

litigation, establish clear legal standards, and reduce burden.

#### *Executive Orders 12372 and 13132*

This regulation will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to require consultations or warrant the preparation of a federalism summary impact statement. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this regulation.

#### *Paperwork Reduction Act*

The information collection requirements contained in this rulemaking are pursuant to the Paperwork Reduction Act, 44 U.S.C. chapter 35 and OMB Control Number 1405-0147, expiring on November 30, 2013.

#### **List of Subjects in 22 CFR Part 62**

Cultural exchange program.  
Accordingly, 22 CFR part 62 is amended as follows:

#### **PART 62—EXCHANGE VISITOR PROGRAM**

■ 1. The authority citation for part 62 is revised to read as follows:

**Authority:** 8 U.S.C. 1101(a)(15)(J), 1182, 1184, 1258; 22 U.S.C. 1431-1442, 2451 *et seq.*; Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. 105-277, Div. G, 112 Stat. 2681 *et seq.*; Reorganization Plan No. 2 of 1977, 3 CFR, 1977 Comp. p. 200; E.O. 12048 of March 27, 1978; 3 CFR, 1978 Comp. p. 168; the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. 104-208, Div. C, 110 Stat. 3009-546, as amended; Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT ACT), Pub. L. 107-56, section 416, 115 Stat. 354; and the Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. 107-173, 116 Stat. 543.

■ 2. Section 62.17 is revised to read as follows:

#### **§ 62.17 [Amended]**

(a) *Remittances.* Fees prescribed within the framework of 31 U.S.C. 9701 must be submitted as directed by the Department and must be in the amount prescribed by law or regulation.

(b) *Amounts of fees.* The following fees are prescribed.

(1) For filing an application for program designation and/or redesignation (Form DS-3036)—\$2,700.00.

(2) For filing an application for exchange visitor status changes (*i.e.*, extension beyond the maximum duration, change of category, reinstatement, reinstatement-update SEVIS status, ECFMG sponsorship authorization, and permission to issue)—\$233.00.

Dated: February 22, 2011.

**Stanley S. Colvin,**

*Deputy Assistant Secretary for Private Sector Exchange, Bureau of Educational and Cultural Affairs, Department of State.*

[FR Doc. 2011-4276 Filed 2-24-11; 8:45 am]

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## **DEPARTMENT OF LABOR**

### **Occupational Safety and Health Administration**

#### **29 CFR Part 1910**

[Docket No. OSHA-2007-0031]

#### **Nationally Recognized Testing Laboratories Fees**

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

**ACTION:** Final rule.

**SUMMARY:** The Occupational Safety and Health Administration (OSHA) is adjusting the approach it uses for calculating the fees the Agency charges Nationally Recognized Testing Laboratories (NRTLs), and also is requiring prepayment of these fees. This adjustment increases the fees; OSHA is phasing in the fee increase over three years for existing NRTLs and pending NRTL applicants. OSHA began charging NRTLs fees in 2000, and revised the fee schedule only twice since then (in 2002 and 2007).

**DATES:** This final rule becomes effective on March 28, 2011.

**FOR FURTHER INFORMATION CONTACT:** MaryAnn Garrahan, Director, Office of Technical Programs and Coordination Activities, NRTL Program, Occupational Safety and Health Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N-3655, Washington, DC 20210, or phone (202) 693-2110. OSHA's Web page includes information about the NRTL Program (see <http://www.osha.gov/dts/otpca/nrtl/index.html> or see <http://www.osha.gov> and select "N" in the site index).

#### **SUPPLEMENTARY INFORMATION:**

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#### **I. Introduction**

The Occupational Safety and Health Administration (OSHA) is adjusting the approach it uses to calculate the fees charged to Nationally Recognized Testing Laboratories (NRTLs). This adjustment will recoup a larger percentage of the cost of administering the NRTL Program than the current approach. This adjustment allows OSHA to continue to charge NRTLs for the core application processing and audit functions performed under the NRTL Program, while also recouping the other costs, such as the cost for ancillary activities that provide special benefits to NRTLs, that currently represent a significant portion of OSHA's costs of running the NRTL Program.

Because the revised approach results in a large increase in the fees for existing NRTLs and pending NRTL applicants, OSHA is instituting a three-year phase-in period for any fee increase that is greater than \$200. OSHA also is revising language in 29 CFR 1910.7(f) (the OSHA rule implementing the NRTL fee structure) to clarify the cost basis for the fees. In addition, OSHA will now require advance payment of all NRTL fees, which complies with instructions to Federal agencies issued by the Office of Management and Budget (OMB).

In this notice, section II describes the NRTL Program and the prior fee structure for charging NRTLs for application processing and audits. In section III, OSHA explains the legal authority for recovering costs for ancillary activities and leave. The Agency also explains the basis for advance collection of the fees. Section IV describes how OSHA will recoup the ancillary and leave costs, and section V shows the derivation of the fee amounts. Sections VI and VII present the revised fee schedule and fee descriptions, respectively, and address the sole comment OSHA received in response to the proposal. Finally, in sections VIII and IX, respectively, OSHA explains the

major revisions to the fees and to the regulatory text of 29 CFR 1910.7(f).

## II. Background

Many of OSHA's safety standards require approval (*i.e.*, tested and certified) of equipment or products used in the workplace to help ensure that workers can use them safely. See, *e.g.*, 29 CFR part 1910, subpart S. In general, an NRTL must approve such equipment and products. The NRTL Program administered by OSHA ensures that laboratories perform testing and certification appropriately.

The NRTL Program requirements are set forth in 29 CFR 1910.7, "Definition and requirements for a nationally recognized testing laboratory," which specifies that, to receive and maintain recognition as an NRTL, an organization must: (1) Have the appropriate capability to test, evaluate, and approve products to assure safe use of the products in the workplace; (2) be completely independent of the manufacturers, vendors, and major users of the products for which OSHA requires certification; (3) have internal programs that ensure proper control of the testing and certification process; and (4) have effective reporting and complaint handling procedures. 29 CFR 1910.7(b).

OSHA requires that organizations applying for initial recognition as an NRTL provide, in writing, detailed and comprehensive information about their programs, processes, and procedures. To process an application, OSHA reviews the written information for completeness and adequacy, and conducts an on-site assessment to determine whether the organization meets the requirements of 29 CFR 1910.7. OSHA uses a similar process when an NRTL (*i.e.*, an organization already recognized) applies for expansion or renewal of its recognition. In addition, the Agency conducts annual audits primarily to ensure that each NRTL maintains its programs and continues to meet the recognition requirements. Currently, there are 15 NRTLs operating 49 recognized sites in the U.S., Canada, Europe, and the Far East. Application processing and audits are the core functions that OSHA performs for the NRTL Program.

To perform these core functions, OSHA also must perform a number of ancillary activities that support these functions. OSHA investigates complaints filed against NRTLs to ensure that the laboratories are performing their testing and certification functions adequately. In addition, OSHA represents the NRTL Program in a variety of forums related

to conformity assessment<sup>1</sup> of products used in the workplace. OSHA also maintains a detailed Web site that both explains the program and, more importantly for the NRTLs, lists all the laboratories currently recognized under the NRTL Program, the products each laboratory can test, and registered certification marks used by each laboratory.

On August 30, 2000, OSHA established a schedule of fees for several of the services rendered to NRTLs; specifically, the application processing and audit functions. In the **Federal Register** notice announcing the fee schedule (65 FR 46797, July 31, 2000), OSHA found that laboratories receive "special benefits" from the NRTL Program, and that charging these laboratories was appropriate under the Independent Offices Appropriations Act of 1952 (IOAA) (31 U.S.C. 9701), OMB Circular A-25 "User Charges," and other legal authorities. 65 FR 46803. At 65 FR 46807, OSHA stated:

NRTLs accrue "special benefits" from the services that OSHA renders to them. These "special benefits" are the product of OSHA's initial and continuing evaluation of their qualifications to test and certify products used in the workplace, *e.g.*, the acknowledgement of their capability as an NRTL. The primary special benefits of NRTL recognition are the resulting business opportunities to test and certify products for manufacturers, the NRTL's clients. These opportunities may be in the form of new, additional, or continuing revenue and clients. Once the NRTL has properly certified a product, a manufacturer may then sell this product to employers, enabling them to comply with product approval requirements in OSHA standards.

Through that rulemaking, OSHA promulgated 29 CFR 1910.7(f). Paragraph (f) states that each applicant for NRTL recognition and each NRTL must pay fees for services provided by OSHA. 29 CFR 1910.7(f)(1). Specifically, the Agency assesses fees for the following activities: (1) Processing applications for initial recognition, expansion of recognition, or renewal of recognition, including on-site reviews; review and evaluation of the applications; and preparation of reports, evaluations and **Federal Register** notices; and (2) audits. The rule also sets forth that OSHA bases the fees, in part, on the staff costs per hour of

performing application processing and audit activities.

This final rule adjusts the approach that OSHA uses to calculate the fees charged for the services it provides to NRTLs. OSHA makes this adjustment because the prior fee schedule only allowed recovery of about half of the allowable reimbursable costs of the NRTL Program.<sup>2</sup> For example, the prior approach did not recover the costs of the ancillary activities that are necessary to the program's functioning.

## III. Legal Considerations

This final rule adjusts the approach that the Agency uses to calculate the fees it charges NRTLs for services performed to the benefit of the NRTLs by including the costs for benefits shared by all NRTLs. As described above, these costs include costs associated with ancillary activities and leave. Although OSHA still does not charge separate fees for the time spent on ancillary activities and leave, it adjusted the rate charged for the fee-generating activities to account for the portion of the program costs attributable to ancillary activities and leave. This section describes the legal basis for OSHA recouping these costs from the NRTLs.

### A. Legal Authority for Charging Fees

#### 1. Statutory Authority

In Title V of the IOAA, Congress set forth the objective of collecting fees and charges for services and things of value provided by an agency. As noted in this statute, "It is the sense of Congress that each service or thing of value provided by an agency \* \* \* to a person \* \* \* is to be self-sustaining to the extent possible." 31 U.S.C. 9701(a). Additionally, the Congressional Committee that drafted the measure indicated, "The Committee is concerned that the Government is not receiving full return from many of the services which it renders to special beneficiaries." *Nat'l Cable Television Ass'n v. U.S.*, 415 U.S. 336 (1974), quoting H.R. Rep. No. 82-384, at 2-3 (1951). Accordingly, Congress enacted the statute to ensure that the specific individuals and companies that receive benefits from agency programs, not taxpayers at large, fund the programs.

<sup>1</sup> OSHA generally uses the term "approval" to describe the type of testing or certification activities performed by NRTLs. Conformity assessment is a term used internationally to describe such activities, and is defined as "any activity concerned with determining directly or indirectly that requirements are fulfilled." (*see* item 12.2, ISO Guide 2—Standardization and related activities—General vocabulary.)

