan administrator, in which case notice of such change must be furnished as soon as reasonably practicable.

(ii) At least quarterly, a statement that includes:

(A) The dollar amount of the fees and expenses described in paragraph (c)(3)(i)(A) of this section that are actually charged (whether by liquidating shares or deducting dollars) during the preceding quarter to the participant's or beneficiary's account for individual services; and

(B) A description of the services to which the charges relate (*e.g.,* loan processing fee).

(4) *Disclosures on or before first investment.* The requirements of paragraphs (c)(1)(i), (c)(2)(i)(A), (c)(3)(i)(A) of this section to furnish information on or before the date on which a participant or beneficiary can first direct his or her investments may be satisfied by furnishing to the participant or beneficiary the most recent annual disclosure furnished to participants and beneficiaries pursuant those paragraphs and any updates to the information furnished to participants and beneficiaries pursuant to paragraphs (c)(1)(ii), (c)(2)(i)(B) and (c)(3)(i)(B) of this section.

(d) *Disclosure of investment-related information.* The plan administrator (or person designated by the plan administrator to act on its behalf), based on the latest information available to the plan, shall:

(1) *Information to be provided automatically.* Except as provided in paragraph (i) of this section, furnish to each participant or beneficiary on or before the date on which he or she can first direct his or her investments and at least annually thereafter, the following information with respect to each designated investment alternative offered under the plan—

(i) *Identifying information.* Such information shall include:

(A) The name of each designated investment alternative; and

(B) The type or category of the investment (*e.g.,* money market fund, balanced fund (stocks and bonds), large-cap stock fund, employer stock fund, employer securities).

(ii) *Performance data.* (A) For designated investment alternatives with respect to which the return is not fixed, the average annual total return of the investment for 1-, 5-, and 10-calendar year periods (or for the life of the alternative, if shorter) ending on the date of the most recently completed calendar year; as well as a statement indicating that an investment's past performance is not necessarily an indication of how the investment will perform in the future; and

(B) For designated investment alternatives with respect to which the return is fixed or stated for the term of the investment, both the fixed or stated annual rate of return and the term of the investment. If, with respect to such a designated investment alternative, the issuer reserves the right to adjust the fixed or stated rate of return prospectively during the term of the contract or agreement, the current rate of return, the minimum rate guaranteed under the contract, if any, and a statement advising participants and beneficiaries that the issuer may adjust the rate of return prospectively and how to obtain (*e.g.,* telephone or Web site) the most recent rate of return required under this section.

(iii) *Benchmarks.* For designated investment alternatives with respect to which the return is not fixed, the name and returns of an appropriate broad-based securities market index over the 1-, 5-, and 10-calendar year periods (or for the life of the alternative, if shorter) comparable to the performance data periods provided under paragraph (d)(1)(ii)(A) of this section, and which is not administered by an affiliate of the investment issuer, its investment adviser, or a principal underwriter, unless the index is widely recognized and used.

(iv) *Fee and expense information.* (A) For designated investment alternatives with respect to which the return is not fixed:

(1) The amount and a description of each shareholder-type fee (fees charged directly against a participant's or beneficiary's investment, such as commissions, sales loads, sales charges, deferred sales charges, redemption fees, surrender charges, exchange fees, account fees, and purchase fees, which are not included in the total annual operating expenses of any designated investment alternative) and a description of any restriction or limitation that may be applicable to a purchase, transfer, or withdrawal of the investment in whole or in part (such as round trip, equity wash, or other restrictions);

(2) The total annual operating expenses of the investment expressed as a percentage (*i.e.,* expense ratio), calculated in accordance with paragraph (h)(5) of this section;

(3) The total annual operating expenses of the investment for a one-year period expressed as a dollar amount for a $1,000 investment (assuming no returns and based on the percentage described in paragraph (d)(1)(iv)(A)(*2*) of this section);

(4) A statement indicating that fees and expenses are only one of several factors that participants and beneficiaries should consider when making investment decisions; and

(5) A statement that the cumulative effect of fees and expenses can substantially reduce the growth of a participant's or beneficiary's retirement account and that participants and beneficiaries can visit the Employee Benefit Security Administration's Web site for an example demonstrating the long-term effect of fees and expenses.

(B) For designated investment alternatives with respect to which the return is fixed for the term of the investment, the amount and a description of any shareholder-type fees

and a description of any restriction or limitation that may be applicable to a purchase, transfer or withdrawal of the investment in whole or in part.

(v) *Internet Web site address.* An Internet Web site address that is sufficiently specific to provide participants and beneficiaries access to the following information regarding the designated investment alternative:

(A) The name of the alternative's issuer;

(B) The alternative's objectives or goals in a manner consistent with Securities and Exchange Commission Form N–1A or N–3, as appropriate;

(C) The alternative's principal strategies (including a general description of the types of assets held by the investment) and principal risks in a manner consistent with Securities and Exchange Commission Form N–1A or N–3, as appropriate;

(D) The alternative's portfolio turnover rate in a manner consistent with Securities and Exchange Commission Form N–1A or N–3, as appropriate;

(E) The alternative's performance data described in paragraph (d)(1)(ii) of this section updated on at least a quarterly basis, or more frequently if required by other applicable law; and

(F) The alternative's fee and expense information described in paragraph (d)(1)(iv) of this section.

(vi) *Glossary.* A general glossary of terms to assist participants and beneficiaries in understanding the designated investment alternatives, or an Internet Web site address that is sufficiently specific to provide access to such a glossary along with a general explanation of the purpose of the address.

(vii) *Annuity options.* If a designated investment alternative is part of a contract, fund or product that permits participants or beneficiaries to allocate contributions toward the future purchase of a stream of retirement income payments guaranteed by an insurance company, the information set forth in paragraph (i)(2)(i) through (i)(2)(vii) of this section with respect to the annuity option, to the extent such information is not otherwise included in investment-related fees and expenses described in paragraph (d)(1)(iv).

(viii) *Disclosures on or before first investment.* The requirement in paragraph (d)(1) of this section to provide information to a participant or beneficiary on or before the date on which the participant or beneficiary can first direct his or her investments may be satisfied by furnishing to the participant or beneficiary the most recent annual disclosure furnished to participants and beneficiaries pursuant to paragraph (d)(1) of this section.

(2) *Comparative format.* (i) Furnish the information described in paragraph (d)(1) and, if applicable, paragraph (i) of this section in a chart or similar format that is designed to facilitate a comparison of such information for each designated investment alternative available under the plan and prominently displays the date, and that includes:

(A) A statement indicating the name, address, and telephone number of the plan administrator (or a person or persons designated by the plan administrator to act on its behalf) to contact for the provision of the information required by paragraph (d)(4) of this section;

(B) A statement that additional investment-related information (including more current performance information) is available at the listed Internet Web site addresses (*see* paragraph (d)(1)(v) of this section); and

(C) A statement explaining how to request and obtain, free of charge, paper copies of the information required to be made available on a Web site pursuant to paragraph (d)(1)(v), paragraph (i)(2)(vi), relating to annuity options, or paragraph (i)(3), relating to fixed-return investments, of this section.

(ii) Nothing in this section shall preclude a plan administrator from including additional information that the plan administrator determines appropriate for such comparisons, provided such information is not inaccurate or misleading.

(3) *Information to be provided subsequent to investment.* Furnish to each investing participant or beneficiary, subsequent to an investment in a designated investment alternative, any materials provided to the plan relating to the exercise of voting, tender and similar rights appurtenant to the investment, to the extent that such rights are passed through to such participant or beneficiary under the terms of the plan.

(4) *Information to be provided upon request.* Furnish to each participant or beneficiary, either at the times specified in paragraph (d)(1), or upon request, the following information relating to designated investment alternatives—

(i) Copies of prospectuses (or, alternatively, any short-form or summary prospectus, the form of which has been approved by the Securities and Exchange Commission) for the disclosure of information to investors by entities registered under either the Securities Act of 1933 or the Investment Company Act of 1940, or similar documents relating to designated investment alternatives that are provided by entities that are not registered under either of these Acts;

(ii) Copies of any financial statements or reports, such as statements of additional information and shareholder reports, and of any other similar materials relating to the plan's designated investment alternatives, to the extent such materials are provided to the plan;

(iii) A statement of the value of a share or unit of each designated investment alternative as well as the date of the valuation; and

(iv) A list of the assets comprising the portfolio of each designated investment alternative which constitute plan assets within the meaning of 29 CFR 2510.3–101 and the value of each such asset (or the proportion of the investment which it comprises).

(e) *Form of disclosure.* (1) The information required to be disclosed pursuant to paragraphs (c)(1)(i), (c)(2)(i)(A), and (c)(3)(i)(A) of this section may be provided as part of the plan's summary plan description furnished pursuant to ERISA section 102 or as part of a pension benefit statement furnished pursuant to ERISA section 105(a)(1)(A)(i), if such summary plan description or pension benefit statement is furnished at a frequency that comports with paragraph (c)(1)(i) of this section.

(2) The information required to be disclosed pursuant to paragraphs (c)(2)(ii) and (c)(3)(ii) of this section may be included as part of a pension benefit statement furnished pursuant to ERISA section 105(a)(1)(A)(i).

(3) A plan administrator that uses and accurately completes the model in the Appendix, taking into account each designated investment alternative offered under the plan, will be deemed to have satisfied the requirements of paragraph (d)(2) of this section.

(4) Except as otherwise explicitly required herein, fees and expenses may be expressed in terms of a monetary amount, formula, percentage of assets, or per capita charge.

(5) The information required to be prepared by the plan administrator for disclosure under this section shall be written in a manner calculated to be understood by the average plan participant.

(f) *Selection and monitoring.* Nothing herein is intended to relieve a fiduciary from its duty to prudently select and monitor providers of services to the plan or designated investment alternatives offered under the plan.

(g) *Manner of furnishing. Reserved.*

(h) *Definitions.* For purposes of this section, the term—

(1) *At least annually thereafter* means at least once in any 12-month period, without regard to whether the plan operates on a calendar or fiscal year basis.

(2) *At least quarterly* means at least once in any 3-month period, without regard to whether the plan operates on a calendar or fiscal year basis.

(3) *Average annual total return* means the average annual compounded rate of return that would equate an initial investment in a designated investment alternative to the ending redeemable value of that investment calculated with the before tax methods of computation prescribed in Securities and Exchange Commission Form N–1A, N–3, or N–4, as appropriate, except that such method of computation may exclude any front-end, deferred or other sales loads that are waived for the participants and beneficiaries of the covered individual account plan.

(4) *Designated investment alternative* means any investment alternative designated by the plan into which participants and beneficiaries may direct the investment of assets held in, or contributed to, their individual accounts. The term "designated investment alternative" shall not include "brokerage windows," "self-directed brokerage accounts," or similar plan arrangements that enable participants and beneficiaries to select investments beyond those designated by the plan.

(5) *Total annual operating expenses* means:

(i) In the case of a designated investment alternative that is registered under the Investment Company Act of 1940, the annual operating expenses and other asset-based charges before waivers and reimbursements (*e.g.,* investment management fees, distribution fees, service fees, administrative expenses, separate account expenses, mortality and expense risk fees) that reduce the alternative's rate of return, expressed as a percentage, calculated in accordance with the required Securities and Exchange Commission form, *e.g.,* Form N–1A (open-end management investment companies) or Form N–3 or N–4 (separate accounts offering variable annuity contracts); or

(ii) In the case of a designated investment alternative that is not registered under the Investment Company Act of 1940, the sum of the fees and expenses described in paragraphs (h)(5)(ii)(A) through (C) of this section before waivers and reimbursements, for the alternative's most recently completed fiscal year, expressed as a percentage of the alternative's average net asset value for that year—

(A) Management fees as described in the Securities and Exchange Commission Form N–1A that reduce the alternative's rate of return,

(B) Distribution and/or servicing fees as described in the Securities and Exchange Commission Form N–1A that reduce the alternative's rate of return, and

(C) Any other fees or expenses not included in paragraphs (h)(5)(ii)(A) or (B) of this section that reduce the alternative's rate of return (*e.g.,* externally negotiated fees, custodial expenses, legal expenses, accounting expenses, transfer agent expenses, recordkeeping fees, administrative fees, separate account expenses, mortality and expense risk fees), excluding brokerage costs described in Item 21 of Securities and Exchange Commission Form N–1A.

(i) *Special rules.* The rules set forth in this paragraph apply solely for purposes of paragraph (d)(1) of this section.

(1) *Qualifying employer securities.* In the case of designated investment alternatives designed to invest in, or primarily in, qualifying employer securities, within the meaning of section 407 of ERISA, the following rules shall apply—

(i) In lieu of the requirements of paragraph (d)(1)(v)(C) of this section (relating to principal strategies and principal risks), provide an explanation of the importance of a well-balanced and diversified investment portfolio.

(ii) The requirements of paragraph (d)(1)(v)(D) of this section (relating to portfolio turnover rate) do not apply to such designated investment alternatives.

(iii) The requirements of paragraph (d)(1)(v)(F) of this section (relating to fee and expense information) do not apply to such designated investment alternatives, unless the designated investment alternative is a fund with respect to which participants or beneficiaries acquire units of participation, rather than actual shares, in exchange for their investment.

(iv) The requirements of paragraph (d)(1)(iv)(A)(*2*) of this section (relating to total annual operating expenses expressed as a percentage) do not apply to such designated investment alternatives, unless the designated investment alternative is a fund with respect to which participants or beneficiaries acquire units of participation, rather than actual shares, in exchange for their investment.

(v) The requirements of paragraph (d)(1)(iv)(A)(*3*) of this section (relating to total annual operating expenses expressed as a dollar amount per $1,000 invested) do not apply to such designated investment alternatives, unless the designated investment alternative is a fund with respect to which participants or beneficiaries acquire units of participation, rather than actual shares, in exchange for their investment.

(vi)(A) With respect to the requirement in paragraph (d)(1)(ii)(A) of this section (relating to performance data for 1-, 5-, and 10-year periods), the definition of "average annual total return" as defined in paragraph (i)(1)(vi)(B) of this section shall apply to such designated investment alternatives in lieu of the definition in paragraph (h)(3) of this section if the qualifying employer securities are publicly traded on a national exchange or generally recognized market and the designated investment alternative is not a fund with respect to which participants or beneficiaries acquire units of participation, rather than actual shares, in exchange for their investment.

(B) The term "average annual total return" means the change in value of an investment in one share of stock on an annualized basis over a specified period, calculated by taking the sum of the dividends paid during the measurement period, assuming reinvestment, plus the difference between the stock price (consistent with ERISA section 3(18)) at the end and at the beginning of the measurement period, and dividing by the stock price at the beginning of the measurement period; reinvestment of dividends is assumed to be in stock at market prices at approximately the same time actual dividends are paid.

(C) The definition of "average annual total return" in paragraph (i)(1)(vi)(B) of this section shall apply to such designated investment alternatives consisting of employer securities that are not publicly traded on a national exchange or generally recognized market, unless the designated investment alternative is a fund with respect to which participants or beneficiaries acquire units of participation, rather than actual shares, in exchange for their investment. Changes in value shall be calculated using principles similar to those set forth in paragraph (i)(1)(vi)(B) of this section.