<sup>2</sup> In February 2007, OSHA issued a revision of its fee schedule to account for increases in program costs (*see* 72 FR 7468). This revision, however, did not alter OSHA's method for calculating fees. OSHA based the increase in the February 2007 fees on cost of living and time adjustments, but used the same calculation set forth in the initial **Federal Register** notice published in July 2000. OSHA previously updated the initial fees in January 2002 (*see* 67 FR 5299).

In addition to establishing a source of funding, Congress also provided general guidance to agency heads on the establishment of fees. The fees are to be “fair” and based on the costs to the Government, the value of the service or thing to the recipient, public policy or interest served, and other relevant facts. See 31 U.S.C. 9701(b). The 1993 OMB Circular A–25 (discussed in greater detail below) embodies the authority of the IOAA, and reflects interpretations from the related case law decisions.

Since 1997, in OSHA’s yearly appropriations, Congress specifically authorized the Secretary of Labor to collect and retain fees charged to sustain the NRTL Program, stating, “[T]he Secretary of Labor is authorized \* \* \* to collect and retain fees for services provided to Nationally Recognized Testing Laboratories, and may utilize such sums \* \* \* to administer national and international laboratory recognition programs that ensure the safety of equipment and products used by workers in the workplace.” See, e.g., Consolidated Appropriations Act for FY 2000, Pub. L. 106–113 (113 Stat. 1501A–222) and Consolidated Appropriations Act, 2009, Pub. L. 111–117 (123 Stat. 3034).

## 2. Case Law

The Supreme Court and the Courts of Appeals issued decisions addressing the application of the IOAA and its interpretation by Federal agencies. These cases provide guidance that provides specific information regarding the fee schedules, and the methods of assessing fees, that agencies may use. These decisions make clear that agencies may recoup all of the Governmental costs associated with providing private entities with specific benefits.

In 1974, the Supreme Court decided the companion cases of *Nat’l Cable Television Ass’n*, 415 U.S. 336, and *Fed. Power Comm’n v. New England Power Co.*, 415 U.S. 345 (1974). In *Nat’l Cable*, the Court found that an agency may charge a fee for services, but the agency should base the fee on “value to the recipient.” *Nat’l Cable*, 415 U.S. at 342–43. In *New England Power Co.*, the Court held that, pursuant to the IOAA and OMB Circular A–25, agencies can only recoup specific charges for specific services to specific individuals or companies. *Fed. Power Comm’n*, 415 U.S. at 349.

In *Nat’l Cable Television Ass’n, Inc. v. FCC*, 554 F.2d 1094 (DC Cir. 1976), the Court of Appeals also made clear that the fees must be for specific services. The court upheld charging both an application fee and an annual fee

provided that the agency, to prevent charging twice for the same service, makes clear the activities covered by each fee. *Nat’l Cable Television Ass’n*, 554 F.2d at 1105. Furthermore, the court agreed that fees based on reasonable approximations of costs for the services are acceptable: “It is sufficient for the Commission to identify the specific items of direct or indirect cost incurred in providing each service or benefit for which it seeks to assess a fee, and then to divide that cost among the members of the recipient class \* \* \* in such a way as to assess each a fee which is roughly proportional to the ‘value’ which that member has thereby received.” *Nat’l Cable Television Ass’n*, 554 F.2d at 1105–1106.

In *Elec. Indus. Ass’n v. FCC*, 554 F.2d 1109 (DC Cir. 1976), the Court of Appeals indicated that “expenses incurred to serve some independent public interest cannot \* \* \* be included in the cost basis for a fee, although the Commission is not prohibited from charging an applicant or grantee the full cost of services rendered \* \* \* which also result in some incidental public benefits.” *Elec. Indus. Ass’n*, 554 F.2d at 1115. Moreover, the court held that the agency can only include, in the cost basis of the fees, expenses incurred to confer value upon the recipient. *Id.* Along similar lines, the same Court of Appeals clarified in a companion case that “the proper standard is not value derived by the recipient but rather value conferred on the recipient. In our view, this standard requires the fee assessed to bear a reasonable relationship to the cost of the services rendered to identifiable recipients.” *Capital Cities Communications, Inc. v. FCC*, 554 F.2d 1135, 1138 (DC Cir. 1976).

Lastly, in *Miss. Power and Light v. U.S. Nuclear Regulatory Comm’n*, 601 F.2d 223 (5th Cir. 1979), the 5th Circuit Court of Appeals upheld the Nuclear Regulatory Commission’s (NRC) fee schedule methodology because the NRC did not seek to recover the entire cost of regulating. The NRC charged a fee based only on the costs of providing a specific benefit to identifiable private parties. *Miss. Power and Light*, 601 F.2d at 230.

## 3. OMB Circular No. A–25

OMB issued Circular No. A–25, pursuant to the IOAA, to establish “Federal policy regarding fees assessed for Government services and for sale or use of Government goods or resources. \* \* \* [I]t provides guidance for agency implementation of charges and the disposition of collections.” User Charges, Circular No. A–25, OMB (July

8, 1993). In section 6 of the Circular, OMB directs agencies to assess user charges “against each identifiable recipient for special benefits derived from Federal activities beyond those received by the general public.” Furthermore, user charges “will be sufficient to recover the full cost to the Federal Government \* \* \* of providing the service, resource, or good when the Government is acting in its capacity as sovereign.” Finally, the Circular defines full cost to include “all direct and indirect costs to any part of the Federal Government of providing a good, resource, or service.” Examples of such costs include personnel costs (including salaries and fringe benefits), physical overhead, management and supervisory costs, and costs of enforcement and research. Circular No. A–25, OMB 6(d)(1)(a)–(e).

The legal authorities described above establish several considerations for determining how an agency can assess fees for services rendered: (1) The agency must base the fees on special benefits derived from Federal activities beyond those benefits received by the general public; (2) the agency must confer the benefits on identifiable recipients; and (3) the fees must bear a reasonable relationship to the cost of the services rendered. In addition, the OMB circular makes clear that agencies can recoup indirect costs of services rendered to special beneficiaries, and that agencies should endeavor to make agency programs self-sustaining to the extent that the programs provide special benefits to identifiable recipients. Assessing NRTL fees that recover the cost of ancillary activities and leave satisfies these considerations, which we further discuss below.

## B. Explanation for Charging Fees for Ancillary Activities

### 1. The Agency Must Base Fees on the Costs To Confer Special Benefits Derived From Federal Activities Beyond Those Benefits Received by the General Public

OSHA based the implemented fee structure on the costs of providing services that confer special benefits. As noted earlier, NRTLs and NRTL applicants accrue special benefits from the services that OSHA renders for the fees. These special benefits are the product of OSHA’s initial and continuing evaluation of an organization’s qualifications to test and certify products used in the workplace. Primarily, these special benefits are the business opportunities that result from OSHA recognition of these organizations as NRTLs, which allows

them to offer their testing and certification services to manufacturers of products that require NRTL testing and certification when used in the workplace. These opportunities are “special benefits derived from Federal activities beyond those received by the general public,” as described in OMB Circular A–25.

Ancillary activities performed by OSHA under the NRTL Program result in identifiable costs from the provision of those specific services and benefits to NRTLs. Examples of ancillary activities include administration of the program, budgetary, and policy matters; training OSHA personnel to perform program activities; interagency and international coordination; responses to requests for information related to the program; handling complaints; Web site development and maintenance; and participation in meetings with stakeholders and outside interest groups.

OSHA must recover the costs of these activities because it incurs such costs solely for the administration of the NRTL Program, from which NRTLs derive special benefits. The absence of these necessary activities would severely reduce, if not eliminate, many of the benefits that NRTLs derive from OSHA recognition. Two examples illustrate this point. First, through application processing and audits, OSHA determines which organizations qualify as NRTLs and which products each NRTL can approve under the NRTL Program. By maintaining a Web site, OSHA shares this information with the public. This activity benefits NRTLs by making current and potential clients, as well as employers, aware that OSHA qualified the NRTLs to approve those products.

Second, complaint handling is a valuable activity that OSHA relies upon, especially between audits, to learn of inappropriate or questionable activities by an NRTL. If, for example, OSHA receives a complaint that an NRTL is testing equipment made for use in extremely hazardous environments, but OSHA does not recognize the NRTL to perform this testing, OSHA would investigate the complaint to determine whether the testing jeopardizes the safety of the equipment. If so, OSHA could take steps to prevent accidents from occurring as a result of using this equipment. Through complaint handling, OSHA reinforces the NRTL Program’s effectiveness, which maintains confidence in the program, and, thus, assures the benefits derived by NRTLs from participation in the program.

## 2. Benefits Are Conferred on Identifiable Recipients

As with the prior schedules, OSHA is assessing fees to identifiable recipients of the NRTL Program benefits. The ancillary activities result in benefits shared among all NRTLs, in contrast to the benefits of the core application and auditing services, which are more easily attributed to individual NRTLs than ancillary activities. To share the costs of these benefits equitably, while still ensuring that the fees charged are specific with regard to the services provided to individual NRTLs, OSHA is apportioning the costs of the shared benefits in accordance with the time OSHA spends on core services rendered to each NRTL. This approach recognizes that an individual NRTL’s portion of the shared benefits relates directly to the core benefits it receives. OSHA is, therefore, retaining its fee structure of charging the NRTLs fees involving core actions directed at, or initiated by, an NRTL, while adjusting the rate used to compute the fee to recoup a greater portion of the actual program costs than is the case currently.

OSHA will charge an NRTL a fee when the NRTL applies, for example, for an expansion of its recognition by OSHA. In this situation, the NRTL is asking OSHA to review its application for expansion so that the NRTL can increase its scope of recognition. The fee that OSHA would charge in this instance is related directly to the NRTL seeking the expansion. The converse is also true: If in any year an NRTL does not apply to expand its recognition, OSHA will not charge the NRTL an expansion-application fee. Thus, the new fee schedule would reimburse OSHA for ancillary activities, but would do so by charging specific NRTLs only when these NRTLs receive the core services of the program.

## 3. The Fees Charged Bear a Reasonable Relationship to the Costs of the Program

OSHA is basing much of the fee schedule on the average documented cost of specific activities performed to benefit the NRTLs. Through the revised fee schedule issued by this rule, OSHA will recover a large percentage of the costs of the NRTL Program. To ensure that it does not overcharge, OSHA structured this revised fee schedule to capture approximately 95% of the costs of the NRTL Program.

## 4. OSHA Is Fully Complying With the IOAA and OMB Circular A–25

Finally, by including the costs of ancillary activities in the fees, OSHA now is fully compliant with the IOAA

and OMB Circular A–25, both of which require agency programs to be self-sustaining to the extent that the programs confer special benefits on identifiable recipients. In fact, until implementation of a revised fee schedule in February 2007, that allowed recovery of approximately 50% of program costs, OSHA was recovering only about 30% of the costs of the NRTL Program; taxpayers were funding the remaining 70% through OSHA’s annual appropriations. This arrangement does not comport with the IOAA and OMB Circular A–25, and OSHA is correcting this deficiency through this final rule.