(2) *Annuity options.* In the case of a designated investment alternative that is a contract, fund or product that permits participants or beneficiaries to allocate contributions toward the current purchase of a stream of retirement income payments guaranteed by an insurance company, the plan administrator shall, in lieu of the

information required by paragraphs (d)(1)(i) through (d)(1)(v), provide each participant or beneficiary the following information with respect to each such option:

(i) The name of the contract, fund or product;

(ii) The option's objectives or goals (*e.g.,* to provide a stream of fixed retirement income payments for life);

(iii) The benefits and factors that determine the price (*e.g.,* age, interest rates, form of distribution) of the guaranteed income payments;

(iv) Any limitations on the ability of a participant or beneficiary to withdraw or transfer amounts allocated to the option (*e.g.,* lock-ups) and any fees or charges applicable to such withdrawals or transfers;

(v) Any fees that will reduce the value of amounts allocated by participants or beneficiaries to the option, such as surrender charges, market value adjustments, and administrative fees;

(vi) A statement that guarantees of an insurance company are subject to its long-term financial strength and claims-paying ability; and

(vii) An Internet Web site address that is sufficiently specific to provide participants and beneficiaries access to the following information—

(A) The name of the option's issuer and of the contract, fund or product;

(B) Description of the option's objectives or goals;

(C) Description of the option's distribution alternatives/guaranteed income payments (*e.g.,* payments for life, payments for a specified term, joint and survivor payments, optional rider payments), including any limitations on the right of a participant or beneficiary to receive such payments;

(D) Description of costs and/or factors taken into account in determining the price of benefits under an option's distribution alternatives/guaranteed income payments (*e.g.,* age, interest rates, other annuitization assumptions);

(E) Description of any limitations on the right of a participant or beneficiary to withdraw or transfer amounts allocated to the option and any fees or charges applicable to a withdrawal or transfer; and

(F) Description of any fees that will reduce the value of amounts allocated by participants or beneficiaries to the option (*e.g.,* surrender charges, market value adjustments, administrative fees).

(3) *Fixed-return investments.* In the case of a designated investment alternative with respect to which the return is fixed for the term of the investment, the plan administrator shall, in lieu of complying with the requirements of paragraph (d)(1)(v) of this section, provide an Internet Web site address that is sufficiently specific to provide participants and beneficiaries access to the following information—

(i) The name of the alternative's issuer;

(ii) The alternatives objectives or goals (*e.g.,* to provide stability of principal and guarantee a minimum rate of return);

(iii) The alternative's performance data described in paragraph (d)(1)(ii)(B) of this section updated on at least a quarterly basis, or more frequently if required by other applicable law;

(iv) The alternative's fee and expense information described in paragraph (d)(1)(iv)(B) of this section.

(4) *Target date or similar funds. Reserved.*

(j) *Dates.* (1) *Effective date.* This section shall be effective on December 20, 2010.

(2) *Applicability date.* This section shall apply to covered individual account plans for plan years beginning on or after November 1, 2011.

(3) *Transitional rules.* (i) Notwithstanding paragraphs (b), (c) and (d) of this section, the initial disclosures required on or before the date on which a participant or beneficiary can first direct his or her investment must be furnished no later than 60 days after such applicability date to participants or beneficiaries who had the right to direct the investment of assets held in, or contributed to, their individual account on the applicability date.

(ii) For plan years beginning before October 1, 2021, if a plan administrator reasonably and in good faith determines that it does not have the information on expenses attributable to the plan that is necessary to calculate, in accordance with paragraph (h)(3) of this section, the 5-year and 10-year average annual total returns for a designated investment alternative that is not registered under the Investment Company Act of 1940, the plan administrator may use a reasonable estimate of such expenses or the plan administrator may use the most recently reported total annual operating expenses of the designated investment alternative as a substitute for such expenses. When a plan administrator uses a reasonable estimate or the most recently reported total annual operating expenses as a substitute for actual expenses pursuant to this paragraph, the administrator shall inform participants of the basis on which the returns were determined. Nothing in this section requires disclosure of returns for periods before the inception of a designated investment alternative.

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APPENDIX to §2550.404a-5 – Model Comparative Chart

ABC Corporation 401k Retirement Plan

Investment Options – January 1, 20XX

This document includes important information to help you compare the investment options under your retirement plan. If you want additional information about your investment options, you can go to the specific Internet Web site address shown below or you can contact [insert name of plan administrator or designee] at [insert telephone number and address]. A free paper copy of the information available on the Web site[s] can be obtained by contacting [insert name of plan administrator or designee] at [insert telephone number].

Document Summary

This document has 3 parts. Part I consists of performance information for plan investment options. This part shows you how well the investments have performed in the past. Part II shows you the fees and expenses you will pay if you invest in an option. Part III contains information about the annuity options under your retirement plan.

Part I. Performance Information

Table 1 focuses on the performance of investment options that do not have a fixed or stated rate of return. Table 1 shows how these options have performed over time and allows you to compare them with an appropriate benchmark for the same time periods. Past performance does not guarantee how the investment option will perform in the future. Your investment in these options could lose money. Information about an option's principal risks is available on the Web site[s].

Table 1—Variable Return Investments

Name/ Type of Option	Average Annual Total Return as of 12/31/XX				Benchmark			
	1yr.	5yr.	10yr.	Since Inception	1yr.	5yr.	10yr.	Since Inception
Equity Funds								
A Index Fund/ S&P 500 www. website address	26.5%	.34%	-1.03%	9.25%	26.46%	.42%	-.95%	9.30%
					S&P 500			
B Fund/ Large Cap www. website address	27.6%	.99%	N/A	2.26%	27.80%	1.02%	N/A	2.77%
					US Prime Market 750 Index			
C Fund/ Int'l Stock www. website address	36.73%	5.26%	2.29%	9.37%	40.40%	5.40%	2.40%	12.09%
					MSCI EAFE			
D Fund/ Mid Cap www. website address	40.22%	2.28%	6.13%	3.29%	46.29%	2.40%	-.52%	4.16%
					Russell Midcap			
Bond Funds								
E Fund/ Bond Index www. website address	6.45%	4.43%	6.08%	7.08%	5.93%	4.97%	6.33%	7.01%
					Barclays Cap. Aggr. Bd.			
Other								
F Fund/ GICs	.72%	3.36%	3.11%	5.56%	1.8%	3.1%	3.3%	5.75%

www. website address					3-month US T-Bill Index			
G Fund/ Stable Value www. website address	4.36%	4.64%	5.07%	3.75%	1.8%	3.1%	3.3%	4.99%
					3-month US T-Bill Index			
Generations 2020/ Lifecycle Fund www. website address	27.94%	N/A	N/A	2.45%	26.46%	N/A	N/A	3.09%
					S&P 500			
					23.95%	N/A	N/A	3.74%
					Generations 2020 Composite Index*			

*Generations 2020 composite index is a combination of a total market index and a US aggregate bond index proportional to the equity/bond allocation in the Generations 2020 Fund.

Table 2 focuses on the performance of investment options that have a fixed or stated rate of return. Table 2 shows the annual rate of return of each such option, the term or length of time that you will earn this rate of return, and other information relevant to performance.

Table 2—Fixed Return Investments

Name/ Type of Option	Return	Term	Other
H 200X/ GIC www. website address	4%	2 Yr.	The rate of return does not change during the stated term.
I LIBOR Plus/ Fixed-Type Investment Account www. website address	LIBOR +2%	Quarterly	The rate of return on 12/31/xx was 2.45%. This rate is fixed quarterly, but will never fall below a guaranteed minimum rate of 2%. Current rate of return information is available on the option's Web site or at 1-800-yyy-zzzz.
J Financial Services Co./ Fixed Account Investment www. website address	3.75%	6 Mos.	The rate of return on 12/31/xx was 3.75%. This rate of return is fixed for six months. Current rate of return information is available on the option's Web site or at 1-800-yyy-zzzz.

Part II. Fee and Expense Information

Table 3 shows fee and expense information for the investment options listed in Table1 and Table 2. Table 3 shows the Total Annual Operating Expenses of the options in Table 1. Total Annual Operating Expenses are expenses that reduce the rate of return of the investment option. Table 3 also shows Shareholder-type Fees. These fees are in addition to Total Annual Operating Expenses.

Table 3—Fees and Expenses

Name / Type of Option	Total Annual Operating Expenses		Shareholder-Type Fees
	As a %	Per $1000	
Equity Funds			
A Index Fund/ S&P 500	0.18%	$1.80	$20 annual service charge subtracted from investments held in this option if valued at less than $10,000.
B Fund/ Large Cap	2.45%	$24.50	2.25% deferred sales charge subtracted from amounts withdrawn within 12 months of purchase.
C Fund/ International	0.79%	$7.90	5.75% sales charge subtracted from amounts invested.

Stock		
D Fund/ Mid Cap ETF	0.20% $2.00	4.25% sales charge subtracted from amounts withdrawn.
Bond Funds		
E Fund/ Bond Index	0.50% $5.00	N/A
Other		
F Fund/ GICs	0.46% $4.60	10% charge subtracted from amounts withdrawn within 18 months of initial investment.
G Fund/ Stable Value	0.65% $6.50	Amounts withdrawn may not be transferred to a competing option for 90 days after withdrawal.
Generations 2020/ Lifecycle Fund	1.50% $15.00	Excessive trading restricts additional purchases (other than contributions and loan repayments) for 85 days.
Fixed Return Investments		
H 200X / GIC	N/A	12% charge subtracted from amounts withdrawn before maturity.
I LIBOR Plus/ Fixed-Type Invest Account	N/A	5% contingent deferred sales charge subtracted from amounts withdrawn; charge reduced by 1% on 12-month anniversary of each investment.
J Financial Serv Co. / Fixed Account Investment	N/A	90 days of interest subtracted from amounts withdrawn before maturity.

The cumulative effect of fees and expenses can substantially reduce the growth of your retirement savings. Visit the Department of Labor's Web site for an example showing the long-term effect of fees and expenses at http://www.dol.gov/ebsa/publications/401k employee.html. Fees and expenses are only one of many factors to consider when you decide to invest in an option. You may also want to think about whether an investment in a particular option, along with your other investments, will help you achieve your financial goals.

Part III. Annuity Information

Table 4 focuses on the annuity options under the plan. Annuities are insurance contracts that allow you to receive a guaranteed stream of payments at regular intervals, usually beginning when you retire and lasting for your entire life. Annuities are issued by insurance companies. Guarantees of an insurance company are subject to its long-term financial strength and claims-paying ability.

Table 4—Annuity Options

Name	Objectives / Goals	Pricing Factors	Restrictions / Fees
Lifetime Income Option www. website address	To provide a guaranteed stream of income for your life, based on shares you acquire while you work. At age 65, you will receive monthly payments of $10 for each share you own, for your life. For example, if	The cost of each share depends on your age and interest rates when you buy it. Ordinarily the closer you are to retirement, the more it will cost you to buy a share.	Payment amounts are based on your life expectancy only and would be reduced if you choose a spousal joint and survivor benefit. You will pay a 25%

	you own 30 shares at age 65, you will receive $300 per month over your life.	The cost includes a guaranteed death benefit payable to a spouse or beneficiary if you die before payments begin. The death benefit is the total amount of your contributions, less any withdrawals.	surrender charge for any amount you withdraw before annuity payments begin. If your income payments are less than $50 per month, the option's issuer may combine payments and pay you less frequently, or return to you the larger of your net contributions or the cash-out value of your income shares.
Generations 2020 Variable Annuity Option www. website address	To provide a guaranteed stream of income for your life, or some other period of time, based on your account balance in the Generations 2020 Lifecycle Fund. This option is available through a variable annuity contract that your plan has with ABC Insurance Company.	You have the right to elect fixed annuity payments in the form of a life annuity, a joint and survivor annuity, or a life annuity with a term certain, but the payment amounts will vary based on the benefit you choose. The cost of this right is included in the Total Annual Operating Expenses of the Generations 2020 Lifecycle Fund, listed in Table 3 above. The cost also includes a guaranteed death benefit payable to a spouse or beneficiary if you die before payments begin. The death benefit is the greater of your account balance or contributions, less any withdrawals.	Maximum surrender charge of 8% of account balance. Maximum transfer fee of $30 for each transfer over 12 in a year. Annual service charge of $50 for account balances below $100,000.

Please visit www.ABCPlanglossary.com for a glossary of investment terms relevant to the investment options under this plan. This glossary is intended to help you better understand your options.

BILLING CODE 4510–29–C

■ 3. In § 2550.404c–1 revise (b)(2)(i)(B), (c)(1)(ii), and (f)(1), and add (d)(2)(iv) to read as follows:

§ 2550.404c–1 ERISA section 404(c) plans.

* * * * *

(b) * * *

(2) * * *

(i) * * *

(B) The participant or beneficiary is provided or has the opportunity to obtain sufficient information to make informed investment decisions with regard to investment alternatives available under the plan, and incidents of ownership appurtenant to such investments. For purposes of this paragraph, a participant or beneficiary will be considered to have sufficient information if the participant or beneficiary is provided by an identified plan fiduciary (or a person or persons designated by the plan fiduciary to act on his behalf):

(*1*) An explanation that the plan is intended to constitute a plan described in section 404(c) of the Employee Retirement Income Security Act, and 29 CFR 2550.404c–1, and that the fiduciaries of the plan may be relieved of liability for any losses which are the direct and necessary result of investment instructions given by such participant or beneficiary;

(*2*) The information required pursuant to 29 CFR 2550.404a–5; and

(*3*) In the case of plans which offer an investment alternative which is designed to permit a participant or beneficiary to directly or indirectly acquire or sell any employer security (employer security alternative), a description of the procedures established to provide for the confidentiality of information relating to the purchase, holding and sale of employer securities, and the exercise of voting, tender and similar rights, by participants and beneficiaries, and the name, address and phone number of the plan fiduciary responsible for monitoring compliance with the procedures (*see* paragraphs (d)(2)(ii)(E)(*4*)(*vii*), (*viii*) and (*ix*) of this section).

* * * * *

(c) * * *

(1) * * *

(ii) For purposes of sections 404(c)(1) and 404(c)(2) of the Act and paragraphs (a) and (d) of this section, a participant or beneficiary will be deemed to have exercised control with respect to voting, tender or similar rights appurtenant to the participant's or beneficiary's ownership interest in an investment alternative, provided that the participant's or beneficiary's investment in the investment alternative was itself the result of an exercise of control; the participant or beneficiary was provided a reasonable opportunity to give instruction with respect to such incidents of ownership, including the provision of the information described in 29 CFR 2550.404a–5(d)(3); and the participant or beneficiary has not failed to exercise control by reason of the circumstances described in paragraph (c)(2) with respect to such incidents of ownership.

* * * * *

(d) * * *

(2) * * *

(iv) Paragraph (d)(2)(i) does not serve to relieve a fiduciary from its duty to prudently select and monitor any service provider or designated investment alternative offered under the plan.

* * * * *

(f) * * *

(1) Plan A is an individual account plan described in section 3(34) of the Act. The plan states that a plan participant or beneficiary may direct the plan administrator to invest any portion of his individual account in a particular diversified equity fund managed by an entity which is not affiliated with the plan sponsor, or any other asset administratively feasible for the plan to hold. However, the plan provides that the plan administrator will not implement certain listed instructions for which plan fiduciaries would not be relieved of liability under section 404(c) (*see* paragraph (d)(2)(ii) of this section). Plan participants and beneficiaries are permitted to give investment instructions during the first week of each month with respect to the equity fund and at any time with respect to other investments. The plan administrator of Plan A provides each participant and beneficiary with the information described in paragraph (b)(2)(i)(B) of this section, including the information that must be provided on or before the date on which a participant or beneficiary can first direct his or her investments and at least annually thereafter pursuant to 29 CFR 2550.404a–5, and provides updated information in the event of any change in the information provided. Subsequent to any investment by a participant or beneficiary, the plan administrator forwards to the investing participant or beneficiary any materials provided to the plan relating to the exercise of voting, tender or similar rights attendant to ownership of an interest in such investment (*see* paragraph (b)(2)(i)(B)(*3*) of this section and 29 CFR 2550.404a–5(d)(3)). Upon request, the plan administrator provides each participant or beneficiary with copies of any prospectuses (or similar documents relating to designated investment alternatives that are provided by entities that are not registered under the Securities Act of 1933 or the Investment Company Act of 1940), financial statements and reports, and any other materials relating to the designated investment alternatives available under the plan in accordance with 29 CFR 2550.404a–5(d)(4)(i) through (iv). Also upon request, the plan administrator provides each participant and beneficiary with other information required by 29 CFR 2550.404a–5(d)(4) with respect to the equity fund, which is a designated investment alternative, including a statement of the value of a share or unit of the participant's or beneficiary's interest in the equity fund and the date of the valuation. Plan A meets the requirements of paragraph (b)(2)(i)(B) of this section regarding the provision of investment information.

* * * * *

Signed at Washington, DC, this 7th day of October 2010.

Phyllis C. Borzi,

Assistant Secretary, Employee Benefits Security Administration, Department of Labor.

[FR Doc. 2010–25725 Filed 10–14–10; 12:45 pm]

BILLING CODE 4510–29–P

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WD 05-2204 (Rev.-16) was first posted on www.wdol.gov on 06/25/2013

REGISTER OF WAGE DETERMINATIONS UNDER THE SERVICE CONTRACT ACT
By direction of the Secretary of Labor

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
WAGE AND HOUR DIVISION
WASHINGTON D.C. 20210

Wage Determination No.: 2005-2204
Revision No.: 16
Date Of Revision: 06/19/2013

Diane C. Koplewski
Director

Division of
Wage Determinations

State: Iowa

Area: Iowa Counties of Allamakee, Benton, Black Hawk, Bremer, Buchanan, Butler, Cedar, Chickasaw, Clayton, Clinton, Delaware, Dubuque, Fayette, Floyd, Grundy, Howard, Iowa, Jackson, Jefferson, Johnson, Jones, Keokuk, Linn, Mitchell, Tama, Van Buren, Washington, Winneshiek

Fringe Benefits Required Follow the Occupational Listing

OCCUPATION CODE - TITLE	FOOTNOTE	RATE
01000 - Administrative Support And Clerical Occupations		
01011 - Accounting Clerk I		12.93
01012 - Accounting Clerk II		15.40
01013 - Accounting Clerk III		21.42
01020 - Administrative Assistant		19.38
01040 - Court Reporter		20.39
01051 - Data Entry Operator I		12.49
01052 - Data Entry Operator II		14.56
01060 - Dispatcher, Motor Vehicle		15.38
01070 - Document Preparation Clerk		14.31
01090 - Duplicating Machine Operator		14.31
01111 - General Clerk I		11.63
01112 - General Clerk II		12.68
01113 - General Clerk III		14.24
01120 - Housing Referral Assistant		16.52
01141 - Messenger Courier		11.00
01191 - Order Clerk I		13.30
01192 - Order Clerk II		15.41
01261 - Personnel Assistant (Employment) I		14.60
01262 - Personnel Assistant (Employment) II		16.34
01263 - Personnel Assistant (Employment) III		18.22
01270 - Production Control Clerk		19.25
01280 - Receptionist		11.71
01290 - Rental Clerk		10.87
01300 - Scheduler, Maintenance		13.24
01311 - Secretary I		13.24
01312 - Secretary II		14.81
01313 - Secretary III		16.52
01320 - Service Order Dispatcher		14.62
01410 - Supply Technician		19.38
01420 - Survey Worker		13.11
01531 - Travel Clerk I		13.20
01532 - Travel Clerk II		14.27
01533 - Travel Clerk III		15.44
01611 - Word Processor I		11.67
01612 - Word Processor II		13.10
01613 - Word Processor III		14.65
05000 - Automotive Service Occupations		

05005 - Automobile Body Repairer, Fiberglass	19.02
05010 - Automotive Electrician	18.51
05040 - Automotive Glass Installer	18.00
05070 - Automotive Worker	18.00
05110 - Mobile Equipment Servicer	16.94
05130 - Motor Equipment Metal Mechanic	19.02
05160 - Motor Equipment Metal Worker	18.00
05190 - Motor Vehicle Mechanic	19.02
05220 - Motor Vehicle Mechanic Helper	16.40
05250 - Motor Vehicle Upholstery Worker	17.45
05280 - Motor Vehicle Wrecker	18.00
05310 - Painter, Automotive	18.51
05340 - Radiator Repair Specialist	18.00
05370 - Tire Repairer	15.19
05400 - Transmission Repair Specialist	19.02
07000 - Food Preparation And Service Occupations	
07010 - Baker	11.88
07041 - Cook I	10.68
07042 - Cook II	11.88
07070 - Dishwasher	8.74
07130 - Food Service Worker	8.96
07210 - Meat Cutter	14.01
07260 - Waiter/Waitress	9.07
09000 - Furniture Maintenance And Repair Occupations	
09010 - Electrostatic Spray Painter	19.76
09040 - Furniture Handler	15.32
09080 - Furniture Refinisher	20.24
09090 - Furniture Refinisher Helper	16.46
09110 - Furniture Repairer, Minor	18.49
09130 - Upholsterer	20.24
11000 - General Services And Support Occupations	
11030 - Cleaner, Vehicles	10.91
11060 - Elevator Operator	10.73
11090 - Gardener	13.23
11122 - Housekeeping Aide	10.73
11150 - Janitor	10.73
11210 - Laborer, Grounds Maintenance	11.79
11240 - Maid or Houseman	9.50
11260 - Pruner	10.95
11270 - Tractor Operator	13.46
11330 - Trail Maintenance Worker	11.79
11360 - Window Cleaner	11.55
12000 - Health Occupations	
12010 - Ambulance Driver	15.48
12011 - Breath Alcohol Technician	15.48
12012 - Certified Occupational Therapist Assistant	19.38
12015 - Certified Physical Therapist Assistant	22.25
12020 - Dental Assistant	17.85
12025 - Dental Hygienist	30.40
12030 - EKG Technician	24.95
12035 - Electroneurodiagnostic Technologist	24.95
12040 - Emergency Medical Technician	15.48
12071 - Licensed Practical Nurse I	14.72
12072 - Licensed Practical Nurse II	16.46
12073 - Licensed Practical Nurse III	18.36
12100 - Medical Assistant	14.34
12130 - Medical Laboratory Technician	16.34
12160 - Medical Record Clerk	14.21
12190 - Medical Record Technician	16.41
12195 - Medical Transcriptionist	14.36
12210 - Nuclear Medicine Technologist	36.18
12221 - Nursing Assistant I	10.66
12222 - Nursing Assistant II	11.98

12223 - Nursing Assistant III		13.07
12224 - Nursing Assistant IV		14.67
12235 - Optical Dispenser		15.13
12236 - Optical Technician		14.72
12250 - Pharmacy Technician		16.23
12280 - Phlebotomist		14.67
12305 - Radiologic Technologist		24.45
12311 - Registered Nurse I		21.66
12312 - Registered Nurse II		26.51
12313 - Registered Nurse II, Specialist		26.51
12314 - Registered Nurse III		32.08
12315 - Registered Nurse III, Anesthetist		32.08
12316 - Registered Nurse IV		38.42
12317 - Scheduler (Drug and Alcohol Testing)		20.40
13000 - Information And Arts Occupations		
13011 - Exhibits Specialist I		17.56
13012 - Exhibits Specialist II		21.43
13013 - Exhibits Specialist III		26.17
13041 - Illustrator I		16.69
13042 - Illustrator II		20.69
13043 - Illustrator III		25.31
13047 - Librarian		22.91
13050 - Library Aide/Clerk		10.65
13054 - Library Information Technology Systems Administrator		20.69
13058 - Library Technician		13.33
13061 - Media Specialist I		14.93
13062 - Media Specialist II		16.69
13063 - Media Specialist III		18.62
13071 - Photographer I		14.72
13072 - Photographer II		17.66
13073 - Photographer III		20.94
13074 - Photographer IV		26.01
13075 - Photographer V		30.93
13110 - Video Teleconference Technician		16.03
14000 - Information Technology Occupations		
14041 - Computer Operator I		13.51
14042 - Computer Operator II		15.11
14043 - Computer Operator III		18.95
14044 - Computer Operator IV		21.08
14045 - Computer Operator V		23.33
14071 - Computer Programmer I	(see 1)	20.67
14072 - Computer Programmer II	(see 1)	25.59
14073 - Computer Programmer III	(see 1)	
14074 - Computer Programmer IV	(see 1)	
14101 - Computer Systems Analyst I	(see 1)	27.53
14102 - Computer Systems Analyst II	(see 1)	
14103 - Computer Systems Analyst III	(see 1)	
14150 - Peripheral Equipment Operator		13.51
14160 - Personal Computer Support Technician		21.08
15000 - Instructional Occupations		
15010 - Aircrew Training Devices Instructor (Non-Rated)		27.53
15020 - Aircrew Training Devices Instructor (Rated)		33.31
15030 - Air Crew Training Devices Instructor (Pilot)		39.12
15050 - Computer Based Training Specialist / Instructor		27.53
15060 - Educational Technologist		26.59
15070 - Flight Instructor (Pilot)		39.12
15080 - Graphic Artist		19.60
15090 - Technical Instructor		18.70
15095 - Technical Instructor/Course Developer		22.98
15110 - Test Proctor		15.09
15120 - Tutor		15.09
16000 - Laundry, Dry-Cleaning, Pressing And Related Occupations		

16010 - Assembler	9.53
16030 - Counter Attendant	9.53
16040 - Dry Cleaner	12.42
16070 - Finisher, Flatwork, Machine	9.53
16090 - Presser, Hand	9.53
16110 - Presser, Machine, Drycleaning	9.53
16130 - Presser, Machine, Shirts	9.53
16160 - Presser, Machine, Wearing Apparel, Laundry	9.53
16190 - Sewing Machine Operator	13.37
16220 - Tailor	14.31
16250 - Washer, Machine	10.54
19000 - Machine Tool Operation And Repair Occupations	
19010 - Machine-Tool Operator (Tool Room)	19.47
19040 - Tool And Die Maker	22.07
21000 - Materials Handling And Packing Occupations	
21020 - Forklift Operator	15.86
21030 - Material Coordinator	19.25
21040 - Material Expediter	19.25
21050 - Material Handling Laborer	15.82
21071 - Order Filler	10.93
21080 - Production Line Worker (Food Processing)	15.86
21110 - Shipping Packer	17.16
21130 - Shipping/Receiving Clerk	15.94
21140 - Store Worker I	14.36
21150 - Stock Clerk	17.94
21210 - Tools And Parts Attendant	15.86
21410 - Warehouse Specialist	15.86
23000 - Mechanics And Maintenance And Repair Occupations	
23010 - Aerospace Structural Welder	23.70
23021 - Aircraft Mechanic I	22.78
23022 - Aircraft Mechanic II	23.70
23023 - Aircraft Mechanic III	24.39
23040 - Aircraft Mechanic Helper	17.66
23050 - Aircraft, Painter	21.89
23060 - Aircraft Servicer	19.85
23080 - Aircraft Worker	20.94
23110 - Appliance Mechanic	21.89
23120 - Bicycle Repairer	15.87
23125 - Cable Splicer	29.41
23130 - Carpenter, Maintenance	20.39
23140 - Carpet Layer	20.94
23160 - Electrician, Maintenance	25.46
23181 - Electronics Technician Maintenance I	23.27
23182 - Electronics Technician Maintenance II	24.15
23183 - Electronics Technician Maintenance III	25.31
23260 - Fabric Worker	19.85
23290 - Fire Alarm System Mechanic	22.78
23310 - Fire Extinguisher Repairer	18.75
23311 - Fuel Distribution System Mechanic	21.24
23312 - Fuel Distribution System Operator	17.57
23370 - General Maintenance Worker	18.15
23380 - Ground Support Equipment Mechanic	22.78
23381 - Ground Support Equipment Servicer	19.85
23382 - Ground Support Equipment Worker	20.94
23391 - Gunsmith I	18.75
23392 - Gunsmith II	20.94
23393 - Gunsmith III	22.78
23410 - Heating, Ventilation And Air-Conditioning Mechanic	24.46
23411 - Heating, Ventilation And Air Contditioning Mechanic (Research Facility)	25.68
23430 - Heavy Equipment Mechanic	21.15
23440 - Heavy Equipment Operator	19.95