In summary, including the cost of ancillary activities in the fees comports with the legal framework described in the preceding section. That is, OSHA based the fees on special benefits to NRTLs, assessed to identifiable beneficiaries of the NRTL Program, and reasonably related to OSHA’s costs of providing the services to the NRTLs.

OSHA recognizes that its new approach differs from the position it took in the 2000 rulemaking implementing the initial fee structure. In that rulemaking, OSHA stated that it would not seek to recover costs for some ancillary activities such as Web site development and training compliance officers on the NRTL Program. *See, e.g.*, 65 FR 46802. At the time of that rulemaking, however, OSHA believed those activities would use only a small portion of the NRTL Program’s resources. Recent workload reviews show that these activities have become a large part of the program, and now are critical in supporting the NRTL Program’s core functions. It is, therefore, appropriate for OSHA to include these costs in the revised fees.

Because work on ancillary activities grew so much faster than program resources over the last several years, OSHA has less time available for application processing and audits than was the case in 2000. Moreover, because existing fees only recoup the cost of time spent on core services, OSHA is recovering a dwindling percentage of the NRTL Program costs. For OSHA to meet, on a timely basis, the needs of the NRTLs in application processing and auditing, while recovering its costs for providing those services, is a significant challenge. Through this final rule, OSHA will fund the resources to improve its effectiveness in rendering these core services.

## C. Explanation for Assessing Costs for Leave

Although the prior fee structure accounted for some personnel costs for core NRTL activities, it did not account

for all personnel costs; therefore, it did not account for the total time spent on core activities. As Federal employees, Department of Labor employees, including OSHA employees, earn leave as part of their regular compensation. However, the prior fee structure failed to account for leave earned by OSHA employees, even though that leave is part of the personnel costs of rendering NRTL services.<sup>3</sup> In this respect, the prior fee structure was not compliant with OMB Circular A-25 and the other legal authorities described above. Thus, in this revised fee structure, OSHA is adjusting the personnel costs to include leave earned by all Federal employees performing services in support of the NRTL Program.

#### *D. Explanation for Advance Collection of the Fees*

Previously, OSHA required that NRTLs and applicants pay an application review fee when submitting an application, and, for initial applications, prepay the fee for an on-site assessment. OSHA generally billed the remainder of the fees to the NRTLs or applicants after it rendered the services. When OSHA adopted this billing system in the 2000 final rule, it expected the system to “reduce collection activity of the Agency, since only one bill would need to be sent to the NRTL for an audit, rather than the two contemplated under the NPRM.” 65 FR 46802 (July 31, 2000). It, therefore, predicted a “minimal financial burden” to the Agency by delaying collection. *Id.*

However, in recent years this post-collection system resulted in problems, including the loss of some funds. For example, to ensure that the Agency retained all fees that were due for audits conducted during a fiscal year, OSHA requested that NRTLs pay fees in advance for any audits that it conducted in the last two months of the Federal Government fiscal year. OSHA requested advance payment because, to comply with Federal mandates, it could not retain any fees received after the end of a fiscal year, but would have to forfeit them to a general Federal Government fund. The current fee-collection system also made it difficult to ensure that the Agency complied with OMB Circular A-25. In addition to providing guidance regarding the collection and retention of user fees, OMB Circular A-25 generally requires agencies to collect user fees in advance. See OMB Circular A-25, Section 6.a.2.(c) (“User charges will be

collected in advance of, or simultaneously with, the rendering of services unless appropriations and authority are provided in advance to allow reimbursable services.”); see also OMB Circular A-11, “Preparation, Submission, And Execution Of The Budget” (June 2008), section 20.13.<sup>4</sup>

Therefore, while the current program directly benefits NRTLs, OSHA must advance funds to cover the program costs until the NRTLs or applicants reimburse OSHA for its program activities. Given the competing demands on the appropriations from which OSHA draws these funds, continued use of these general operating funds to pre-fund the NRTL Program could adversely impact OSHA’s ability to perform other operational functions.

In summary, OSHA will now bill in advance for audits and other fees to ensure compliance with OMB guidance, and to reduce any financial impact on OSHA’s other functions caused by advancing funds to the NRTL Program. OSHA will estimate and collect travel costs and other expenses in advance, and will adjust any difference between actual costs and estimated costs after completion of the audit or other activity.

#### **IV. Explanation of the Revised Approach for Calculating Fees**

Through this final rule, OSHA will continue to calculate the fee for each of the service activities listed in the fee schedule by multiplying an equivalent average cost per hour rate (ECR) by the time it takes to perform that activity: Fee for Activity = ECR × Time for Activity.

In the July 31, 2000, **Federal Register** notice, OSHA explained that it derived the initial fee schedule’s ECR by dividing the total estimated direct and indirect costs of the program, excluding travel, (TPC),<sup>5</sup> by the total available annual work hours of the NRTL Program and legal staff that perform the services (TAW).<sup>6</sup> Although OSHA did not

<sup>4</sup> Section 20.13(a) is a description of revolving funds that requires that, in the absence of a revolving fund, “advance payments must accompany orders.” Section 20.13(b) specifies that agencies may use one of two methods to cover obligations by expenditure accounts, either using “advances collected up to the amount of accompanying orders” or “[w]orking capital that is available for this purpose.”

<sup>5</sup> The TPC includes personnel costs for the NRTL Program and legal staff (including support and management staff), equipment, contract, and other costs necessary for the operation of the program. The ECR does not include travel expenses because OSHA charges for the actual staff travel expenses for an on-site visit after the auditor completes the visit.

<sup>6</sup> In discussing total hours in this notice, we often refer to “FTEs,” which stands for “full-time equivalents.” For purposes of this notice, FTEs equals total work hours divided by 2,080, the total available annual work hours (TAW) for one full-

illustrate the derivation of the ECR as an equation in the 2000 notice, it does so here for clarification, and refers to it as ECR2000 (to contrast it with the equation for ECR2009, which we explain later in this notice); accordingly,  $ECR2000 = TPC2000/TAW2000$ .<sup>7</sup> As discussed above, the approach used in 2000 resulted in fees that recouped the costs only of the time spent actually performing individualized audits and application processing, which is only a portion of TAW, and did not recoup the costs of the time associated with running the program and providing other benefits shared among all NRTLs.

To account properly for the costs associated with these shared benefits, OSHA proposed and requested comment on the following calculation for the new ECR (ECR2009): Dividing the new estimated total cost of the NRTL Program (TPC2009) by the total annual service hours (TAS2009). This latter term is a new figure that equals the total estimated work hours that the NRTL Program staff spend on the core service activities for which OSHA will bill NRTLs; accordingly,  $ECR2009 = TPC2009/TAS2009$ . By way of comparison with the prior fee schedules, TAS equals TAW minus estimated hours spent on ancillary activities (AH) and leave (LH) (*i.e.*,  $TAS = TAW - AH - LH$ ). By continuing to include the full program costs in the numerator (TPC2009), but including in the denominator (TAS2009) only the amount of time spent on providing “billable” core services, the revised ECR more accurately represents the total work hours spent on those core activities than the current 2000 equation; OSHA bills these hours to the NRTLs. The Agency did not receive any comments on this new calculation methodology, and is including it in the final rule as proposed.

OSHA could achieve the same result by charging each NRTL separately for its share of the program resources used to produce the shared benefits. OSHA did not use this method primarily because it would be impractical to calculate and track these shared costs separately for each NRTL, and to attribute the costs appropriately to individual NRTLs through separate fees. As explained above, the new fee approach adopted in this final rule, in which OSHA charges NRTLs only for core services, provides

time Federal employee (*i.e.*, 1 FTE = 2,080 work hours).

<sup>7</sup> We use the TPC abbreviation in discussing our calculations in this final rule, but the total amount shown in the July 2000 notice (*i.e.*, TPC2000) will differ from the total shown in this final rule (*i.e.*, TPC2009) because of changes in the total costs of the program.

<sup>3</sup> A small portion of NRTL fees covers the costs of legal services performed by attorneys in the Office of the Solicitor of Labor. OSHA included leave costs in that portion of the fees.

a more straightforward and manageable method, in comparison to the previous approach, of ensuring that OSHA recoups only “specific charges for specific services to specific individuals or companies.” *Fed. Power Comm’n*, 415 U.S. at 349. In addition to this methodological change, the revised fee schedule presented in this notice also includes updated calculations of the total resources committed to the NRTL Program (TPC2009), and of the average time spent on some of the service activities for which OSHA charges fees.

OSHA estimated that TAS2009 = 3.5075 FTEs (7295.6 work hours), which is 50.11% of total available annual work hours (TAW2009), 7.0 FTE.<sup>8</sup> Using the TPC2009 of \$1,079,090, shown in Table 1 below, the new rate is: ECR2009 = \$1,079,090/7295.6 hours = \$147.90.

Table 1 below shows a summary of program costs and value of revised ECR2009, which OSHA uses later to generate the revised fee schedule in section VI below.

TABLE 1—NRTL PROGRAM ANNUAL COST ESTIMATES—NEW ECR2009 CALCULATION

Description	Costs
Direct expenses .....	\$512,342
Indirect expenses * .....	566,748
Total program costs (excluding travel) ( <i>aka</i> “TPC2009”) .....	1,079,090
Travel expenses .....	72,600
Overall program costs (includes travel) ** .....	1,151,690
TAS2009 (3.5075 FTE × 2,080 work hours per FTE) .....	7,295.6
ECR2009 = TPC2009/ TAS2009 .....	147.90

\* This amount consists of \$441,408 for management, ancillary, and support costs; and \$125,340 for equipment and other costs. **Note:** OSHA incurs most of these costs, but the costs also include applicable costs of a division of the Department of Labor’s Office of the Solicitor.

\*\* OSHA estimates the amount of fee collections to be approximately 95.2% of this total, or \$1,096,000.

Finally, as mentioned above, the total cost of administering the NRTL Program increased since the last revision to the fee schedule published on February 15, 2007. This cost increase is due to two main reasons: an increase to account for additional program-staff resources, and the annual salary adjustments for Federal employees. Because of the increase to the TPC, and the revised approach for calculating ECR2009 described in this notice, OSHA’s base rate (ECR) is increasing almost 132%, from \$63.80 (in effect since February 15, 2007) to \$147.90 shown above. OSHA estimates that this rate would result in total annual collections of \$1,096,000 beginning three years after this rule’s effective date, provided OSHA’s NRTL Program costs remain unchanged. In fact, due to the three-year phase-in period, the rate and estimated total annual collections will increase the first year to about \$91.80 and \$690,000, respectively. Without a change in the fee schedule, but with the increase in staffing requirements for the NRTL Program, the first year’s rate and estimated total annual collections would increase to \$73.72 and \$583,000, respectively. If the program’s costs remain unchanged in the second year of the phase-in period, the rate and total annual collections resulting from the new approach would be about \$119.90 and \$880,000, respectively.