23460 - Instrument Mechanic	22.78
23465 - Laboratory/Shelter Mechanic	21.89
23470 - Laborer	13.20
23510 - Locksmith	21.89
23530 - Machinery Maintenance Mechanic	24.28
23550 - Machinist, Maintenance	19.63
23580 - Maintenance Trades Helper	16.46
23591 - Metrology Technician I	22.78
23592 - Metrology Technician II	23.57
23593 - Metrology Technician III	24.26
23640 - Millwright	23.19
23710 - Office Appliance Repairer	20.39
23760 - Painter, Maintenance	18.50
23790 - Pipefitter, Maintenance	25.63
23810 - Plumber, Maintenance	21.82
23820 - Pneudraulic Systems Mechanic	22.78
23850 - Rigger	22.78
23870 - Scale Mechanic	20.94
23890 - Sheet-Metal Worker, Maintenance	22.17
23910 - Small Engine Mechanic	19.22
23931 - Telecommunications Mechanic I	23.73
23932 - Telecommunications Mechanic II	24.67
23950 - Telephone Lineman	21.08
23960 - Welder, Combination, Maintenance	20.27
23965 - Well Driller	22.78
23970 - Woodcraft Worker	22.78
23980 - Woodworker	18.75
24000 - Personal Needs Occupations	
24570 - Child Care Attendant	9.63
24580 - Child Care Center Clerk	12.02
24610 - Chore Aide	11.02
24620 - Family Readiness And Support Services Coordinator	12.50
24630 - Homemaker	15.31
25000 - Plant And System Operations Occupations	
25010 - Boiler Tender	22.78
25040 - Sewage Plant Operator	18.72
25070 - Stationary Engineer	22.78
25190 - Ventilation Equipment Tender	17.66
25210 - Water Treatment Plant Operator	18.72
27000 - Protective Service Occupations	
27004 - Alarm Monitor	17.82
27007 - Baggage Inspector	10.95
27008 - Corrections Officer	18.93
27010 - Court Security Officer	19.14
27030 - Detection Dog Handler	14.39
27040 - Detention Officer	18.93
27070 - Firefighter	18.68
27101 - Guard I	10.95
27102 - Guard II	14.39
27131 - Police Officer I	21.40
27132 - Police Officer II	23.77
28000 - Recreation Occupations	
28041 - Carnival Equipment Operator	10.45
28042 - Carnival Equipment Repairer	10.82
28043 - Carnival Equpment Worker	9.09
28210 - Gate Attendant/Gate Tender	13.41
28310 - Lifeguard	11.01
28350 - Park Attendant (Aide)	15.00
28510 - Recreation Aide/Health Facility Attendant	10.95
28515 - Recreation Specialist	18.59
28630 - Sports Official	11.95
28690 - Swimming Pool Operator	15.27

29000 - Stevedoring/Longshoremen Occupational Services		
29010 - Blocker And Bracer		20.93
29020 - Hatch Tender		20.93
29030 - Line Handler		20.93
29041 - Stevedore I		18.59
29042 - Stevedore II		21.89
30000 - Technical Occupations		
30010 - Air Traffic Control Specialist, Center (HFO)	(see 2)	35.77
30011 - Air Traffic Control Specialist, Station (HFO)	(see 2)	24.66
30012 - Air Traffic Control Specialist, Terminal (HFO)	(see 2)	27.16
30021 - Archeological Technician I		17.33
30022 - Archeological Technician II		19.39
30023 - Archeological Technician III		24.03
30030 - Cartographic Technician		24.03
30040 - Civil Engineering Technician		22.29
30061 - Drafter/CAD Operator I		17.33
30062 - Drafter/CAD Operator II		21.58
30063 - Drafter/CAD Operator III		22.11
30064 - Drafter/CAD Operator IV		26.60
30081 - Engineering Technician I		15.65
30082 - Engineering Technician II		17.86
30083 - Engineering Technician III		20.62
30084 - Engineering Technician IV		24.34
30085 - Engineering Technician V		29.79
30086 - Engineering Technician VI		36.05
30090 - Environmental Technician		24.03
30210 - Laboratory Technician		25.15
30240 - Mathematical Technician		24.03
30361 - Paralegal/Legal Assistant I		15.73
30362 - Paralegal/Legal Assistant II		19.50
30363 - Paralegal/Legal Assistant III		23.85
30364 - Paralegal/Legal Assistant IV		28.86
30390 - Photo-Optics Technician		24.03
30461 - Technical Writer I		18.08
30462 - Technical Writer II		22.11
30463 - Technical Writer III		26.75
30491 - Unexploded Ordnance (UXO) Technician I		22.74
30492 - Unexploded Ordnance (UXO) Technician II		27.51
30493 - Unexploded Ordnance (UXO) Technician III		32.97
30494 - Unexploded (UXO) Safety Escort		22.74
30495 - Unexploded (UXO) Sweep Personnel		22.74
30620 - Weather Observer, Combined Upper Air Or Surface Programs	(see 2)	21.63
30621 - Weather Observer, Senior	(see 2)	24.03
31000 - Transportation/Mobile Equipment Operation Occupations		
31020 - Bus Aide		12.53
31030 - Bus Driver		15.72
31043 - Driver Courier		13.44
31260 - Parking and Lot Attendant		11.13
31290 - Shuttle Bus Driver		14.05
31310 - Taxi Driver		12.42
31361 - Truckdriver, Light		14.05
31362 - Truckdriver, Medium		14.87
31363 - Truckdriver, Heavy		19.87
31364 - Truckdriver, Tractor-Trailer		19.87
99000 - Miscellaneous Occupations		
99030 - Cashier		8.77
99050 - Desk Clerk		9.56
99095 - Embalmer		24.57
99251 - Laboratory Animal Caretaker I		12.85
99252 - Laboratory Animal Caretaker II		13.63
99310 - Mortician		24.57
99410 - Pest Controller		15.59

99510 - Photofinishing Worker	11.95
99710 - Recycling Laborer	15.04
99711 - Recycling Specialist	17.17
99730 - Refuse Collector	13.97
99810 - Sales Clerk	12.45
99820 - School Crossing Guard	13.71
99830 - Survey Party Chief	24.55
99831 - Surveying Aide	12.29
99832 - Surveying Technician	16.84
99840 - Vending Machine Attendant	13.02
99841 - Vending Machine Repairer	14.28
99842 - Vending Machine Repairer Helper	13.02

ALL OCCUPATIONS LISTED ABOVE RECEIVE THE FOLLOWING BENEFITS:

HEALTH & WELFARE: Life, accident, and health insurance plans, sick leave, pension plans, civic and personal leave, severance pay, and savings and thrift plans. Minimum employer contributions costing an average of $3.81 per hour computed on the basis of all hours worked by service employees employed on the contract.

VACATION: 2 weeks paid vacation after 1 year of service with a contractor or successor; 3 weeks after 5 years, 4 weeks after 15 years, and 5 weeks after 25 years. Length of service includes the whole span of continuous service with the present contractor or successor, wherever employed, and with the predecessor contractors in the performance of similar work at the same Federal facility. (Reg. 29 CFR 4.173)

HOLIDAYS: A minimum of ten paid holidays per year, New Year's Day, Martin Luther King Jr's Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, and Christmas Day. (A contractor may substitute for any of the named holidays another day off with pay in accordance with a plan communicated to the employees involved.) (See 29 CFR 4174)

THE OCCUPATIONS WHICH HAVE NUMBERED FOOTNOTES IN PARENTHESES RECEIVE THE FOLLOWING:

1) COMPUTER EMPLOYEES: Under the SCA at section 8(b), this wage determination does not apply to any employee who individually qualifies as a bona fide executive, administrative, or professional employee as defined in 29 C.F.R. Part 541. Because most Computer System Analysts and Computer Programmers who are compensated at a rate not less than $27.63 (or on a salary or fee basis at a rate not less than $455 per week) an hour would likely qualify as exempt computer professionals, (29 C.F.R. 541. 400) wage rates may not be listed on this wage determination for all occupations within those job families. In addition, because this wage determination may not list a wage rate for some or all occupations within those job families if the survey data indicates that the prevailing wage rate for the occupation equals or exceeds $27.63 per hour conformances may be necessary for certain nonexempt employees. For example, if an individual employee is nonexempt but nevertheless performs duties within the scope of one of the Computer Systems Analyst or Computer Programmer occupations for which this wage determination does not specify an SCA wage rate, then the wage rate for that employee must be conformed in accordance with the conformance procedures described in the conformance note included on this wage determination.

Additionally, because job titles vary widely and change quickly in the computer industry, job titles are not determinative of the application of the computer professional exemption. Therefore, the exemption applies only to computer employees who satisfy the compensation requirements and whose primary duty consists of:

(1) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
(2) The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
(3) The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
(4) A combination of the aforementioned duties, the performance of which requires the same level of skills. (29 C.F.R. 541.400).

2) AIR TRAFFIC CONTROLLERS AND WEATHER OBSERVERS - NIGHT PAY & SUNDAY PAY: If you work at night as part of a regular tour of duty, you will earn a night differential and receive an additional 10% of basic pay for any hours worked between 6pm and 6am. If you are a full-time employed (40 hours a week) and Sunday is part of your regularly scheduled workweek, you are paid at your rate of basic pay plus a Sunday premium of 25% of your basic rate for each hour of Sunday work which is not overtime (i.e. occasional work on Sunday outside the normal tour of duty is considered overtime work).

HAZARDOUS PAY DIFFERENTIAL: An 8 percent differential is applicable to employees employed in a position that represents a high degree of hazard when working with or in close proximity to ordinance, explosives, and incendiary materials. This includes work such as screening, blending, dying, mixing, and pressing of sensitive ordance, explosives, and pyrotechnic compositions such as lead azide, black powder and photoflash powder. All dry-house activities involving propellants or explosives. Demilitarization, modification, renovation, demolition, and maintenance operations on sensitive ordnance, explosives and incendiary materials. All operations involving regrading and cleaning of artillery ranges.

A 4 percent differential is applicable to employees employed in a position that represents a low degree of hazard when working with, or in close proximity to ordance, (or employees possibly adjacent to) explosives and incendiary materials which involves potential injury such as laceration of hands, face, or arms of the employee engaged in the operation, irritation of the skin, minor burns and the like; minimal damage to immediate or adjacent work area or equipment being used. All operations involving, unloading, storage, and hauling of ordance, explosive, and incendiary ordnance material other than small arms ammunition. These differentials are only applicable to work that has been specifically designated by the agency for ordance, explosives, and incendiary material differential pay.

** UNIFORM ALLOWANCE **

If employees are required to wear uniforms in the performance of this contract (either by the terms of the Government contract, by the employer, by the state or local law, etc.), the cost of furnishing such uniforms and maintaining (by laundering or dry cleaning) such uniforms is an expense that may not be borne by an employee where such cost reduces the hourly rate below that required by the wage determination. The Department of Labor will accept payment in accordance with the following standards as compliance:

The contractor or subcontractor is required to furnish all employees with an adequate number of uniforms without cost or to reimburse employees for the actual cost of the uniforms. In addition, where uniform cleaning and maintenance is made the responsibility of the employee, all contractors and subcontractors subject to this wage determination shall (in the absence of a bona fide collective bargaining agreement providing for a different amount, or the furnishing of contrary affirmative proof as to the actual cost), reimburse all employees for such cleaning and maintenance at a rate of $3.35 per week (or $.67 cents per day). However, in those instances where the uniforms furnished are made of "wash and wear" materials, may be routinely washed and dried with other personal garments, and do not require any special treatment such as dry cleaning, daily washing, or commercial

laundering in order to meet the cleanliness or appearance standards set by the terms of the Government contract, by the contractor, by law, or by the nature of the work, there is no requirement that employees be reimbursed for uniform maintenance costs.

The duties of employees under job titles listed are those described in the "Service Contract Act Directory of Occupations", Fifth Edition, April 2006, unless otherwise indicated. Copies of the Directory are available on the Internet. A links to the Directory may be found on the WHD home page at http://www.dol.gov/esa/whd/ or through the Wage Determinations On-Line (WDOL) Web site at http://wdol.gov/.

REQUEST FOR AUTHORIZATION OF ADDITIONAL CLASSIFICATION AND WAGE RATE {Standard Form 1444 (SF 1444)}

Conformance Process:

The contracting officer shall require that any class of service employee which is not listed herein and which is to be employed under the contract (i.e., the work to be performed is not performed by any classification listed in the wage determination), be classified by the contractor so as to provide a reasonable relationship (i.e., appropriate level of skill comparison) between such unlisted classifications and the classifications listed in the wage determination. Such conformed classes of employees shall be paid the monetary wages and furnished the fringe benefits as are determined. Such conforming process shall be initiated by the contractor prior to the performance of contract work by such unlisted class(es) of employees. The conformed classification, wage rate, and/or fringe benefits shall be retroactive to the commencement date of the contract. {See Section 4.6 (C)(vi)} When multiple wage determinations are included in a contract, a separate SF 1444 should be prepared for each wage determination to which a class(es) is to be conformed.

The process for preparing a conformance request is as follows:

1) When preparing the bid, the contractor identifies the need for a conformed occupation(s) and computes a proposed rate(s).

2) After contract award, the contractor prepares a written report listing in order proposed classification title(s), a Federal grade equivalency (FGE) for each proposed classification(s), job description(s), and rationale for proposed wage rate(s), including information regarding the agreement or disagreement of the authorized representative of the employees involved, or where there is no authorized representative, the employees themselves. This report should be submitted to the contracting officer no later than 30 days after such unlisted class(es) of employees performs any contract work.

3) The contracting officer reviews the proposed action and promptly submits a report of the action, together with the agency's recommendations and pertinent information including the position of the contractor and the employees, to the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, for review. (See section 4.6(b)(2) of Regulations 29 CFR Part 4).

4) Within 30 days of receipt, the Wage and Hour Division approves, modifies, or disapproves the action via transmittal to the agency contracting officer, or notifies the contracting officer that additional time will be required to process the request.

5) The contracting officer transmits the Wage and Hour decision to the contractor.

6) The contractor informs the affected employees.

Information required by the Regulations must be submitted on SF 1444 or bond paper.

When preparing a conformance request, the "Service Contract Act Directory of

Occupations" (the Directory) should be used to compare job definitions to insure that duties requested are not performed by a classification already listed in the wage determination. Remember, it is not the job title, but the required tasks that determine whether a class is included in an established wage determination. Conformances may not be used to artificially split, combine, or subdivide classifications listed in the wage determination.

Service Contract Act of 1965, as Amended

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

WH Publication 1146
Revised July 1978

SERVICE CONTRACT ACT OF 1965, AS AMENDED [1]

(41 U.S.C. 351, *et seq.*)

(Revised text [1] showing in italics new or amended language provided by Public Law 92-473, as enacted October 9, 1972, and in bold face new or amended language provided by Public Law 94-489, as enacted October 13, 1976.)

AN ACT To provide labor standards for certain persons employed by Federal contractors to furnish services to Federal agencies, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Service Contract Act of 1965".

SEC. 2. (a) Every contract (and any bid specification therefor) entered into by the United States or the District of Columbia in excess of $2,500, except as provided in section 7 of this Act, whether negotiated or advertised, the principal purpose of which is to furnish services in the United States through the use of service employees shall contain the following:

(1) A provision specifying the minimum monetary wages to be paid the various classes of service employees in the performance of the contract or any subcontract thereunder, as determined by the Secretary, or his authorized representative, in accordance with prevailing rates for such employees in the locality, *or, where a collective bargaining agreement covers any such service employees, in accordance with the rates for such employees provided for in such agreement, including prospective wage increases provided for in such agreement as a result of arm's-length negotiations. In no case shall such wages be lower than the minimum specified in subsection (b).*

(2) A provision specifying the fringe benefits to be furnished the various classes of service employees, engaged in the performance of the contract or any subcontract thereunder, as determined by the Secretary or his authorized representative to be prevailing for such employees in the locality, *or, where a collective-bargaining agreement covers any such service employees, to be provided for in such agreement, including prospective fringe benefit increases provided for in such agreement, as a result of arm's-length negotiations.* Such fringe benefits shall include medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, unemployment benefits, life insurance, disability and sickness insurance, accident insurance, vacation and holiday pay, costs of apprenticeship or other similar programs and other bona fide fringe benefits not otherwise required by Federal, State, or local law to be provided by the contractor or subcontractor. The obligation under this subparagraph may be discharged by furnishing any equivalent combinations of fringe benefits or by making equivalent or differential payments in cash under rules and regulations established by the Secretary.