For existing NRTLs and applicants that submit applications prior to the effective date of this final rule, OSHA will phase in, over three years, any fee increase that is greater than \$200: a 33% increase for the first year’s fees; a similar increase for the second year’s fees; and the remaining increase in the third year. OSHA uses this \$200 threshold because it limits the number of fees that would otherwise increase

100% for the first year; OSHA will phase in the increase for the remaining fees, thus reducing the financial impact the increase may have on any existing NRTL or applicant. As evident from the comparison of fees shown in VIII of this notice, this approach affects only three fees, which will increase by a combined total of \$510. The \$200 threshold and the three-year phase-in period will balance the need for a period of adjustment for some existing NRTLs against OSHA’s responsibility to recoup the full costs of the NRTL Program as soon as possible. Although OSHA requested comments on these approaches and suggested alternatives, it received no comments.

The entire increase is effective immediately for any organization that submits an application to become a new NRTL if OSHA receives the application on or after the effective date of this final rule. OSHA is taking this approach because, unlike currently recognized NRTLs and pending applicants, new applicants are free to choose whether or not to participate in the NRTL Program.

**V. Basis and Derivation of Fee Amounts**

Tables 2, 3, 4, and 5, below, present the costs of the major activities for the various fee categories. In general, OSHA calculated the cost of these activities by multiplying the staff<sup>9</sup> activity time by ECR, and adding any applicable average travel costs. However, because OSHA charges for actual travel, only non-travel costs serve as the basis for the fees shown later in Tables A and B. In deriving the fee amounts shown in the fee schedule (Table A or B), OSHA generally rounded the costs shown in Tables 2, 3, 4, and 5, up or down, to the nearest \$5 or \$10 amount.

TABLE 2—INITIAL APPLICATION COST ESTIMATES

Major activity	Type of cost	Average hours	Average cost *
Initial application review .....	Office and field staff time .....	120	\$17,749
Additional review time .....	Office staff .....	16	2,367
Limited review time .....	Office staff .....	24	3,550
On-site assessment—first day (per site, per assessor) .....	Field staff time (16 hours preparation, 6 hours to process travel documents, and 8 hours at site). Field staff travel expense (\$700 airfare/other + \$100 per diem).	30 NA	4,437 800

<sup>8</sup> TAW2009 equals 7.0 FTE (*i.e.*, 7.0 FTE currently working on OSHA’s NRTL Program); AH2009 equals 2.6675 FTE; and LH2009 equals 0.825 FTE. As a result, TAS2009 equals 7.0 minus 2.6675 minus 0.825, which is equal to 3.5075 FTE. **Note:**

We also can derive the ECR2009 from the ECR2007 (\$63.80) using a factor that takes into account the effects due to leave and ancillary activities, and the use of TAS instead of TAW. We do not illustrate this derivation here since the calculation is more

involved than, and gives the same result as, the simple equation above.

<sup>9</sup> The term “staff” encompasses Federal employees, as well as any contract employees retained by OSHA for work on the NRTL Program.

TABLE 2—INITIAL APPLICATION COST ESTIMATES—Continued

Major activity	Type of cost	Average hours	Average cost *
<i>Total for on-site assessment—first day</i>			5,237
On-site assessment—each additional day ** (per site, per assessor)	Field staff time (at site) .....	8	1,183
	Field staff travel expense (per diem only) .....	NA	100
<i>Total for on-site assessment—each additional day</i>			1,283
On-site assessment travel time—per day (per site, per assessor) .....	Field staff .....	8	1,183
Review and evaluation (10 test standards) .....	Office staff time .....	2	296
Final report and Federal Register notice .....	Field and office staff time .....	132	19,524
Fees invoice processing .....	Office staff time .....	2	296

\* Average cost for staff time = average hours × equivalent average direct staff cost/hr. (\$147.90).

\*\*Note: 2 additional days estimated for 2 assessors, and 4 additional days estimated for 1 assessor.

See notes to Table A below for more information concerning the activities listed in this table.

TABLE 3—EXPANSION APPLICATION (ADDITIONAL SITE) COST ESTIMATES

Major activity	Type of cost	Average hours	Average cost *
Application review (expansion for site) .....	Office and field staff time .....	56	\$8,283
Additional review time .....	Office staff .....	8	1,183
On-site assessment—first day (per site, per assessor) .....	Field staff time (12 hours preparation, 4 hours to process travel documents, and 8 hours at site). Field staff travel time expense (\$700 airfare/other + \$100 per diem).	40 NA	5,916 800
	<i>Total for on-site assessment—first day</i>		6,716
On-site assessment—additional day ** (per site, per assessor) .....	Field staff time (at site) .....	8	1,183
	Field staff travel expense (per diem only) .....	NA	100
<i>Total for on-site assessment—each additional day</i>			1,283
On-site assessment travel time—per day (per site, per assessor) .....	Field staff .....	8	1,183
Review and evaluation fee (10 test standards) .....	Office staff time .....	2	296
Final report and Federal Register notice .....	Field and office staff time .....	50	7,396
Fees invoice processing .....	Office staff time .....	2	296

\* Average cost for staff time = average hours × equivalent average direct staff cost/hr. (\$147.90).

\*\*Note: 2 additional days estimated for 1 assessor.

See notes to Table A below for more information concerning the activities listed in this table.

TABLE 4—RENEWAL OR EXPANSION (OTHER THAN ADDITIONAL SITE) APPLICATION COST ESTIMATES

Major activity	Type of cost	Average hours	Average cost *
Application review (renewal or expansion other than additional site)	Office and field staff time .....	2	296
Additional review time .....	Office staff .....	8	1,183
Renewal application—information review .....	Office staff .....	40	5,916
On-site assessment—first day (expansion) (per site, per assessor) ..	Field staff time (8 hours preparation, 4 hours to process travel documents, and 8 hours at site). Field staff travel expense (\$700 airfare/other + \$100 per diem).	20 NA	2,958 800
	<i>Total for on-site assessment—first day (expansion)</i>		3,758
On-site assessment—first day (renewal) (per site, per assessor) .....	Field staff time (16 hours preparation, 4 hours to process travel documents, and 8 hours at site). Field staff travel expense (\$700 airfare/other + \$100 per diem).	28 NA	4,141 800
	<i>Total for on-site assessment—first day (renewal)</i>		4,941
On-site assessment—additional day ** (per site, per assessor) .....	Field staff time (at site) .....	8	1,183

TABLE 4—RENEWAL OR EXPANSION (OTHER THAN ADDITIONAL SITE) APPLICATION COST ESTIMATES—Continued

Major activity	Type of cost	Average hours	Average cost *
	Field staff travel expense (covers per diem only)	NA	100
	<i>Total for on-site assessment—each additional day</i>		1,283
On-site assessment travel time—per day (per site, per assessor) .....	Field staff .....	8	1,183
Review and evaluation fee (10 test standards) (expansion) .....	Office staff time .....	2	296
Final report and Federal Register notice (with on-site assessment) ..	Office and field staff time .....	50	7,396
Final report and Federal Register notice (no on-site assessment) .....	Office and field staff time .....	30	4,437
Supplemental program review .....	Office and field staff time (per program requested, including consultation and assessor's memo) .....	4	592
Fees invoice processing .....	Office staff time .....	2	296

\* Average cost for staff time = average hours × equivalent average direct staff cost/hr. (\$147.90).

\*\*Note: 2 additional days estimated for renewal assessment; no additional days for expansion assessment.

See notes to Table A below for more information concerning the activities listed in this table.

TABLE 5—ON-SITE OR OFFICE AUDIT COST ESTIMATES

Major activity	Type of cost	Average hours	Average cost
On-site audit—first day (per site, per auditor) ** .....	Field staff time (12 hours pre-site review preparation, 4 hours to process travel documents, and 8 hours at site).	24	\$3,550
	Prepare report/contact NRTL plus office review staff time (3 days for field staff and 2 hours for office staff).	26	3,846
	<i>Subtotal (first day—regular audit)</i>		7,396
	Field staff travel expense (700 airfare/other + 100 per diem).	NA	800
	<i>Total for on-site audit—first day (regular audit)</i>		8,196
On-site audit—first day (per site, per auditor)** (no nonconformances or observations requiring a response).	Prepare report plus office review staff time (4 hours for field staff and 2 hours for office staff).	6	887
	<i>Total for on-site audit (first day—audit with no nonconformances)****</i>		5,237
On-site audit—additional day*** (per site, per auditor) .....	Field staff time (at site) .....	8	1,183
	Travel expense (covers per diem only) .....	NA	100
	<i>Total for on-site audit—each additional day</i>		1,283
On-site audit travel time—per day (per site, per auditor); also review of revised audit response—per on-site or office audit.	Field staff .....	8	1,183
Office audit—per day (per site, per auditor); no nonconformances or observations requiring a response.	Field staff .....	8	1,183
Office audit—per day (per site, per auditor); with nonconformances.	Field staff .....	16	2,367
Fees invoice processing .....	Office staff time .....	2	296

\* Average cost for staff time = average hours × equivalent average direct staff cost/hr. (\$147.90).

\*\* OSHA charges this first-day fee only once if it audits multiple sites of the NRTL during one trip.

\*\*\* Note: One additional day is estimated for one auditor.

\*\*\*\* The 3,550 Field staff time and \$800 Field staff travel expense are identical to those for the regular audit. See notes to Table A below for more information concerning the activities listed in this table.

**VI. Revised Fee Schedules**

*A. First Phase Fee Schedule for Existing NRTLs and Pending Applicants*

OSHA is implementing the revised fee schedules shown below in Tables A and B. All existing NRTLs and any initial

applicant (*i.e.*, an entity not presently approved by OSHA as an NRTL) having a pending application (*i.e.*, received by OSHA before the effective date of this rule), must pay the fees set forth in Table A during the first year of the three-year phase-in period. OSHA will

publish the revised fee schedule for the second year at a later date, as explained below. In this final rule, OSHA revised the audit fees as explained above, and modified the fee schedule in Table A of the proposal slightly to clarify that initial NRTL applicants having



applications received by OSHA on or after the effective date of this rule must pay the fees in Table B, not Table A. The Agency eliminated the initial-application review fee in Table A, and added a reference to footnote 7 of the table to explain the fee amount that OSHA charges to pending applicants (*i.e.*, those applicants having applications received before the effective date of this rule) that substantially modify their applications after the effective date of the rule.

The fees in Table A are the fees for the first phase of OSHA's fee increase, which are applicable to existing NRTLs and pending applicants. As explained above, for existing NRTLs and pending applicants, OSHA is phasing in over a period of three years any fee increase that is greater than 200: 33% of the increased fees specified in this final rule on the effective date of the rule; another 33% increase in the second year; and the final 34% increase in the third year. OSHA will adjust the percentage increase when it performs its periodic

review of the fees during the next two years; it will base the adjustment on any increase or decrease in fees calculated for each of those years. During this review, OSHA will determine the amount of time it actually charged for application processing and audits, and the actual indirect travel OSHA performed, and adjust the amount in the fee schedule by the amount over- or underestimated. OSHA then will publish the second-year fee schedule in the **Federal Register**.

TABLE A—NATIONALLY RECOGNIZED TESTING LABORATORY PROGRAM FEE SCHEDULE FOR EXISTING NRTLs AND APPLICANTS WHEN OSHA RECEIVES THE APPLICATION BEFORE MARCH 28, 2011

Type of service	Activity or category (fee charged per application unless noted otherwise)	Fee amount
APPLICATION PROCESSING .....	Initial application review <sup>1 8</sup> (this fee is applicable only as described in note 7 to this table).	See note 7.
	Expansion-application review (per additional site) <sup>1 8</sup> .....	\$3,420.
	Renewal or expansion (other) application review <sup>1</sup> .....	\$300.
	Renewal information review fee <sup>7</sup> .....	\$1,470.
	Additional review—initial application (if the application requires substantial revision, submit one-half of initial-application review fee) <sup>7</sup> .	\$2,370.
	Additional review—renewal or expansion application <sup>7</sup> .....	\$730.
	Limited review—initial application <sup>7</sup> .....	\$1,170.
	Assessment—initial application (per person, per site—first day) <sup>2 10</sup> .....	\$2,740 + travel expenses.
	Assessment—renewal application (per person, per site—first day) <sup>3 10</sup> .....	\$2,570 + travel expenses.
	Assessment—expansion application (additional site) (per person, per site—first day) <sup>3</sup> .	\$2,200 + travel expenses.
	Assessment—expansion application (other) (per person, per site—first day) <sup>3</sup> .	\$1,830 + travel expenses.
	Assessment—each additional day or each day on travel (per person, per site) <sup>2 3</sup> .	\$730 + travel expenses.
	Review and evaluation <sup>5</sup> (\$30 per standard if already recognized for NRTLs and requires minimal review; otherwise, \$296 per standard).	\$30 per standard OR \$296 per standard.
	Final report and <b>Federal Register</b> notice—initial application <sup>5 9</sup> .....	\$12,080.
	Final report and <b>Federal Register</b> notice—renewal or expansion application (if OSHA performs on-site assessment) <sup>5 9</sup> .	\$4,580.
	Final report and <b>Federal Register</b> notice—renewal or expansion application (if OSHA performs no on-site assessment) <sup>5 9</sup> .	\$2,740.
AUDITS .....	On-site audit (per person, per site, first day) <sup>6</sup> (\$3,260—no nonconformances).	\$4,240 + travel expenses.
	On-site audit—each additional day (on-site or on travel) .....	\$730 + travel expenses.
	(per person, per site); or review of revised audit response—per on-site or office audit <sup>6</sup> .	
	Office audit (per person, per site, per day) <sup>6</sup> —\$730 if no nonconformances, \$1,120 if nonconformances found.	\$730 or \$1,120.
MISCELLANEOUS .....	Supplemental travel (per site—for sites located outside the 48 contiguous U.S. states or the District of Columbia) <sup>4</sup> .	\$1,000.
	Supplemental program review (per program requested) <sup>4</sup> .....	\$270.
	Fees invoice processing (per application or audit) <sup>4</sup> .....	\$300.
	Travel document processing (4 hours, per application or audit) <sup>4</sup> .....	\$270.
	Late payment <sup>11</sup> .....	\$150.
	Compensatory time for travel (per hour) <sup>10</sup> .....	\$56.40.

Notes to Table A (“Nationally Recognized Testing Laboratory Program Fee Schedule”):

1. Must I pay the application-review fees, and when must I pay these fees?

If you are applying for initial recognition as an NRTL, and OSHA receives your application on or after the effective date of this fee schedule, you must pay the initial-application review fee in Table B when you submit your initial application. Pay this fee as two payments: one equaling the limited-review fee amount, and the remainder of the fee as a second payment. (See note 7 to this fee schedule if you submit your initial application before this schedule's effective date.) If you are an NRTL and applying for an expansion or renewal of recognition, you must pay the expansion-application review fee or renewal-application review fee, as appropriate, and submit this fee concurrently with your expansion or renewal application. See note 7 if you amend or revise your initial or expansion application.

2. What assessment fees do I pay for an initial application, and when must I pay these fees?

If you are applying for initial recognition as an NRTL, and we accept your application, we bill you for the assessment fee and you must pay it before we perform the assessment. We base the prepaid assessment fee on estimated staff time and travel costs. After completing the actual assessment, we calculate the assessment fee based on the actual staff time and travel costs incurred in performing the assessment. The fee for staff time equals the first-day assessment fee for an initial application, plus the assessment fee for each additional at the site or on travel. (**Note:** Days charged for being in travel status are those allowed under government travel rules. This note applies to any assessment or audit.) We determine actual travel expenses based on government per diem and other travel rules. We bill or refund the difference between the amount you prepaid and the actual assessment fee. We reflect this difference in the final bill that we send to you for the application.

3. What assessment fees do I submit for an expansion or renewal application, and when must I pay these fees?

If you are an NRTL and applying solely for an expansion or renewal of recognition, you do not submit any assessment fee with your application. If we need to perform an assessment for the expansion or renewal request, we bill you for this fee and you must pay it before we perform the assessment. We will base the prepaid fee on estimated staff time and travel costs. Following the assessment, we will calculate the fee based on the actual staff time and travel costs we incurred in performing the assessment. The fee for staff time equals the first-day assessment fee for the particular type of application, plus the assessment fee for each additional at the site or on travel. We determine actual travel expenses based on government per diem and other travel rules. OSHA charges the NRTL the first-day fee only once if OSHA audits multiple sites of the NRTL during one trip. We bill or refund the difference between the prepaid amount and the amount of the final invoice that we send to you for the application.

4. When do I pay the supplemental travel, the supplemental program review, the fees invoice processing fees, or the travel document processing fee?

You must pay the supplemental travel fee when you submit an initial application for recognition and the site you identified for recognition is outside the 48 contiguous U.S. states or the District of Columbia. The current supplemental travel fee is \$1,000. We factor in this prepayment when we bill for the actual costs of the assessment, as described in note 2 to Table A above. See note 8 for possible refund of application or assessment fees. You must pay the supplemental program-review fee when you apply for approval to use other qualified parties or facilities to perform specific activities. See Chapter 2 of the NRTL Program Directive for more information regarding supplemental programs. We will include the invoice-processing fee in the total for each of our invoices to you. You must pay the travel document processing fee in advance to cover the costs of arranging and obtaining reimbursement for travel, which we generally include in the first-day fee for assessments and audits. We charge this fee for additional sites of the NRTL visited during one trip. We also charge this fee separately for trips to a location when the preparation time for the trip is minimal; for example, trips to a site that the NRTL qualified to perform specific or limited testing or certification activities for the NRTL.

5. When do I pay the review and evaluation, and the final report and **Federal Register** notice, fees?

An applicant or an NRTL also must pay these fees in advance of OSHA performing the assessment for the application. We calculate the review and evaluation fee at the rate of \$30 per test standard requested for those standards that OSHA previously recognized for any NRTL and that require minimal review or do not represent a new area of testing for the NRTL. Otherwise, this fee is \$296 per standard requested.

6. When do I pay the audit fee?

Each NRTL must pay this fee (on-site or office, as deemed necessary) in advance of OSHA commencing the audit, and we calculate this prepaid fee based on estimated staff time and travel costs. Following the audit, we will calculate the fee based on actual staff time and travel costs incurred in performing the audit. We charge the first-day audit fee at the rate of \$4,240 for the first day at the site if the audit finds nonconformances or observations requiring a response. If the audit finds none, OSHA will credit the NRTL's account to reduce the fee to \$3,260. In addition, we charge \$730 for each additional day at the site, and \$730 for each day in travel, plus actual travel expenses for each auditor. We also charge at the rate of \$730 per day to review the NRTL's revised or supplemental response when its original response did not adequately resolve all the nonconformances documented in OSHA's audit report. OSHA charges the NRTL the first-day fee only once if OSHA audits multiple sites of the NRTL during one trip. However, see note 4 above. We determine actual travel expenses based on government per diem and other travel rules. We may add any underpayment(s) or credit any overpayments to the invoice for a future audit of the NRTL's site. For an office audit, we charge \$730, per site, per person, per day, if the audit finds no nonconformances, and \$1,120, if we find nonconformances or observations requiring a response. When the NRTL's response does not adequately resolve the nonconformances, the \$730 per-day fee also applies to review the NRTL's revised or supplemental response.

7. When do I pay the additional review fee, renewal information review fee, or limited review fee?

The additional review fee covers the staff time required to review new or modified information submitted after we completed our preliminary review of an application. There is no charge for review of a "minor" revision, which entails modifying or supplementing less than approximately 10% of the documentation in the application. You must pay the additional review fee when submitting revisions modifying or supplementing from 10% to 50% of the documentation. For a new application, the fee represents 16 hours of additional review time, and for a renewal or expansion application, the fee represents 8 hours of additional review time. If you exceed that 50% threshold when submitting revised documentation for your application (*i.e.*, you substantially revise your application), you must pay half of the initial-application review fee (\$4,635, if a pending applicant; \$8,875 if a new applicant), the expansion-application review fee for adding a site, or the renewal- or expansion (other)-application fee, as applicable. If this latter fee applies, you also must pay review and evaluation fee (\$296) for each test standard affected by the revision. The renewal information review fee applies when an NRTL submits updated information to OSHA in connection with a request for renewal of recognition. You must pay the additional review or renewal information review fee when submitting the additional or updated information. The limited review fee covers the time to review and return a new application that we find to be substantially deficient. OSHA deducts this fee from any refund due to the applicant.

8. When and how can I obtain a refund for the fees that I paid?

If you withdraw an initial application, or an expansion application for an additional site, after we commenced but before completing the full review, we will refund half of the application review fee. If you withdraw your application before we commence travel to your site to perform the on-site assessment, we will refund any prepaid assessment fees, or credit your account. We also will credit your account for any amount of the prepaid assessment or audit fees collected that is greater than the actual cost of the assessment. If the limited review fee applies (*i.e.*, we return the application), we will refund the balance of the initial-application review fee (*i.e.*, the amount in excess of the limited review fee). If an organization is no longer part of the NRTL Program, we will refund any funds collected in excess of all actual costs incurred through the date of termination. Other than these cases, we do not generally refund or grant credit for any other fees due or collected.

9. Am I still liable for any fees even if OSHA rejects my application or terminates my recognition?

If we reject your application, we will retain the fees pertaining to tasks we performed. For example, if we perform an assessment for an expansion application but deny the expansion, we will retain your prepaid assessment fee. Similarly, we will retain the final report and **Federal Register** fee if we wrote the report and published the notice. See note 11 to this Table A for the consequences of nonpayment.