(3) A provision that no part of the services covered by this Act will be performed in buildings or surroundings or under working conditions, provided by or under the control or supervision of the contractor or any subcontractor, which are unsanitary or hazardous or dangerous to the health or safety of service employees engaged to furnish the services.

(4) A provision that on the date a service employee commences work on a contract to which this Act applies, the contractor or subcontractor will deliver to the employee a notice of the compensation required under paragraphs (1) and (2) of this subsection, on a form prepared by the Federal agency,

[1] Public Law 89-286, 79 Stat. 1034, as amended by Public Law 92-473, 86 Stat. 789; by Public Law 93-57, 87 Stat. 140; and by Public Law 94-489, 90 Stat. 2358.

or will post a notice of the required compensation in a prominent place at the worksite.

(5) A statement of the rates that would be paid by the Federal agency to the various classes of service employees if section 5341 **or section 5332** *of title 5, United States Code, were applicable to them. The Secretary shall give due consideration to such rates in making the wage and fringe benefit determinations specified in this section.*

(b) (1) No contractor who enters into any contract with the Federal Government the principal purpose of which is to furnish services through the use of service employees and no subcontractor thereunder shall pay any of his employees engaged in performing work on such contracts less than the minimum wage specified under section 6(a)(1) of the Fair Labor Standards Act of 1938, as amended (52 Stat. 1060; 29 U.S.C. 201, et seq.).

(2) The provisions of sections 3, 4, and 5 of this Act shall be applicable to violations of this subsection.

SEC. 3. (a) Any violation of any of the contract stipulations required by section 2(a) (1) or (2) or of section 2(b) of this Act shall render the party responsible therefor liable for a sum equal to the amount of any deductions, rebates, refunds, or underpayment of compensation due to any employee engaged in the performance of such contract. So much of the accrued payment due on the contract or any other contract between the same contractor and the Federal Government may be withheld as is necessary to pay such employees. Such withheld sums shall be held in a deposit fund. On order of the Secretary, any compensation which the head of the Federal agency or the Secretary has found to be due pursuant to this Act shall be paid directly to the underpaid employees from any accrued payments withheld under this Act.

(b) In accordance with regulations prescribed pursuant to section 4 of this Act, the Federal agency head or the Secretary is hereby authorized to carry out the provisions of this section.

(c) In addition, when a violation is found of any contract stipulation, the contract is subject upon written notice to cancellation by the contracting agency. Whereupon, the United States may enter into other contracts or arrangements for the completion of the original contract, charging any additional cost to the original contractor.

SEC. 4. (a) Sections 4 and 5 of the Act of June 30, 1936 (49 Stat. 2036), as amended, shall govern the Secretary's authority to enforce this Act, make rules, regulations, issue orders, hold hearings, and make decisions based upon findings of fact, and take other appropriate action hereunder.

(b) The Secretary may provide such reasonable limitations and may make such rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions of this Act (*other than section 10*), *but only in special circumstances where he determines that such limitation, variation, tolerance, or exemption is necessary and proper in the public interest or to avoid the serious impairment of government business, and is in accord with the remedial purpose of this Act to protect prevailing labor standards.*

(c) No contractor or subcontractor under a contract, which succeeds a contract subject to this Act and under which substantially the same services are furnished, shall pay any service employee under such contract less than the wages and fringe benefits, including accrued wages and fringe benefits, and any prospective increases in wages and fringe benefits provided for in a collective-bargaining agreement as a result of arm's-length negotiations, to which such service employees would have been entitled if they were employed under the predecessor contract: Provided, *That in any of the foregoing circumstances such obligations shall not apply if the Secretary finds after a hearing in accordance with regulations adopted by the Secretary that such wages and fringe benefits are substantially at variance with those which prevail for services of a character similar in the locality.*

(d) Subject to limitations in annual appropriation Acts but notwithstanding any other provision of law, contracts to which this Act applies may, if authorized by the Secretary,

be for any term of years not exceeding five, if each such contract provides for the periodic adjustment of wages and fringe benefits pursuant to future determinations, issued in the manner prescribed in section 2 of this Act no less often than once every two years during the term of the contract, covering the various classes of service employees.

SEC. 5. (a) The Comptroller General is directed to distribute a list to all agencies of the Government giving the names of persons or firms that the Federal agencies or the Secretary have found to have violated this Act. Unless the Secretary otherwise recommends *because of unusual circumstances,* no contract of the United States shall be awarded to the persons or firms appearing on this list or to any firm, corporation, partnership, or association in which such persons or firms have a substantial interest until three years have elapsed from the date of publication of the list containing the name of such persons or firms. *Where the Secretary does not otherwise recommend because of unusual circumstances, he shall, not later than ninety days after a hearing examiner has made a finding of a violation of this Act, forward to the Comptroller General the name of the individual or firm found to have violated the provisions of this Act.*

(b) If the accrued payments withheld under the terms of the contract are insufficient to reimburse all service employees with respect to whom there has been a failure to pay the compensation required pursuant to this Act, the United States may bring action against the contractor, subcontractor, or any sureties in any court of competent jurisdiction to recover the remaining amount of underpayments. Any sums thus recovered by the United States shall be held in the deposit fund and shall be paid, on order of the Secretary, directly to the underpaid employee or employees. Any sum not paid to an employee because of inability to do so within three years shall be covered into the Treasury of the United States as miscellaneous receipts.

SEC. 6. In determining any overtime pay to which such service employees are entitled under any Federal law, the regular or basic hourly rate of pay of such an employee shall not include any fringe benefit payments computed hereunder which are excluded from the regular rate under the Fair Labor Standards Act by provisions of section 7(d) thereof.

SEC. 7. This Act shall not apply to—

(1) any contract of the United States or District of Columbia for construction, alteration and/or repair, including painting and decorating of public buildings or public works;

(2) any work required to be done in accordance with the provisions of the Walsh-Healey Public Contracts Act (49 Stat. 2036);

(3) any contract for the carriage of freight or personnel by vessel, airplane, bus, truck, express, railway line or oil or gas pipeline where published tariff rates are in effect;

(4) any contract for the furnishing of services by radio, telephone, telegraph, or cable companies, subject to the Communications Act of 1934;

(5) any contract for public utility services, including electric light and power, water, steam, and gas;

(6) any employment contract providing for direct services to a Federal agency by an individual or individuals; and

(7) any contract with the Post Office Department, the principal purpose of which is the operation of postal contract stations.

SEC. 8. For the purposes of this Act—

(a) "Secretary" means Secretary of Labor.

(b) The term "service employee" means any person engaged in the performance of a contract entered into by the United States and not exempted under section 7, whether negotiated or advertised, the principal purpose of which is to furnish services in the United States (other than any person employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in part 541 of title 29, Code of Federal Regulations, as of July 30, 1976, and any subsequent revision of those regulations); and shall include all such persons

regardless of any contractual relationship that may be alleged to exist between a contractor or subcontractor and such persons.

(c) The term "compensation" means any of the payments or fringe benefits described in section 2 of this Act.

(d) The term "United States" when used in a geographical sense shall include any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, Outer Continental Shelf lands as defined in the Outer Continental Shelf Lands Act, American Samoa, Guam, Wake Island, Eniwetok Atoll, Kwajalein Atoll, Johnston Island, and Canton Island,[2] but shall not include any other territory under the jurisdiction of the United States or any United States base or possession within a foreign country.

SEC. 9. This Act shall apply to all contracts entered into pursuant to negotiations concluded or invitations for bids issued on or after ninety days from the date of enactment of this Act.

Sec. 10. It is the intent of the Congress that determinations of minimum monetary wages and fringe benefits for the various classes of service employees under the provisions of paragraphs (1) and (2) of section 2 should be made with respect to all contracts subject to this Act, as soon as it is administratively feasible to do so. In any event, the Secretary shall make such determinations with respect to at least the following contracts subject to this Act which are entered into during the applicable fiscal year:

(1) For the fiscal year ending June 30, 1973, all contracts under which more than twenty-five service employees are to be employed.

(2) For the fiscal year ending June 30, 1974, all contracts, under which more than twenty service employees are to be employed.

(3) For the fiscal year ending June 30, 1975, all contracts under which more than fifteen service employees are to be employed.

(4) For the fiscal year ending June 30, 1976, all contracts under which more than ten service employees are to be employed.

(5) For the fiscal year ending June 30, 1977, and for each fiscal year thereafter, all contracts under which more than five service employees are to be employed.

Approved October 22, 1965 (Public Law 89-286).

Approved October 9, 1972 (Amendments, Public Law 92-473).

Approved October 13, 1976 (Amendments, Public Law 94-489).

[2] Canton Island added by Public Law 93-57, 87 Stat. 140.

Legislative History (Public Law 89-286):
House Report No. 948 (Comm. on Education & Labor).
Senate Report No. 798 (Comm. on Labor & Public Welfare).
Congressional Record, Vol. 111 (1965):
Sept. 20, Considered and passed House.
Oct. 1, Considered and passed Senate, amended.
Oct. 6, House concurred in Senate amendment.

Legislative History (Public Law 92-473):
House Report No. 92-1251 (Comm. on Education and Labor).
Senate Report No. 92-1131 (Comm. on Labor and Public Welfare).
Congressional Record, Vol. 118 (1972):
Aug. 7, considered and passed House.
Sept. 19, considered and passed Senate, amended.
Sept. 27, House concurred in Senate amendments.

Legislative History (Public Law 94-489):
House Report No. 94-1571 (Comm. on Education and Labor).
Congressional Record, Vol. 122 (1976):
Sept. 21, considered and passed House.
Sept. 30, considered and passed Senate.

UCC: uniform commercial code

U.C.C. - ARTICLE 4A - FUNDS TRANSFER

PART 1. SUBJECT MATTER AND DEFINITIONS [Table of Contents]

§ 4A-101. SHORT TITLE.

This Article may be cited as Uniform Commercial Code--Funds Transfers.

§ 4A-102. SUBJECT MATTER.

Except as otherwise provided in Section 4A-108, this Article applies to funds transfers defined in Section 4A-104.

§ 4A-103. PAYMENT ORDER - DEFINITIONS.

(a) In this Article:

(1) "**Payment order**" means an instruction of a sender to a receiving bank, transmitted orally, electronically, or in writing, to pay, or to cause another bank to pay, a fixed or determinable amount of money to a beneficiary if:

(i) the instruction does not state a condition to payment to the beneficiary other than time of payment,

(ii) the receiving bank is to be reimbursed by debiting an account of, or otherwise receiving payment from, the sender, and

(iii) the instruction is transmitted by the sender directly to the receiving bank or to an agent, funds-transfer system, or communication system for transmittal to the receiving bank.

(2) "**Beneficiary**" means the person to be paid by the beneficiary's bank.

(3) "**Beneficiary's bank**" means the bank identified in a payment order in which an account of the beneficiary is to be credited pursuant to the order or which otherwise is to make payment to the beneficiary if the order does not provide for payment to an account.

(4) "**Receiving bank**" means the bank to which the sender's instruction is addressed.

(5) "**Sender**" means the person giving the instruction to the receiving bank.

(b) If an instruction complying with subsection (a)(1) is to make more than one payment to a beneficiary, the instruction is a separate payment order with respect to each payment.

(c) A payment order is issued when it is sent to the receiving bank.

§ 4A-104. FUNDS TRANSFER - DEFINITIONS.

In this Article:

(a) "**Funds transfer**" means the series of transactions, beginning with the originator's payment order, made for the purpose of making payment to the beneficiary of the order. The term includes any payment order issued by the originator's bank or an intermediary bank intended to carry out the originator's payment order. A funds transfer is completed by acceptance by the beneficiary's bank of a payment order for the benefit of the beneficiary of the originator's payment order.

(b) "**Intermediary bank**" means a receiving bank other than the originator's bank or the beneficiary's bank.

(c) "**Originator**" means the sender of the first payment order in a funds transfer.

(d) "**Originator's bank**" means (i) the receiving bank to which the payment order of the originator is issued if the originator is not a bank, or (ii) the originator if the originator is a bank.

§ 4A-105. OTHER DEFINITIONS.

(a) In this Article:

(1) "**Authorized account**" means a deposit account of a customer in a bank designated by the customer as a source of payment of payment orders issued by the customer to the bank. If a customer does not so designate an account, any account of the customer is an authorized account if payment of a payment order from that account is not inconsistent with a restriction on the use of that account.

(2) "**Bank**" means a person engaged in the business of banking and includes a savings bank, savings and loan association, credit union, and trust company. A branch or separate office of a bank is a separate bank for purposes of this Article.

(3) "**Customer**" means a person, including a bank, having an account with a bank or from whom a bank has agreed to receive payment orders.

(4) "**Funds-transfer business day**" of a receiving bank means the part of a day during which the receiving bank is open for the receipt, processing, and transmittal of payment orders and cancellations and amendments of payment orders.

(5) "**Funds-transfer system**" means a wire transfer network, automated clearing house, or other communication system of a clearing house or other association of banks through which a payment order by a bank may be transmitted to the bank to which the order is addressed.

(6) [reserved]

(7) "**Prove**" with respect to a fact means to meet the burden of establishing the fact (Section 1-201(b)(8)).

(b) Other definitions applying to this Article and the sections in which they appear are:

"**Acceptance**"	Section 4A-209
"**Beneficiary**"	Section 4A-103
"**Beneficiary's bank**"	Section 4A-103
"**Executed**"	Section 4A-301
"**Execution date**"	Section 4A-301
"**Funds transfer**"	Section 4A-104
"**Funds-transfer system rule**"	Section 4A-501

"**Intermediary bank**" Section 4A-104

"**Originator**" Section 4A-104

"**Originator's bank**" Section 4A-104

"**Payment by beneficiary's bank to beneficiary**" Section 4A-405

"**Payment by originator tobeneficiary**" Section 4A-406

"**Payment by sender to receiving bank**" Section 4A-403

"**Payment date**" Section 4A-401

"**Payment order**" Section 4A-103

"**Receiving bank**" Section 4A-103

"**Security procedure**" Section 4A-201

"**Sender**" Section 4A-103

(c) The following definitions in Article 4 apply to this Article:

"**Clearing house**" Section 4-104

"**Item**" Section 4-104

"**Suspends payments**" Section 4-104

(d) In addition Article 1 contains general definitions and principles of construction and interpretation applicable throughout this Article.

§ 4A-106. TIME PAYMENT ORDER IS RECEIVED.