10. What rate does OSHA use to charge for staff time (including Comp Time)?

OSHA estimated an equivalent staff cost per hour that it uses for determining the fees shown in the fee schedule. This hourly rate takes into account the costs for salary, fringe benefits, equipment, contract services, supervision and support for each "direct staff" member, that is, the staff that perform the main activities identified in the fee schedule. The rate is an average of these amounts for each of these direct staff members. The current estimated equivalent staff costs per hour = \$147.90. The hourly rate for Comp Time is based on the direct staff average salary and fringe costs only (\$56.40). OSHA also will charge this rate for any other OSHA staff travel time in excess of the staff's normal 40-hour work week.

(For more information about Compensatory Time, see additional explanation in section VIII of this notice ("Major Changes to the Fee Schedule").)

11. What happens if I do not pay the fees you bill to me?

As explained above, if you are an applicant, we will send you a final bill (for any assessment and for the fees related to the review and evaluation, and the final report and **Federal Register** notice) in advance of the assessment. If you do not pay the bill by the due date, we will assess the Late Payment fee shown in Table A of this notice. This late-payment fee represents one hour of staff time at the equivalent staff cost per hour (see note 10). We also will halt any work on your application. If we do not receive payment within 30 days of the original due date, we will cancel your application. If you do not pay the prepaid fee for an audit by the due date, we will assess the late-payment fee shown in Table A of this notice. However, OSHA may decide to proceed with the audit. If we do not receive payment within 30 days of the original due date for an audit fee, we will publish a **Federal Register** notice stating our plan to revoke your NRTL recognition. However, note that, in either case, you may be subject to collection procedures under U.S. (Federal) law.

12. How do I know whether this is the most current fee schedule?

You may contact OSHA's NRTL Program (202-693-2110 or 2300) or visit the program's Web site to determine the effective date of the most current fee schedule. Access the site by selecting "N" in the alphabetical Index at <http://www.osha.gov>. Any application-review fees are those fees in effect on the date you submit your application. Other application-processing fees are those fees in effect when we perform the activity covered by the fee. Audit fees are those fees in effect on the date we begin the audit.

*B. Fee Schedule for Applicants When OSHA Receives the Initial Application on or After March 28, 2011*

Table B below is the fee schedule applicable to any applicant having an

initial application received by OSHA on or after the effective date of this rule. This fee schedule also represents the projected fee that would apply to all other NRTLs and applicants when OSHA fully implements the final phase

of the fee phase-in beginning in the third year after this rule's effective date. Table B is based on current projections, and it is likely that OSHA will adjust these fees during its periodic fee-review process.

**TABLE B—NATIONALLY RECOGNIZED TESTING LABORATORY PROGRAM FEE SCHEDULE FOR APPLICANTS WHEN OSHA RECEIVES THE INITIAL APPLICATION ON OR AFTER MARCH 28, 2011**

Type of service	Activity or category (fee charged per application unless noted otherwise)	Fee amount
APPLICATION PROCESSING .....	Initial application review (submit fee as two payments) <sup>1 8</sup> .....	\$17,750.
	Expansion-application review (per additional site) <sup>1 8</sup> .....	\$8,280.
	Renewal or expansion (other) application review <sup>1</sup> .....	\$300.
	Renewal Information Review Fee <sup>7</sup> .....	\$2,370.
	Additional review—initial application (if the application requires substantial revision, submit one-half of initial-application review fee) <sup>7</sup> .	\$2,370.
	Additional review—renewal or expansion application <sup>7</sup> .....	\$730.
	Limited review—initial application <sup>7</sup> .....	\$3,550.
	Assessment—initial application (per person, per site—first day) <sup>2 10</sup> .....	\$4,440 + travel expenses.
	Assessment—renewal application (per person, per site—first day) <sup>3 10</sup> .....	\$4,140 + travel expenses.
	Assessment—expansion application (additional site) (per person, per site—first day) <sup>3</sup> .	\$3,550 + travel expenses.
	Assessment—expansion application (other) (per person, per site—first day) <sup>3</sup> .	\$2,960 + travel expenses.
	Assessment—each additional day or each day on travel (per person, per site) <sup>2 3</sup> .	\$1,180 + travel expenses.
	Review and evaluation <sup>5</sup> (\$30 per standard if OSHA already recognizes the NRTLs and requires minimal review; otherwise, \$296 per standard).	\$30 per standard OR \$296 per standard.
	Final report and <b>Federal Register</b> notice—initial application <sup>5 9</sup> .....	\$19,520.
	Final report and <b>Federal Register</b> notice—renewal or expansion application (if OSHA performs on-site assessment) <sup>5 9</sup> .	\$7,390.
Final report and FEDERAL REGISTER notice—renewal or expansion application (if OSHA performs no on-site assessment) <sup>5 9</sup> .	\$4,440.	
AUDITS .....	On-site audit (per person, per site, first day) <sup>6</sup> .....	\$7,400 + travel expenses.
	(\$4,440—no nonconformances) .....	
	On-site audit—each additional day (on-site or on travel) (per person, per site), or review of revised audit response—per on-site or office audit <sup>6</sup> .	\$1,180 + travel expenses.
MISCELLANEOUS .....	Office audit (per person, per site, per day) <sup>6</sup> —\$1,180 if no nonconformances, \$2,370 if nonconformances found.	\$1,180 or \$2,370.
	Supplemental travel (per site—for sites located outside the 48 contiguous U.S. states or the District of Columbia) <sup>4</sup> .	\$1,000.
	Supplemental program review (per program requested) <sup>4</sup> .....	\$590.
	Fees invoice processing (per application or audit) <sup>4</sup> .....	\$300.
	Travel document processing (4 hours, per application or audit) <sup>4</sup> .....	\$590.
Late payment <sup>11</sup> .....	\$150.	
Compensatory time for travel (per hour) <sup>10</sup> .....	\$56.40.	

The notes to Table B are the same as the notes to Table A, except that the corresponding Table B fees apply instead of the Table A fees shown in these notes.

**VII. Description of Fees and Review of Comment**

This section describes the major tasks and functions covered currently by each type of fee category, e.g., application fees, and the basis used to charge each fee.

*Application Fees.* This fee is for the technical work performed by OSHA's office and field staff in reviewing application documents to determine whether an applicant submitted complete and adequate information. The application review does not include a determination on the test standards requested, which OSHA covers in the review and evaluation fee. OSHA based

the application fees on the average cost per type of application. OSHA uses an average cost because the amount of time spent on application review does not vary greatly by type of application, i.e., the number and type of documents submitted generally will be the same for a specific type of application.

Experience shows that most applicants follow the application guide that OSHA provides to them.

*Assessment Fees.* This fee is different for the initial, renewal, expansion (site), and expansion (other) applications. OSHA based this fee on the number of days for staff preparatory and on-site work, and related travel. OSHA uses six

types of assessment fees, five of which involve charges per site and per person. The four assessment fees for the first day represent charges for office preparation and 8 hours visiting an applicant's facility. There is one fee covering either additional days at the facility or additional days in travel. OSHA assesses additional days in travel for either a half or a full day of travel. OSHA also assesses a supplemental travel amount for travel outside the contiguous 48 U.S. states or the District of Columbia. For initial applications, applicants must submit the amount to cover the assessment in advance with the application. In addition to the first

day and additional day amounts, the applicant or NRTL must pay actual travel expenses, based on government per diem and travel rules. For initial applications, OSHA will adjust the final bill or refund to the applicant for any difference between actual travel expenses and the advance travel amount.

Similar to the application fee, the office-preparation time generally involves the same types of activities. Actual time at the facility may vary, but the staff spend at least a full day performing the on-site work. The fee for the additional day reflects time spent at the facility and the actual travel expenses for that day.

**Review and Evaluation Fee.** OSHA charges this fee for evaluating each test standard that an applicant is proposing be part of its scope of recognition. The fee represents the staff time spent during the office review of such an application, and varies with the number of test standards requested by the applicant. In general, OSHA bases the fee on the estimated time necessary to review test standards to determine whether each one is “appropriate,” as defined in 29 CFR 1910.7, and whether each test standard covers equipment for which OSHA mandates certification by an NRTL. The fee also covers time required to determine the current designation and status (*i.e.*, active or withdrawn) of a test standard, which involves reviewing current directories of the applicable standards-development organization. Furthermore, it includes time spent discussing the results of the application review with the applicant. The actual time spent will vary depending on whether an applicant requests test standards previously approved by OSHA for other NRTLs. When the review is minimal, these activities take approximately 2 hours for 10 standards. When the review is more substantial, the estimated average review time per standard is one hour for each standard. Substantial review will occur when OSHA did not previously recognize the standard for any NRTL, or when the NRTL is proposing to test in a new area, *i.e.*, for a type of product not similar to any product currently included under its scope of recognition.

**Final Report/Federal Register Notice Fees.** OSHA charges these two fees for each application. The fee involves the staff time required to prepare a report of the on-site review of an applicant’s or an NRTL’s facility, which includes contacting the applicant or NRTL to discuss issues or items raised by findings made by OSHA during the on-site review. The fee also represents the time spent making the final evaluation

of an application, preparing the required **Federal Register** notices, and responding to comments received in response to the **Federal Register** notice. OSHA bases these fees on average costs per type of application, since the type and content of documents prepared are generally the same for each type of applicant. There is a separate fee when OSHA does not perform an on-site assessment. In these cases, the NRTL Program staff perform an office assessment and prepare a recommendation regarding expansion or renewal.

**On-site Audit Fees.** These fees include the time for office preparation, time at the NRTL facility and travel, and time to prepare the report of the on-site audit. OSHA assesses the fee on a per-site basis, because the amount of preparation time generally does not vary significantly between sites. The actual time on site will vary depending on the scope of the audit but, currently, the limit generally is two days. As previously described, the audit fee includes amounts for travel based on actual travel expenses.

OSHA received only one comment in response to the proposed rule (see Ex. OSHA–2007–0031–0002), and the commenter expressed three concerns regarding the proposed audit fees. First, the commenter had a concern about the applicability of the first-day fee for an audit listed in Table 5 of the proposed rule. This table detailed the average actual costs that the Agency incurred in conducting an audit. The commenter noted that, under the rule as proposed, each audit would include a first-day fee, thereby changing OSHA’s past practice of charging this fee only once if it visited multiple sites of an NRTL during one trip. OSHA will continue this practice, but did not explicitly note the practice in the proposal. Accordingly, OSHA revised Table 5 and the applicable note in the fee schedule to state the practice OSHA will follow. The revision, however, also clarifies that the fee for making travel arrangements still applies to each site, even though they may be sites of the same NRTL.<sup>10</sup>

Second, the commenter asserted that OSHA was charging too much time for the “prepare report/contact NRTL” portion of the audit fee. The commenter questioned the number of days of field

staff time shown in Figure 5 of the proposed rule.<sup>11</sup> These days cover preparation of the report, any discussion with the NRTL when its response is unclear or unacceptable, and review and analysis of the NRTL’s response to any nonconformances and observations identified during the audit.<sup>12</sup> The proposed rule was unclear regarding this latter task as evidenced by the commenter’s statement that the proposal excluded a charge for this activity. While OSHA will continuously search for efficiencies in administering the NRTL Program, it cannot deviate from the actual costs of the program as would be necessary if it followed the commenter’s recommendation.

The commenter also did not recognize the work done by OSHA auditors after the site visit, which is part of this item. An OSHA auditor develops an internal report detailing the auditor’s review of each element of the NRTL’s operations, and preparing the final version of the report detailing the nonconformances found. In addition, the auditor will be uploading this information into an audit report database. Three days to accomplish all of these tasks is reasonable, and represents OSHA’s actual experience.

The third concern involved the commenter’s belief that OSHA’s audit fee excluded review and analysis of an NRTL’s response to determine whether the corrective or other actions are acceptable. As explained earlier, the “prepare report/contact NRTL” portion of the audit fee includes this task. The commenter, believing OSHA omitted this portion of the audit fee, recommended that OSHA charge a fee based on the “levels of noncompliance,” which OSHA takes to mean the number of nonconformances found during an audit. In response to this recommendation, OSHA notes that it calculates each fee based on the average time taken to complete an activity, and, in the case of the “prepare report/contact NRTL” part of the audit fee, the time taken to prepare and record the reports, review the NRTL’s response, and contact the NRTL to address any remaining issues. Therefore, it would be inappropriate to charge a fee based on the number of nonconformances because that number does not

<sup>10</sup> The amount of time spent arranging travel plans for each site visited during one trip is typically the same regardless of whether the site is for the same, or a different, NRTL. Therefore, OSHA will continue to account for this part of the preparation time through the travel document processing fee. OSHA charges this fee when the auditor visits more than one NRTL site during one trip. See note 4 to Table A, below.

<sup>11</sup> This portion of the audit fee was shown as 26 work hours in the proposed rule, of which 24 hours, *i.e.*, 3 work days, was field time, and not the 2 days that was shown in the proposed rule. Table 5 of this final rule reflects the correct days. Eight of these 24 hours apply to reviewing the NRTL’s response and contacting the NRTL, if needed.

<sup>12</sup> In this rule, when the term “nonconformance” is used alone, it also includes observations for which OSHA requires a response from the NRTL.

necessarily correspond to the time spent by the auditor. In addition, it would be impractical to track, and base a fee on, the time taken to review the corrective action for each nonconformance or any response required for an observation. In practice, the time taken for the auditor's review is simply the time to review the NRTL's entire response to OSHA's audit report, which OSHA already included in the 26 work hours shown in Table 5 for the "prepare report/contact NRTL" part of the audit fee.

The commenter's concern pointed out that the proposed on-site audit fee calculation inaccurately captures the staff's review time in the extreme cases, i.e., it is too high when there are no nonconformances, and too low when the resolution of nonconformances consumes a great deal of OSHA staff's time. To correct this inaccuracy, OSHA adjusted the audit fees by: (1) Reducing the fee by 20 work hours when there are no nonconformances, and (2) charging for extra time when the NRTL must submit a revised or supplemental response because the original one did not adequately address all of the nonconformances. In these latter cases, OSHA will charge the NRTL a daily rate, or a fraction of this rate, for the actual time OSHA staff spends reviewing the revised response. OSHA expects that it will rarely need to charge for extra time. However, in these cases,

the program office will alert the NRTL about the extra charge, and then document the extra time and bill the NRTL accordingly. Based on its past experience, OSHA expects that the number of audits without nonconformances will exceed those audits that will require revised responses. Accordingly, it does not expect the additional fees to result in a significant increase in the overall cost impact to NRTLs.

*Office Audit Fees.* OSHA charges a separate fee for an office audit conducted instead of an on-site visit. OSHA provides a per-day rate, and the description in the schedule now makes this clear. Originally, this type of audit was to apply to an NRTL that regularly has little or no nonconformances during OSHA's on-site audit of the NRTL's site(s). Accordingly, the fee for the office audit, \$730 per day under Table A, reflects the time to perform the audit and prepare a relatively short report. However, while addressing the sole comment to the Docket, OSHA also determined that a clarification was necessary regarding the fee for an office audit. OSHA adjusted the fee schedule to include a fee for office audits that find nonconformances, \$1,120 under Table A. This fee reflects 16 hours for preparation of the audit report and review of the NRTL's response. This fee is lower than the similar fee for an on-

site audit because office audits generally require less auditor review time than for on-site audits. As in the case of the on-site, an additional per-day fee also applies to an office audit when the NRTL must submit a revised or supplemental response.

*Miscellaneous Fees.* The fee schedule shows the average cost for one full day of staff time. OSHA uses this fee primarily when refunding the assessment fee. OSHA will also charge a fee for late payment of the audit fee. OSHA bases the amount for the late fee on 1 hour of staff time charged at the fully implemented rate shown in Table B above. OSHA also charges a supplemental program-review fee, which represents the time OSHA needs to review the documents that an NRTL submits to justify its proposed use of a supplemental program. Supplemental programs allow NRTLs to use other qualified parties or facilities to perform the specific tasks covered by the program, and that are necessary for product testing and certification.

**VIII. Major Changes to the Fee Schedule**

The following table shows the major adjustments (*i.e.*, increases or decreases of \$100 or more) that OSHA made to the fee schedule in Table A compared to the prior 2007 fee schedule.<sup>13</sup>

Description of activity or category	Prior fee amount	New fee amount—first year increase	New fee amount—full increase
Initial application review .....	\$5,100 .....	\$17,750 .....	\$17,750.
Expansion-application review .....	\$1,020 .....	\$3,420 .....	\$8,280.
Additional review—initial application .....	\$1,020 .....	\$2,370 .....	\$2,370.
Renewal application—information review .....	\$1,020 .....	\$1,470 .....	\$2,370.
Additional review—renewal or expansion application .....	\$510 .....	\$730 .....	\$1,180.
Limited review—initial application .....	\$0 .....	\$3,550 .....	\$3,550.
Assessment—initial application (per person, per site—first day) ...	\$1,910 .....	\$4,440 .....	\$4,440.
Assessment—renewal application (per person, per site—first day)	\$1,790 .....	\$2,570 .....	\$4,140.
Assessment—expansion (additional site) (per person, per site—first day).	\$1,530 .....	\$2,200 .....	\$3,550.
Assessment—expansion (other) (per person, per site—first day)	\$1,280 .....	\$1,830 .....	\$2,960.
Assessment—each additional day, or travel time—each day (per person, per site).	\$510 .....	\$1,180 (new applications); 730 other applications.	\$1,180.
Review and evaluation .....	\$13 per standard ...	\$30 per standard .....	\$30 per standard.
Final report and <b>Federal Register</b> notice—initial application .....	\$8,420 .....	\$19,520 .....	\$19,520.
Final report and <b>Federal Register</b> notice—renewal or expansion application (if OSHA performs on-site assessment).	\$3,190 .....	\$4,580 .....	\$7,390.
Final report and <b>Federal Register</b> notice—renewal or expansion application (if OSHA performs no on-site assessment).	\$1,910 .....	\$2,740 .....	\$4,440.
On-site audit (first day) .....	\$2,680 .....	\$4,240 .....	\$7,400.
On-site audit (first day) (no nonconformances) .....	\$0 .....	\$3,260 .....	\$4,400.
On-site audit—each additional day .....	\$510 .....	\$730 .....	\$1,180.
Office audit—nonconformances found .....	\$0 .....	\$1,120 .....	\$2,370.
Supplemental program review .....	\$260 .....	\$270 .....	\$590.
Invoice processing .....	\$130 .....	\$300 .....	\$300.

<sup>13</sup> See 73 FR 7468 (February 15, 2007) for the 2007 fee schedule.

*Clarification of Travel Expenses Fee.* The fee schedule states that OSHA will charge for time on travel following government travel rules. Those rules permit a traveler to earn a special type of leave called “compensatory time for travel,” or simply “travel comp time.” The traveler generally earns this time when in transit for a duration of time that exceeds the traveler’s regular work schedule. Travel comp time is earned time off, as opposed to receiving overtime pay. The amount of travel comp time varies depending on the specific circumstances of the travel. In general, it is greater for trips outside the contiguous 48 U.S. states and the District of Columbia than for trips within the U.S. Travel comp time is for travel time that exceeds an employee’s regular work hours, *i.e.*, the total available work hours (TAW) discussed under section III above. Because this time is specific to a particular trip, OSHA will include it in the travel fee that OSHA charges for a trip. OSHA does not include travel comp time in the total time used to develop the ECR, *i.e.*, the TAS. Instead, OSHA will charge travel comp time at the average rate for direct OSHA staff time, which will be \$56.40 under the revised fee schedule. Although this discussion focuses on travel comp time, OSHA also will charge this rate for any other OSHA staff travel time in excess of the staff’s regular work hours.

**IX. Changes to 29 CFR 1910.7(f)**

As noted earlier, 29 CFR 1910.7(f) specifies the conditions for assessing and determining fees. This rule states that OSHA will assess fees for processing applications for initial recognition, expansion of recognition, or renewal of recognition, review and evaluation of the applications, and preparation of reports, evaluations, publishing **Federal Register** notices, and audits of sites. It further states that OSHA will calculate the fees based on either the average or actual time required to perform the work necessary, the staff costs per hour, and the average or actual costs for travel for on-site reviews. 29 CFR 1910.7(f)(1) and (2). In addition, this rule states that OSHA will review costs annually, and will propose a revised fee schedule if warranted. In this final rule, OSHA is replacing the reference to an “annual review” with a “periodic review” to allow it more flexibility in adjusting fees as appropriate. OSHA does not expect to review the fee schedule more than once annually, but anticipates situations in which it may not complete the cost review within a single-year period.

OSHA also is revising the language in paragraph (f) to clarify the basis used for calculating fees, consistent with OMB Circular A–25. Specifically, this revision makes clear that the term “costs” means the full costs of performing the activities that benefit the NRTLs. Thus, as revised, paragraph (f)(2) reads: “The fee schedule established by OSHA reflects the *full* cost of performing the activities for each service listed in paragraph (f)(1) of this section.” (Emphasis added.) Similarly, OSHA is revising paragraph (f)(3)(i) to clarify that the two references to the cost of the program mean the *full* cost of the program.

OSHA also is revising the language in paragraphs 29 CFR 1910.7(f)(1) and (f)(4) to require advance payment of the fees. In this regard, OSHA is revising the first sentence of 29 CFR 1910.7(f)(1) to specify that NRTLs and applicants must pay all applicable fees in advance. In addition, OSHA is revising the table in 29 CFR 1910.7(f)(4), which establishes important billing periods and related actions, to provide information on the new advanced-billing process. One of the revisions to this table reduces the amount of time OSHA must wait before publishing its plan to revoke recognition of NRTLs that do pay audit fees. Accordingly, OSHA revised the current provision of “60 days after the bill date” to “30 days after due date.” OSHA requested comment on this revision in the proposal, but received none.