(a) The time of receipt of a payment order or communication cancelling or amending a payment order is determined by the rules applicable to receipt of a notice stated in Section 1-202. A receiving bank may fix a cut-off time or times on a funds-transfer business day for the receipt and processing of payment orders and communications cancelling or amending payment orders. Different cut-off times may apply to payment orders, cancellations, or amendments, or to different categories of payment orders, cancellations, or amendments. A cut-off time may apply to senders generally or different cut-off times may apply to different senders or categories of payment orders. If a payment order or communication cancelling or amending a payment order is received after the close of a funds-transfer business day or after the appropriate cut-off time on a funds-transfer business day, the receiving bank may treat the payment order or communication as received at the opening of the next funds-transfer business day.

(b) If this Article refers to an execution date or payment date or states a day on which a receiving bank is required to take action, and the date or day does not fall on a funds-transfer business day, the next day that is a funds-transfer business day is treated as the date or day stated, unless the contrary is stated in this Article.

§ 4A-107. FEDERAL RESERVE REGULATIONS AND OPERATING CIRCULARS.

Regulations of the Board of Governors of the Federal Reserve System and operating circulars of the Federal Reserve Banks supersede any inconsistent provision of this Article to the extent of the inconsistency.

§ 4A-108. EXCLUSION OF CONSUMER TRANSACTIONS GOVERNED BY FEDERAL LAW.

This Article does not apply to a funds transfer any part of which is governed by the Electronic Fund Transfer Act of 1978 (Title XX, Public Law 95-630, 92 Stat. 3728, 15 U.S.C. § 1693 et seq.) as amended from time to time.

PART 2. ISSUE AND ACCEPTANCE OF PAYMENT ORDER [Table of Contents]

§ 4A-201. SECURITY PROCEDURE.

"**Security procedure**" means a procedure established by agreement of a customer and a receiving bank for the purpose of (i) verifying that a payment order or communication amending or cancelling a payment order is that of the customer, or (ii) detecting error in the transmission or the content of the payment order or communication. A security procedure may require the use of algorithms or other codes, identifying words or numbers, encryption, callback procedures, or similar security devices. Comparison of a signature on a payment order or communication with an authorized specimen signature of the customer is not by itself a security procedure.

§ 4A-202. AUTHORIZED AND VERIFIED PAYMENT ORDERS.

(a) A payment order received by the receiving bank is the authorized order of the person identified as sender if that person authorized the order or is otherwise bound by it under the law of agency.

(b) If a bank and its customer have agreed that the authenticity of payment orders issued to the bank in the name of the customer as sender will be verified pursuant to a security procedure, a payment order received by the receiving bank is effective as the order of the customer, whether or not authorized, if (i) the security procedure is a commercially reasonable method of providing security against unauthorized payment orders, and (ii) the bank proves that it accepted the payment order in good faith and in compliance with the security procedure and any written agreement or instruction of the customer restricting acceptance of payment orders issued in the name of the customer. The bank is not required to follow an instruction that violates a written agreement with the customer or notice of which is not received at a time and in a manner affording the bank a reasonable opportunity to act on it before the payment order is accepted.

(c) Commercial reasonableness of a security procedure is a question of law to be determined by considering the wishes of the customer expressed to the bank, the circumstances of the customer known to the bank, including the size, type, and frequency of payment orders normally issued by the customer to the bank, alternative security procedures offered to the customer, and security procedures in general use by customers and receiving banks similarly situated. A security procedure is deemed to be commercially reasonable if (i) the security procedure was chosen by the customer after the bank offered, and the customer refused, a security procedure that was commercially reasonable for that customer, and (ii) the customer expressly agreed in writing to be bound by any payment order, whether or not authorized, issued in its name and accepted by the bank in compliance with the security procedure chosen by the customer.

(d) The term "**sender**" in this Article includes the customer in whose name a payment order is issued if the order is the authorized order of the customer under subsection (a), or it is effective as the order of the customer under subsection (b).

(e) This section applies to amendments and cancellations of payment orders to the same extent it applies to payment orders.

(f) Except as provided in this section and in Section 4A-203(a)(1), rights and obligations arising under this section or Section 4A-203 may not be varied by agreement.

§ 4A-203. UNENFORCEABILITY OF CERTAIN VERIFIED PAYMENT ORDERS.

(a) If an accepted payment order is not, under Section 4A-202(a), an authorized order of a customer

identified as sender, but is effective as an order of the customer pursuant to Section 4A-202(b), the following rules apply:

(1) By express written agreement, the receiving bank may limit the extent to which it is entitled to enforce or retain payment of the payment order.

(2) The receiving bank is not entitled to enforce or retain payment of the payment order if the customer proves that the order was not caused, directly or indirectly, by a person (i) entrusted at any time with duties to act for the customer with respect to payment orders or the security procedure, or (ii) who obtained access to transmitting facilities of the customer or who obtained, from a source controlled by the customer and without authority of the receiving bank, information facilitating breach of the security procedure, regardless of how the information was obtained or whether the customer was at fault. Information includes any access device, computer software, or the like.

(b) This section applies to amendments of payment orders to the same extent it applies to payment orders.

§ 4A-204. REFUND OF PAYMENT AND DUTY OF CUSTOMER TO REPORT WITH RESPECT TO UNAUTHORIZED PAYMENT ORDER.

(a) If a receiving bank accepts a payment order issued in the name of its customer as sender which is (i) not authorized and not effective as the order of the customer under Section 4A-202, or (ii) not enforceable, in whole or in part, against the customer under Section 4A-203, the bank shall refund any payment of the payment order received from the customer to the extent the bank is not entitled to enforce payment and shall pay interest on the refundable amount calculated from the date the bank received payment to the date of the refund. However, the customer is not entitled to interest from the bank on the amount to be refunded if the customer fails to exercise ordinary care to determine that the order was not authorized by the customer and to notify the bank of the relevant facts within a reasonable time not exceeding 90 days after the date the customer received notification from the bank that the order was accepted or that the customer's account was debited with respect to the order. The bank is not entitled to any recovery from the customer on account of a failure by the customer to give notification as stated in this section.

(b) Reasonable time under subsection (a) may be fixed by agreement as stated in Section 1-204(1), but the obligation of a receiving bank to refund payment as stated in subsection (a) may not otherwise be varied by agreement.

§ 4A-205. ERRONEOUS PAYMENT ORDERS.

(a) If an accepted payment order was transmitted pursuant to a security procedure for the detection of error and the payment order (i) erroneously instructed payment to a beneficiary not intended by the sender, (ii) erroneously instructed payment in an amount greater than the amount intended by the sender, or (iii) was an erroneously transmitted duplicate of a payment order previously sent by the sender, the following rules apply:

(1) If the sender proves that the sender or a person acting on behalf of the sender pursuant to Section 4A-206 complied with the security procedure and that the error would have been detected if the receiving bank had also complied, the sender is not obliged to pay the order to the extent stated in paragraphs (2) and (3).

(2) If the funds transfer is completed on the basis of an erroneous payment order described in clause (i) or (iii) of subsection (a), the sender is not obliged to pay the order and the receiving bank is entitled to recover from the beneficiary any amount paid to the beneficiary to the extent allowed by the law governing mistake and restitution.

(3) If the funds transfer is completed on the basis of a payment order described in clause (ii) of subsection (a), the sender is not obliged to pay the order to the extent the amount received by the beneficiary is greater than the amount intended by the sender. In that case, the receiving bank is entitled to recover from the beneficiary the excess amount received to the extent allowed by the law governing mistake and restitution.

(b) If (i) the sender of an erroneous payment order described in subsection (a) is not obliged to pay all or part of the order, and (ii) the sender receives notification from the receiving bank that the order

was accepted by the bank or that the sender's account was debited with respect to the order, the sender has a duty to exercise ordinary care, on the basis of information available to the sender, to discover the error with respect to the order and to advise the bank of the relevant facts within a reasonable time, not exceeding 90 days, after the bank's notification was received by the sender. If the bank proves that the sender failed to perform that duty, the sender is liable to the bank for the loss the bank proves it incurred as a result of the failure, but the liability of the sender may not exceed the amount of the sender's order.

(c) This section applies to amendments to payment orders to the same extent it applies to payment orders.

§ 4A-206. TRANSMISSION OF PAYMENT ORDER THROUGH FUNDS-TRANSFER OR OTHER COMMUNICATION SYSTEM.

(a) If a payment order addressed to a receiving bank is transmitted to a funds-transfer system or other third-party communication system for transmittal to the bank, the system is deemed to be an agent of the sender for the purpose of transmitting the payment order to the bank. If there is a discrepancy between the terms of the payment order transmitted to the system and the terms of the payment order transmitted by the system to the bank, the terms of the payment order of the sender are those transmitted by the system. This section does not apply to a funds-transfer system of the Federal Reserve Banks.

(b) This section applies to cancellations and amendments of payment orders to the same extent it applies to payment orders.

§ 4A-207. MISDESCRIPTION OF BENEFICIARY.

(a) Subject to subsection (b), if, in a payment order received by the beneficiary's bank, the name, bank account number, or other identification of the beneficiary refers to a nonexistent or unidentifiable person or account, no person has rights as a beneficiary of the order and acceptance of the order cannot occur.

(b) If a payment order received by the beneficiary's bank identifies the beneficiary both by name and by an identifying or bank account number and the name and number identify different persons, the following rules apply:

(1) Except as otherwise provided in subsection (c), if the beneficiary's bank does not know that the name and number refer to different persons, it may rely on the number as the proper identification of the beneficiary of the order. The beneficiary's bank need not determine whether the name and number refer to the same person.

(2) If the beneficiary's bank pays the person identified by name or knows that the name and number identify different persons, no person has rights as beneficiary except the person paid by the beneficiary's bank if that person was entitled to receive payment from the originator of the funds transfer. If no person has rights as beneficiary, acceptance of the order cannot occur.

(c) If (i) a payment order described in subsection (b) is accepted, (ii) the originator's payment order described the beneficiary inconsistently by name and number, and (iii) the beneficiary's bank pays the person identified by number as permitted by subsection (b)(1), the following rules apply:

(1) If the originator is a bank, the originator is obliged to pay its order.

(2) If the originator is not a bank and proves that the person identified by number was not entitled to receive payment from the originator, the originator is not obliged to pay its order unless the originator's bank proves that the originator, before acceptance of the originator's order, had notice that payment of a payment order issued by the originator might be made by the beneficiary's bank on the basis of an identifying or bank account number even if it identifies a person different from the named beneficiary. Proof of notice may be made by any admissible evidence. The originator's bank satisfies the burden of proof if it proves that the originator, before the payment order was accepted, signed a writing stating the information to which the notice relates.

(d) In a case governed by subsection (b)(1), if the beneficiary's bank rightfully pays the person

identified by number and that person was not entitled to receive payment from the originator, the amount paid may be recovered from that person to the extent allowed by the law governing mistake and restitution as follows:

(1) If the originator is obliged to pay its payment order as stated in subsection (c), the originator has the right to recover.

(2) If the originator is not a bank and is not obliged to pay its payment order, the originator's bank has the right to recover.

§ 4A-208. MISDESCRIPTION OF INTERMEDIARY BANK OR BENEFICIARY'S BANK.

(a) This subsection applies to a payment order identifying an intermediary bank or the beneficiary's bank only by an identifying number.

(1) The receiving bank may rely on the number as the proper identification of the intermediary or beneficiary's bank and need not determine whether the number identifies a bank.

(2) The sender is obliged to compensate the receiving bank for any loss and expenses incurred by the receiving bank as a result of its reliance on the number in executing or attempting to execute the order.

(b) This subsection applies to a payment order identifying an intermediary bank or the beneficiary's bank both by name and an identifying number if the name and number identify different persons.

(1) If the sender is a bank, the receiving bank may rely on the number as the proper identification of the intermediary or beneficiary's bank if the receiving bank, when it executes the sender's order, does not know that the name and number identify different persons. The receiving bank need not determine whether the name and number refer to the same person or whether the number refers to a bank. The sender is obliged to compensate the receiving bank for any loss and expenses incurred by the receiving bank as a result of its reliance on the number in executing or attempting to execute the order.

(2) If the sender is not a bank and the receiving bank proves that the sender, before the payment order was accepted, had notice that the receiving bank might rely on the number as the proper identification of the intermediary or beneficiary's bank even if it identifies a person different from the bank identified by name, the rights and obligations of the sender and the receiving bank are governed by subsection (b)(1), as though the sender were a bank. Proof of notice may be made by any admissible evidence. The receiving bank satisfies the burden of proof if it proves that the sender, before the payment order was accepted, signed a writing stating the information to which the notice relates.

(3) Regardless of whether the sender is a bank, the receiving bank may rely on the name as the proper identification of the intermediary or beneficiary's bank if the receiving bank, at the time it executes the sender's order, does not know that the name and number identify different persons. The receiving bank need not determine whether the name and number refer to the same person.

(4) If the receiving bank knows that the name and number identify different persons, reliance on either the name or the number in executing the sender's payment order is a breach of the obligation stated in Section 4A-302(a)(1).

§ 4A-209. ACCEPTANCE OF PAYMENT ORDER.

(a) Subject to subsection (d), a receiving bank other than the beneficiary's bank accepts a payment order when it executes the order.

(b) Subject to subsections (c) and (d), a beneficiary's bank accepts a payment order at the earliest of the following times:

(1) when the bank (i) pays the beneficiary as stated in Section 4A-405(a) or 4A-405(b), or (ii) notifies the beneficiary of receipt of the order or that the account of the beneficiary has been credited with respect to the order unless the notice indicates that the bank is rejecting the order or that funds with respect to the order may not be withdrawn or used until receipt of payment from the sender of the order;

(2) when the bank receives payment of the entire amount of the sender's order pursuant to Section 4A-403(a)(1) or 4A-403(a)(2); or

(3) the opening of the next funds-transfer business day of the bank following the payment date of the order if, at that time, the amount of the sender's order is fully covered by a withdrawable credit balance in an authorized account of the sender or the bank has otherwise received full payment from the sender, unless the order was rejected before that time or is rejected within (i) one hour after that time, or (ii) one hour after the opening of the next business day of the sender following the payment date if that time is later. If notice of rejection is received by the sender after the payment date and the authorized account of the sender does not bear interest, the bank is obliged to pay interest to the sender on the amount of the order for the number of days elapsing after the payment date to the day the sender receives notice or learns that the order was not accepted, counting that day as an elapsed day. If the withdrawable credit balance during that period falls below the amount of the order, the amount of interest payable is reduced accordingly.

(c) Acceptance of a payment order cannot occur before the order is received by the receiving bank. Acceptance does not occur under subsection (b)(2) or (b)(3) if the beneficiary of the payment order does not have an account with the receiving bank, the account has been closed, or the receiving bank is not permitted by law to receive credits for the beneficiary's account.

(d) A payment order issued to the originator's bank cannot be accepted until the payment date if the bank is the beneficiary's bank, or the execution date if the bank is not the beneficiary's bank. If the originator's bank executes the originator's payment order before the execution date or pays the beneficiary of the originator's payment order before the payment date and the payment order is subsequently canceled pursuant to Section 4A-211(b), the bank may recover from the beneficiary any payment received to the extent allowed by the law governing mistake and restitution.

§ 4A-210. REJECTION OF PAYMENT ORDER.

(a) A payment order is rejected by the receiving bank by a notice of rejection transmitted to the sender orally, electronically, or in writing. A notice of rejection need not use any particular words and is sufficient if it indicates that the receiving bank is rejecting the order or will not execute or pay the order. Rejection is effective when the notice is given if transmission is by a means that is reasonable in the circumstances. If notice of rejection is given by a means that is not reasonable, rejection is effective when the notice is received. If an agreement of the sender and receiving bank establishes the means to be used to reject a payment order, (i) any means complying with the agreement is reasonable and (ii) any means not complying is not reasonable unless no significant delay in receipt of the notice resulted from the use of the noncomplying means.

(b) This subsection applies if a receiving bank other than the beneficiary's bank fails to execute a payment order despite the existence on the execution date of a withdrawable credit balance in an authorized account of the sender sufficient to cover the order. If the sender does not receive notice of rejection of the order on the execution date and the authorized account of the sender does not bear interest, the bank is obliged to pay interest to the sender on the amount of the order for the number of days elapsing after the execution date to the earlier of the day the order is canceled pursuant to Section 4A-211(d) or the day the sender receives notice or learns that the order was not executed, counting the final day of the period as an elapsed day. If the withdrawable credit balance during that period falls below the amount of the order, the amount of interest is reduced accordingly.

(c) If a receiving bank suspends payments, all unaccepted payment orders issued to it are deemed rejected at the time the bank suspends payments.

(d) Acceptance of a payment order precludes a later rejection of the order. Rejection of a payment order precludes a later acceptance of the order.

§ 4A-211. CANCELLATION AND AMENDMENT OF PAYMENT ORDER.

(a) A communication of the sender of a payment order cancelling or amending the order may be transmitted to the receiving bank orally, electronically, or in writing. If a security procedure is in effect between the sender and the receiving bank, the communication is not effective to cancel or amend the order unless the communication is verified pursuant to the security procedure or the bank

agrees to the cancellation or amendment.

(b) Subject to subsection (a), a communication by the sender cancelling or amending a payment order is effective to cancel or amend the order if notice of the communication is received at a time and in a manner affording the receiving bank a reasonable opportunity to act on the communication before the bank accepts the payment order.

(c) After a payment order has been accepted, cancellation or amendment of the order is not effective unless the receiving bank agrees or a funds-transfer system rule allows cancellation or amendment without agreement of the bank.

(1) With respect to a payment order accepted by a receiving bank other than the beneficiary's bank, cancellation or amendment is not effective unless a conforming cancellation or amendment of the payment order issued by the receiving bank is also made.

(2) With respect to a payment order accepted by the beneficiary's bank, cancellation or amendment is not effective unless the order was issued in execution of an unauthorized payment order, or because of a mistake by a sender in the funds transfer which resulted in the issuance of a payment order (i) that is a duplicate of a payment order previously issued by the sender, (ii) that orders payment to a beneficiary not entitled to receive payment from the originator, or (iii) that orders payment in an amount greater than the amount the beneficiary was entitled to receive from the originator. If the payment order is canceled or amended, the beneficiary's bank is entitled to recover from the beneficiary any amount paid to the beneficiary to the extent allowed by the law governing mistake and restitution.

(d) An unaccepted payment order is canceled by operation of law at the close of the fifth funds-transfer business day of the receiving bank after the execution date or payment date of the order.

(e) A canceled payment order cannot be accepted. If an accepted payment order is canceled, the acceptance is nullified and no person has any right or obligation based on the acceptance. Amendment of a payment order is deemed to be cancellation of the original order at the time of amendment and issue of a new payment order in the amended form at the same time.

(f) Unless otherwise provided in an agreement of the parties or in a funds-transfer system rule, if the receiving bank, after accepting a payment order, agrees to cancellation or amendment of the order by the sender or is bound by a funds-transfer system rule allowing cancellation or amendment without the bank's agreement, the sender, whether or not cancellation or amendment is effective, is liable to the bank for any loss and expenses, including reasonable attorney's fees, incurred by the bank as a result of the cancellation or amendment or attempted cancellation or amendment.

(g) A payment order is not revoked by the death or legal incapacity of the sender unless the receiving bank knows of the death or of an adjudication of incapacity by a court of competent jurisdiction and has reasonable opportunity to act before acceptance of the order.

(h) A funds-transfer system rule is not effective to the extent it conflicts with subsection (c)(2).

§ 4A-212. LIABILITY AND DUTY OF RECEIVING BANK REGARDING UNACCEPTED PAYMENT ORDER.

If a receiving bank fails to accept a payment order that it is obliged by express agreement to accept, the bank is liable for breach of the agreement to the extent provided in the agreement or in this Article, but does not otherwise have any duty to accept a payment order or, before acceptance, to take any action, or refrain from taking action, with respect to the order except as provided in this Article or by express agreement. Liability based on acceptance arises only when acceptance occurs as stated in Section 4A-209, and liability is limited to that provided in this Article. A receiving bank is not the agent of the sender or beneficiary of the payment order it accepts, or of any other party to the funds transfer, and the bank owes no duty to any party to the funds transfer except as provided in this Article or by express agreement.

PART 3. EXECUTION OF SENDER'S PAYMENT ORDER BY RECEIVING BANK

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§ 4A-301. EXECUTION AND EXECUTION DATE.

(a) A payment order is "**executed**" by the receiving bank when it issues a payment order intended to carry out the payment order received by the bank. A payment order received by the beneficiary's bank can be accepted but cannot be executed.

(b) "**Execution date**" of a payment order means the day on which the receiving bank may properly issue a payment order in execution of the sender's order. The execution date may be determined by instruction of the sender but cannot be earlier than the day the order is received and, unless otherwise determined, is the day the order is received. If the sender's instruction states a payment date, the execution date is the payment date or an earlier date on which execution is reasonably necessary to allow payment to the beneficiary on the payment date.

§ 4A-302. OBLIGATIONS OF RECEIVING BANK IN EXECUTION OF PAYMENT ORDER.

(a) Except as provided in subsections (b) through (d), if the receiving bank accepts a payment order pursuant to Section 4A-209(a), the bank has the following obligations in executing the order:

(1) The receiving bank is obliged to issue, on the execution date, a payment order complying with the sender's order and to follow the sender's instructions concerning (i) any intermediary bank or funds-transfer system to be used in carrying out the funds transfer, or (ii) the means by which payment orders are to be transmitted in the funds transfer. If the originator's bank issues a payment order to an intermediary bank, the originator's bank is obliged to instruct the intermediary bank according to the instruction of the originator. An intermediary bank in the funds transfer is similarly bound by an instruction given to it by the sender of the payment order it accepts.

(2) If the sender's instruction states that the funds transfer is to be carried out telephonically or by wire transfer or otherwise indicates that the funds transfer is to be carried out by the most expeditious means, the receiving bank is obliged to transmit its payment order by the most expeditious available means, and to instruct any intermediary bank accordingly. If a sender's instruction states a payment date, the receiving bank is obliged to transmit its payment order at a time and by means reasonably necessary to allow payment to the beneficiary on the payment date or as soon thereafter as is feasible.

(b) Unless otherwise instructed, a receiving bank executing a payment order may (i) use any funds-transfer system if use of that system is reasonable in the circumstances, and (ii) issue a payment order to the beneficiary's bank or to an intermediary bank through which a payment order conforming to the sender's order can expeditiously be issued to the beneficiary's bank if the receiving bank exercises ordinary care in the selection of the intermediary bank. A receiving bank is not required to follow an instruction of the sender designating a funds-transfer system to be used in carrying out the funds transfer if the receiving bank, in good faith, determines that it is not feasible to follow the instruction or that following the instruction would unduly delay completion of the funds transfer.

(c) Unless subsection (a)(2) applies or the receiving bank is otherwise instructed, the bank may execute a payment order by transmitting its payment order by first class mail or by any means reasonable in the circumstances. If the receiving bank is instructed to execute the sender's order by transmitting its payment order by a particular means, the receiving bank may issue its payment order by the means stated or by any means as expeditious as the means stated.

(d) Unless instructed by the sender, (i) the receiving bank may not obtain payment of its charges for services and expenses in connection with the execution of the sender's order by issuing a payment order in an amount equal to the amount of the sender's order less the amount of the charges, and (ii) may not instruct a subsequent receiving bank to obtain payment of its charges in the same manner.

§ 4A-303. ERRONEOUS EXECUTION OF PAYMENT ORDER.

(a) A receiving bank that (i) executes the payment order of the sender by issuing a payment order in an amount greater than the amount of the sender's order, or (ii) issues a payment order in execution

of the sender's order and then issues a duplicate order, is entitled to payment of the amount of the sender's order under Section 4A-402(c) if that subsection is otherwise satisfied. The bank is entitled to recover from the beneficiary of the erroneous order the excess payment received to the extent allowed by the law governing mistake and restitution.

(b) A receiving bank that executes the payment order of the sender by issuing a payment order in an amount less than the amount of the sender's order is entitled to payment of the amount of the sender's order under Section 4A-402(c) if (i) that subsection is otherwise satisfied and (ii) the bank corrects its mistake by issuing an additional payment order for the benefit of the beneficiary of the sender's order. If the error is not corrected, the issuer of the erroneous order is entitled to receive or retain payment from the sender of the order it accepted only to the extent of the amount of the erroneous order. This subsection does not apply if the receiving bank executes the sender's payment order by issuing a payment order in an amount less than the amount of the sender's order for the purpose of obtaining payment of its charges for services and expenses pursuant to instruction of the sender.

(c) If a receiving bank executes the payment order of the sender by issuing a payment order to a beneficiary different from the beneficiary of the sender's order and the funds transfer is completed on the basis of that error, the sender of the payment order that was erroneously executed and all previous senders in the funds transfer are not obliged to pay the payment orders they issued. The issuer of the erroneous order is entitled to recover from the beneficiary of the order the payment received to the extent allowed by the law governing mistake and restitution.

§ 4A-304. DUTY OF SENDER TO REPORT ERRONEOUSLY EXECUTED PAYMENT ORDER.

If the sender of a payment order that is erroneously executed as stated in Section 4A-303 receives notification from the receiving bank that the order was executed or that the sender's account was debited with respect to the order, the sender has a duty to exercise ordinary care to determine, on the basis of information available to the sender, that the order was erroneously executed and to notify the bank of the relevant facts within a reasonable time not exceeding 90 days after the notification from the bank was received by the sender. If the sender fails to perform that duty, the bank is not obliged to pay interest on any amount refundable to the sender under Section 4A-402(d) for the period before the bank learns of the execution error. The bank is not entitled to any recovery from the sender on account of a failure by the sender to perform the duty stated in this section.

§ 4A-305. LIABILITY FOR LATE OR IMPROPER EXECUTION OR FAILURE TO EXECUTE PAYMENT ORDER.

(a) If a funds transfer is completed but execution of a payment order by the receiving bank in breach of Section 4A-302 results in delay in payment to the beneficiary, the bank is obliged to pay interest to either the originator or the beneficiary of the funds transfer for the period of delay caused by the improper execution. Except as provided in subsection (c), additional damages are not recoverable.

(b) If execution of a payment order by a receiving bank in breach of Section 4A-302 results in (i) noncompletion of the funds transfer, (ii) failure to use an intermediary bank designated by the originator, or (iii) issuance of a payment order that does not comply with the terms of the payment order of the originator, the bank is liable to the originator for its expenses in the funds transfer and for incidental expenses and interest losses, to the extent not covered by subsection (a), resulting from the improper execution. Except as provided in subsection (c), additional damages are not recoverable.

(c) In addition to the amounts payable under subsections (a) and (b), damages, including consequential damages, are recoverable to the extent provided in an express written agreement of the receiving bank.

(d) If a receiving bank fails to execute a payment order it was obliged by express agreement to execute, the receiving bank is liable to the sender for its expenses in the transaction and for incidental expenses and interest losses resulting from the failure to execute. Additional damages, including

consequential damages, are recoverable to the extent provided in an express written agreement of the receiving bank, but are not otherwise recoverable.

(e) Reasonable attorney's fees are recoverable if demand for compensation under subsection (a) or (b) is made and refused before an action is brought on the claim. If a claim is made for breach of an agreement under subsection (d) and the agreement does not provide for damages, reasonable attorney's fees are recoverable if demand for compensation under subsection (d) is made and refused before an action is brought on the claim.

(f) Except as stated in this section, the liability of a receiving bank under subsections (a) and (b) may not be varied by agreement.

PART 4. PAYMENT [Table of Contents]

§ 4A-401. PAYMENT DATE.

"**Payment date**" of a payment order means the day on which the amount of the order is payable to the beneficiary by the beneficiary's bank. The payment date may be determined by instruction of the sender but cannot be earlier than the day the order is received by the beneficiary's bank and, unless otherwise determined, is the day the order is received by the beneficiary's bank.

§ 4A-402. OBLIGATION OF SENDER TO PAY RECEIVING BANK.

(a) This section is subject to Sections 4A-205 and 4A-207.

(b) With respect to a payment order issued to the beneficiary's bank, acceptance of the order by the bank obliges the sender to pay the bank the amount of the order, but payment is not due until the payment date of the order.

(c) This subsection is subject to subsection (e) and to Section 4A-303. With respect to a payment order issued to a receiving bank other than the beneficiary's bank, acceptance of the order by the receiving bank obliges the sender to pay the bank the amount of the sender's order. Payment by the sender is not due until the execution date of the sender's order. The obligation of that sender to pay its payment order is excused if the funds transfer is not completed by acceptance by the beneficiary's bank of a payment order instructing payment to the beneficiary of that sender's payment order.

(d) If the sender of a payment order pays the order and was not obliged to pay all or part of the amount paid, the bank receiving payment is obliged to refund payment to the extent the sender was not obliged to pay. Except as provided in Sections 4A-204 and 4A-304, interest is payable on the refundable amount from the date of payment.

(e) If a funds transfer is not completed as stated in subsection (c) and an intermediary bank is obliged to refund payment as stated in subsection (d) but is unable to do so because not permitted by applicable law or because the bank suspends payments, a sender in the funds transfer that executed a payment order in compliance with an instruction, as stated in Section 4A-302(a)(1), to route the funds transfer through that intermediary bank is entitled to receive or retain payment from the sender of the payment order that it accepted. The first sender in the funds transfer that issued an instruction requiring routing through that intermediary bank is subrogated to the right of the bank that paid the intermediary bank to refund as stated in subsection (d).

(f) The right of the sender of a payment order to be excused from the obligation to pay the order as stated in subsection (c) or to receive refund under subsection (d) may not be varied by agreement.

§ 4A-403. PAYMENT BY SENDER TO RECEIVING BANK.

(a) Payment of the sender's obligation under Section 4A-402 to pay the receiving bank occurs as follows:

(1) If the sender is a bank, payment occurs when the receiving bank receives final settlement of the obligation through a Federal Reserve Bank or through a funds-transfer system.

(2) If the sender is a bank and the sender (i) credited an account of the receiving bank with the sender, or (ii) caused an account of the receiving bank in another bank to be credited, payment occurs when the credit is withdrawn or, if not withdrawn, at midnight of the day on which the credit is withdrawable and the receiving bank learns of that fact.

(3) If the receiving bank debits an account of the sender with the receiving bank, payment occurs when the debit is made to the extent the debit is covered by a withdrawable credit balance in the account.

(b) If the sender and receiving bank are members of a funds-transfer system that nets obligations multilaterally among participants, the receiving bank receives final settlement when settlement is complete in accordance with the rules of the system. The obligation of the sender to pay the amount of a payment order transmitted through the funds-transfer system may be satisfied, to the extent permitted by the rules of the system, by setting off and applying against the sender's obligation the right of the sender to receive payment from the receiving bank of the amount of any other payment order transmitted to the sender by the receiving bank through the funds-transfer system. The aggregate balance of obligations owed by each sender to each receiving bank in the funds-transfer system may be satisfied, to the extent permitted by the rules of the system, by setting off and applying against that balance the aggregate balance of obligations owed to the sender by other members of the system. The aggregate balance is determined after the right of setoff stated in the second sentence of this subsection has been exercised.

(c) If two banks transmit payment orders to each other under an agreement that settlement of the obligations of each bank to the other under Section 4A-402 will be made at the end of the day or other period, the total amount owed with respect to all orders transmitted by one bank shall be set off against the total amount owed with respect to all orders transmitted by the other bank. To the extent of the setoff, each bank has made payment to the other.

(d) In a case not covered by subsection (a), the time when payment of the sender's obligation under Section 4A-402(b) or 4A-402(c) occurs is governed by applicable principles of law that determine when an obligation is satisfied.

§ 4A-404. OBLIGATION OF BENEFICIARY'S BANK TO PAY AND GIVE NOTICE TO BENEFICIARY.

(a) Subject to Sections 4A-211(e), 4A-405(d), and 4A-405(e), if a beneficiary's bank accepts a payment order, the bank is obliged to pay the amount of the order to the beneficiary of the order. Payment is due on the payment date of the order, but if acceptance occurs on the payment date after the close of the funds-transfer business day of the bank, payment is due on the next funds-transfer business day. If the bank refuses to pay after demand by the beneficiary and receipt of notice of particular circumstances that will give rise to consequential damages as a result of nonpayment, the beneficiary may recover damages resulting from the refusal to pay to the extent the bank had notice of the damages, unless the bank proves that it did not pay because of a reasonable doubt concerning the right of the beneficiary to payment.

(b) If a payment order accepted by the beneficiary's bank instructs payment to an account of the beneficiary, the bank is obliged to notify the beneficiary of receipt of the order before midnight of the next funds-transfer business day following the payment date. If the payment order does not instruct payment to an account of the beneficiary, the bank is required to notify the beneficiary only if notice is required by the order. Notice may be given by first class mail or any other means reasonable in the circumstances. If the bank fails to give the required notice, the bank is obliged to pay interest to the beneficiary on the amount of the payment order from the day notice should have been given until the day the beneficiary learned of receipt of the payment order by the bank. No other damages are recoverable. Reasonable attorney's fees are also recoverable if demand for interest is made and refused before an action is brought on the claim.

(c) The right of a beneficiary to receive payment and damages as stated in subsection (a) may not be varied by agreement or a funds-transfer system rule. The right of a beneficiary to be notified as

stated in subsection (b) may be varied by agreement of the beneficiary or by a funds-transfer system rule if the beneficiary is notified of the rule before initiation of the funds transfer.

§ 4A-405. PAYMENT BY BENEFICIARY'S BANK TO BENEFICIARY.

(a) If the beneficiary's bank credits an account of the beneficiary of a payment order, payment of the bank's obligation under Section 4A-404(a) occurs when and to the extent (i) the beneficiary is notified of the right to withdraw the credit, (ii) the bank lawfully applies the credit to a debt of the beneficiary, or (iii) funds with respect to the order are otherwise made available to the beneficiary by the bank.

(b) If the beneficiary's bank does not credit an account of the beneficiary of a payment order, the time when payment of the bank's obligation under Section 4A-404(a) occurs is governed by principles of law that determine when an obligation is satisfied.

(c) Except as stated in subsections (d) and (e), if the beneficiary's bank pays the beneficiary of a payment order under a condition to payment or agreement of the beneficiary giving the bank the right to recover payment from the beneficiary if the bank does not receive payment of the order, the condition to payment or agreement is not enforceable.

(d) A funds-transfer system rule may provide that payments made to beneficiaries of funds transfers made through the system are provisional until receipt of payment by the beneficiary's bank of the payment order it accepted. A beneficiary's bank that makes a payment that is provisional under the rule is entitled to refund from the beneficiary if (i) the rule requires that both the beneficiary and the originator be given notice of the provisional nature of the payment before the funds transfer is initiated, (ii) the beneficiary, the beneficiary's bank and the originator's bank agreed to be bound by the rule, and (iii) the beneficiary's bank did not receive payment of the payment order that it accepted. If the beneficiary is obliged to refund payment to the beneficiary's bank, acceptance of the payment order by the beneficiary's bank is nullified and no payment by the originator of the funds transfer to the beneficiary occurs under Section 4A-406.

(e) This subsection applies to a funds transfer that includes a payment order transmitted over a funds-transfer system that (i) nets obligations multilaterally among participants, and (ii) has in effect a loss-sharing agreement among participants for the purpose of providing funds necessary to complete settlement of the obligations of one or more participants that do not meet their settlement obligations. If the beneficiary's bank in the funds transfer accepts a payment order and the system fails to complete settlement pursuant to its rules with respect to any payment order in the funds transfer, (i) the acceptance by the beneficiary's bank is nullified and no person has any right or obligation based on the acceptance, (ii) the beneficiary's bank is entitled to recover payment from the beneficiary, (iii) no payment by the originator to the beneficiary occurs under Section 4A-406, and (iv) subject to Section 4A-402(e), each sender in the funds transfer is excused from its obligation to pay its payment order under Section 4A-402(c) because the funds transfer has not been completed.

§ 4A-406. PAYMENT BY ORIGINATOR TO BENEFICIARY; DISCHARGE OF UNDERLYING OBLIGATION.

(a) Subject to Sections 4A-211(e), 4A-405(d), and 4A-405(e), the originator of a funds transfer pays the beneficiary of the originator's payment order (i) at the time a payment order for the benefit of the beneficiary is accepted by the beneficiary's bank in the funds transfer and (ii) in an amount equal to the amount of the order accepted by the beneficiary's bank, but not more than the amount of the originator's order.

(b) If payment under subsection (a) is made to satisfy an obligation, the obligation is discharged to the same extent discharge would result from payment to the beneficiary of the same amount in money, unless (i) the payment under subsection (a) was made by a means prohibited by the contract of the beneficiary with respect to the obligation, (ii) the beneficiary, within a reasonable time after receiving notice of receipt of the order by the beneficiary's bank, notified the originator of the beneficiary's refusal of the payment, (iii) funds with respect to the order were not withdrawn by the beneficiary or applied to a debt of the beneficiary, and (iv) the beneficiary would suffer a loss that could reasonably have been avoided if payment had been made by a means complying with the

contract. If payment by the originator does not result in discharge under this section, the originator is subrogated to the rights of the beneficiary to receive payment from the beneficiary's bank under Section 4A-404(a).

(c) For the purpose of determining whether discharge of an obligation occurs under subsection (b), if the beneficiary's bank accepts a payment order in an amount equal to the amount of the originator's payment order less charges of one or more receiving banks in the funds transfer, payment to the beneficiary is deemed to be in the amount of the originator's order unless upon demand by the beneficiary the originator does not pay the beneficiary the amount of the deducted charges.

(d) Rights of the originator or of the beneficiary of a funds transfer under this section may be varied only by agreement of the originator and the beneficiary.

PART 5. MISCELLANEOUS PROVISIONS [Table of Contents]

§ 4A-501. VARIATION BY AGREEMENT AND EFFECT OF FUNDS-TRANSFER SYSTEM RULE.

(a) Except as otherwise provided in this Article, the rights and obligations of a party to a funds transfer may be varied by agreement of the affected party.

(b) "**Funds-transfer system rule**" means a rule of an association of banks (i) governing transmission of payment orders by means of a funds-transfer system of the association or rights and obligations with respect to those orders, or (ii) to the extent the rule governs rights and obligations between banks that are parties to a funds transfer in which a Federal Reserve Bank, acting as an intermediary bank, sends a payment order to the beneficiary's bank. Except as otherwise provided in this Article, a funds-transfer system rule governing rights and obligations between participating banks using the system may be effective even if the rule conflicts with this Article and indirectly affects another party to the funds transfer who does not consent to the rule. A funds-transfer system rule may also govern rights and obligations of parties other than participating banks using the system to the extent stated in Sections 4A-404(c), 4A-405(d), and 4A-507(c).

§ 4A-502. CREDITOR PROCESS SERVED ON RECEIVING BANK; SETOFF BY BENEFICIARY'S BANK.

(a) As used in this section, "**creditor process**" means levy, attachment, garnishment, notice of lien, sequestration, or similar process issued by or on behalf of a creditor or other claimant with respect to an account.

(b) This subsection applies to creditor process with respect to an authorized account of the sender of a payment order if the creditor process is served on the receiving bank. For the purpose of determining rights with respect to the creditor process, if the receiving bank accepts the payment order the balance in the authorized account is deemed to be reduced by the amount of the payment order to the extent the bank did not otherwise receive payment of the order, unless the creditor process is served at a time and in a manner affording the bank a reasonable opportunity to act on it before the bank accepts the payment order.

(c) If a beneficiary's bank has received a payment order for payment to the beneficiary's account in the bank, the following rules apply:

(1) The bank may credit the beneficiary's account. The amount credited may be set off against an obligation owed by the beneficiary to the bank or may be applied to satisfy creditor process served on the bank with respect to the account.

(2) The bank may credit the beneficiary's account and allow withdrawal of the amount credited unless creditor process with respect to the account is served at a time and in a manner affording the bank a reasonable opportunity to act to prevent withdrawal.

(3) If creditor process with respect to the beneficiary's account has been served and the bank has had a

reasonable opportunity to act on it, the bank may not reject the payment order except for a reason unrelated to the service of process.

(d) Creditor process with respect to a payment by the originator to the beneficiary pursuant to a funds transfer may be served only on the beneficiary's bank with respect to the debt owed by that bank to the beneficiary. Any other bank served with the creditor process is not obliged to act with respect to the process.

§ 4A-503. INJUNCTION OR RESTRAINING ORDER WITH RESPECT TO FUNDS TRANSFER.

For proper cause and in compliance with applicable law, a court may restrain (i) a person from issuing a payment order to initiate a funds transfer, (ii) an originator's bank from executing the payment order of the originator, or (iii) the beneficiary's bank from releasing funds to the beneficiary or the beneficiary from withdrawing the funds. A court may not otherwise restrain a person from issuing a payment order, paying or receiving payment of a payment order, or otherwise acting with respect to a funds transfer.

§ 4A-504. ORDER IN WHICH ITEMS AND PAYMENT ORDERS MAY BE CHARGED TO ACCOUNT; ORDER OF WITHDRAWALS FROM ACCOUNT.

(a) If a receiving bank has received more than one payment order of the sender or one or more payment orders and other items that are payable from the sender's account, the bank may charge the sender's account with respect to the various orders and items in any sequence.

(b) In determining whether a credit to an account has been withdrawn by the holder of the account or applied to a debt of the holder of the account, credits first made to the account are first withdrawn or applied.

§ 4A-505. PRECLUSION OF OBJECTION TO DEBIT OF CUSTOMER'S ACCOUNT.

If a receiving bank has received payment from its customer with respect to a payment order issued in the name of the customer as sender and accepted by the bank, and the customer received notification reasonably identifying the order, the customer is precluded from asserting that the bank is not entitled to retain the payment unless the customer notifies the bank of the customer's objection to the payment within one year after the notification was received by the customer.

§ 4A-506. RATE OF INTEREST.

(a) If, under this Article, a receiving bank is obliged to pay interest with respect to a payment order issued to the bank, the amount payable may be determined (i) by agreement of the sender and receiving bank, or (ii) by a funds-transfer system rule if the payment order is transmitted through a funds-transfer system.

(b) If the amount of interest is not determined by an agreement or rule as stated in subsection (a), the amount is calculated by multiplying the applicable Federal Funds rate by the amount on which interest is payable, and then multiplying the product by the number of days for which interest is payable. The applicable Federal Funds rate is the average of the Federal Funds rates published by the Federal Reserve Bank of New York for each of the days for which interest is payable divided by 360. The Federal Funds rate for any day on which a published rate is not available is the same as the published rate for the next preceding day for which there is a published rate. If a receiving bank that accepted a payment order is required to refund payment to the sender of the order because the funds transfer was not completed, but the failure to complete was not due to any fault by the bank, the interest payable is reduced by a percentage equal to the reserve requirement on deposits of the receiving bank.

§ 4A-507. CHOICE OF LAW.

(a) The following rules apply unless the affected parties otherwise agree or subsection (c) applies:

(1) The rights and obligations between the sender of a payment order and the receiving bank are governed by the law of the jurisdiction in which the receiving bank is located.

(2) The rights and obligations between the beneficiary's bank and the beneficiary are governed by the law of the jurisdiction in which the beneficiary's bank is located.

(3) The issue of when payment is made pursuant to a funds transfer by the originator to the beneficiary is governed by the law of the jurisdiction in which the beneficiary's bank is located.

(b) If the parties described in each paragraph of subsection (a) have made an agreement selecting the law of a particular jurisdiction to govern rights and obligations between each other, the law of that jurisdiction governs those rights and obligations, whether or not the payment order or the funds transfer bears a reasonable relation to that jurisdiction.

(c) A funds-transfer system rule may select the law of a particular jurisdiction to govern (i) rights and obligations between participating banks with respect to payment orders transmitted or processed through the system, or (ii) the rights and obligations of some or all parties to a funds transfer any part of which is carried out by means of the system. A choice of law made pursuant to clause (i) is binding on participating banks. A choice of law made pursuant to clause (ii) is binding on the originator, other sender, or a receiving bank having notice that the funds-transfer system might be used in the funds transfer and of the choice of law by the system when the originator, other sender, or receiving bank issued or accepted a payment order. The beneficiary of a funds transfer is bound by the choice of law if, when the funds transfer is initiated, the beneficiary has notice that the funds-transfer system might be used in the funds transfer and of the choice of law by the system. The law of a jurisdiction selected pursuant to this subsection may govern, whether or not that law bears a reasonable relation to the matter in issue.

(d) In the event of inconsistency between an agreement under subsection (b) and a choice-of-law rule under subsection (c), the agreement under subsection (b) prevails.

(e) If a funds transfer is made by use of more than one funds-transfer system and there is inconsistency between choice-of-law rules of the systems, the matter in issue is governed by the law of the selected jurisdiction that has the most significant relationship to the matter in issue.

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