**X. Final Economic Analysis and Final Regulatory Flexibility Analysis**

Executive Order 12866 and the Regulatory Flexibility Act (RFA), as amended in 1996, require each Federal agency to analyze the costs, and other consequences and impacts, including small business impacts, of its rules. Consistent with these requirements, OSHA analyzed the costs of this final rule and the impacts of this rule on affected laboratories and small businesses.

The Agency received one comment on the proposal (Ex. OSHA 2007–0031–0002). The commenter suggested revisions to the unit costs used to determine NRTLs’ fees. As noted above in this preamble, OSHA revised the unit costs in response to this comment; however, the average cost of NRTLs’ fees remains unchanged from the proposal. The Agency updated information on revenue for the affected industry and laboratories; otherwise, this final economic analysis changed little from the preliminary economic analysis (PEA) accompanying the proposed regulation.

*Affected Industries*

When the Agency established its NRTL fee schedule in 2000, there were 17 NRTLs with 42 operational sites. Today, there are 15 NRTLs (including two foreign-owned and -operated NRTLs) with 49 sites (see the following table for a list of current NRTLs).

NRTL name	Number of sites
Canadian Standards Association (CSA) .....	6
Communication Certification Laboratory, Inc. (CCL) .....	1
Curtis-Straus LLC (CSL) .....	1
FM Global Technologies LLC (FM) .....	2
Intertek Testing Services NA, Inc. (ITSNA) .....	13
MET Laboratories, Inc. (MET) .....	1
National Technical Systems, Inc. (NTS) .....	1
NSF International (NSF) .....	1
SGS U.S. Testing Co., Inc. (SGSUS) .....	1
Southwest Research Institute (SwRI) .....	1
TUV America, Inc. (TUVAM) .....	3
TUV Product Services GmbH (TUVPSG) .....	1
TUV Rheinland of North America, Inc. (TUV) .....	1
Underwriters Laboratories Inc. (UL) .....	15
Wyle Laboratories, Inc. (WL) .....	1
<b>Total (15 NRTLs) .....</b>	<b>49</b>

Source: OSHA Directorate of Technical Support and Emergency Management.

*Costs*

The Agency estimated in 2000 that it would collect approximately \$239,000 in fees annually (65 FR 46815). OSHA updated its fee schedule in February, 2007, and showed total estimated program costs of approximately \$755,000 (72 FR 7469), estimating that these updated fees would enable it to collect only about half of these costs (*i.e.*, \$380,000). As Table 1 above shows, the revisions made in this final rule, including revisions to calculating OSHA costs and updating Federal employee salary levels, could increase the fees collected to about \$1,096,000. In comparison, if OSHA updated costs using the original calculation method (without adjustment for ancillary activities and leave), and included the increase in staff resources, the total fees collected would only increase to about \$583,000. The impact of the increase, when fully implemented, will be \$513,000 (\$1,096,000 minus \$583,000). Because OSHA’s analysis evaluates the impact of the final rule as if the full increase during the third year was in

effect, the impact will actually be less during the first two years after the rule's effective date because OSHA is phasing in the fee increase. In addition, OSHA's analysis evaluates the total impact on existing NRTLs and on new applicants. Accordingly, the actual impact on existing NRTLs will be less because new applicants will pay some of the increased fees.

#### *Economic Impacts*

The fee increase will have only a minor impact on industry revenues and profits. NAICS 54138 ("Testing Laboratories") had \$12.3 billion in revenues in 2007 (updated from the PEA) (U.S. Census Bureau, 2007 Economic Census). In the 2000 rulemaking, as here, the Agency estimated that net before-tax profits were 5.7 percent of revenues (Robert Morris Associates, Annual Statement Studies, Reference 2). The Agency, therefore, estimates 2007 industry before-tax profits as \$701 million (5.7% of \$12.3 billion). The entire \$1,096,000 million in user fees represents 0.00009, or 0.009 percent, of industry revenues (\$1.09 million/\$12.3 billion) and 0.00155, or 0.155 percent, of industry profits (1.09/701). Thus, the impact of the additional new user fees of \$513,000 will be even less. The Agency concludes that the changes to the fee calculation, and the resulting increase in fees, are economically feasible for the industry.

Average cost per affected firm of the increase in NRTL fees is about \$73,067 (\$1,096,000/15); while average cost per affected NRTL establishment (site) is about \$22,367 (\$1,096,000/49). As a result, OSHA expects larger firms with multiple recognized sites to have higher total user fees. The Agency believes that the increase in NRTL user fees will have little, if any, impact on the affected firms because demand for NRTL services continues to grow, and there was no apparent adverse affect from increasing NRTL fees in 2000 and 2007.

Any impact on the NRTLs depends on whether the NRTLs can raise prices to their customers. The Agency concludes that there are no good substitutes for the certification supplied by NRTLs, and it is likely that the NRTLs will pass the higher user fees on to the large number of NRTL customers via small price increases. The Agency concludes that the new, higher NRTL fees will have little economic impact on the affected firms and establishments.

#### *Regulatory Flexibility Act Certification*

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), each Federal agency must assess the impact of its rules on small entities, and prepare a

final regulatory flexibility analysis unless the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. Thus, the Agency also estimated in this final rule the relative effect of the new user fees on small businesses. In the original fees rulemaking in 2000, OSHA defined small businesses as those businesses with less than \$5 million in sales (the Small Business Administration (SBA) criterion for the industry, see SBA Web site Reference 3 below). These businesses have fewer than 100 employees and average revenue of about \$2.4 million. In the 2000 rulemaking, OSHA estimated user fees to be about \$6,000 per "small" testing laboratory, which was less than 0.3 percent of average small-business revenues, and less than 5 percent of before-tax profits (Table 6, 65 FR 46817). The February 15, 2007, revision (73 FR 7468) raised the average establishment's fee to about \$7,700 (\$380,000/49). The higher user fees adopted by the Agency herein increased the expected average user fee for a small testing laboratory to about \$22,367.

Revenues for the industry also increased, from \$5 billion in 1992, to an estimated \$12.3 billion in 2007 (1992 and 2007 Economic Census). Similarly, the SBA size criterion of a small business in the testing-laboratory industry increased to \$11 million in annual revenues (SBA Web site; see link under "References" below). The Agency estimates that the new user fees still represent less than 1 percent of revenues and 5 percent of profits for small businesses in this industry. The marginal increase in user fees, which is about \$14,667 per testing laboratory (to \$22,367 from \$7,700), is a small fraction of current revenues and profits. The economic costs are less than 1 percent of revenues and 5 percent of before-tax profits, and the Agency concludes that these NRTLs will pass the costs on to the firms' customers. The Agency, therefore, certifies that the higher NRTLs fees will not have a significant impact on a substantial number of small entities. The Agency concludes that 13 of the 15 affected NRTLs are small entities, as defined by current SBA criterion. Finally, as noted in the 2000 rulemaking (65 FR 46797), the collection of user fees from NRTLs is not a new cost to society, but represents a transfer of the governmental cost of the NRTL Program from taxpayers to an industry directly consuming government services.

OSHA did not receive any comments on the initial regulatory flexibility

analysis or the economic analysis published in the proposal.

#### *References*

1. U.S. Department of Commerce, Bureau of the Census, 1992 Census of Service Industries: Industry Series: SC92-S-1, -4, -5. Washington, DC, February 1995.
2. Risk Management Associates (formerly Robert Morris Associates), Annual Statement Studies, September 1995.
3. U.S. Small Business Administration Web site <http://www.sba.gov>. Table of Small Business Size Standards Matched to North American Industry Classification System Codes [http://www.sba.gov/idc/groups/public/documents/sba\\_homepage/serv\\_std\\_tablepdf.pdf](http://www.sba.gov/idc/groups/public/documents/sba_homepage/serv_std_tablepdf.pdf).

#### **XI. Unfunded Mandates Reform Act**

For the purposes of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1501, *et seq.*), this rule does not include any Federal mandate that may result in increased expenditures by State, local, or tribal governments, or an increased expenditure by the private sector of more than \$100 million.

#### **XII. Paperwork Reduction Act**

This rule does not impose or remove any information collection requirements for the purposes of the Paperwork Reduction Act of 1995, 44 U.S.C. 3501-30. Under the Office of Management and Budget (OMB) control number 1218-0147, OSHA has authority to collect information for purposes of NRTL Program activities.

#### **XIII. Federalism**

OSHA reviewed this final rule in accordance with Executive Order 13132. This final rule only sets fees for services provided by the Federal government to private entities and has no impact on Federalism. The rule does not limit or restrict State policy options.

#### **XIV. State Plan States**

This final rule will not affect the 27 States and Territories that have OSHA-approved occupational safety and health plans. Twenty-two of these States and Territories operate OSHA-approved State Plans covering both private- and public-sector employees: Alaska; Arizona; California; Hawaii; Indiana; Iowa; Kentucky; Maryland; Michigan; Minnesota; Nevada; New Mexico; North Carolina; Oregon; Puerto Rico; South Carolina; Tennessee; Utah; Vermont; Virginia; Washington; and Wyoming. Four States (Connecticut, Illinois, New Jersey, and New York) plus the Virgin Islands have OSHA-approved State Plans that apply to State and local government employees only.

**XV. Authority and Signature**

David Michaels, PhD, MPH, Assistant Secretary of Labor for Occupational Safety and Health, 200 Constitution Avenue, NW., Washington, DC 20210, authorized the preparation of this notice. Accordingly, the Agency is issuing this notice pursuant to Sections 6(b) and 8(g) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 655 and 657), Secretary of Labor's Order No. 4-2010 (75 FR 55355), and 29 CFR part 1911.

Signed at Washington, DC, on February 16, 2011.

**David Michaels,**

*Assistant Secretary of Labor for Occupational Safety and Health.*

**List of Subjects in 29 CFR Part 1910**

Fees, Occupational safety and health, Product testing and certification, Safety, Testing laboratories.

For the reasons stated in the preamble of this final rule, OSHA amends subpart A of 29 CFR part 1910 as follows:

**PART 1910—OCCUPATIONAL SAFETY AND HEALTH STANDARDS**

**Subpart A—General [Amended]**

■ 1. Revise the authority citation for subpart A to read as follows:

**Authority:** Sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order No. 12-71 (36 FR 8754), 8-76 (41 FR 25059), 9-83 (48 FR 35736), 1-90 (55 FR 9033), 6-96 (62 FR 111), 3-2000 (65 FR 50017), 5-2002 (67 FR 65008), 5-2007 (72 FR 31159), and 4-2010 (75 FR 55355), as applicable.

Sections 1910.6, 1910.7, 1910.8 and 1910.9 also issued under 29 CFR part 1911. Section 1910.7(f) also issued under 31 U.S.C. 9701, 29 U.S.C. 9a, 5 U.S.C. 553; Pub. L. 106-113 (113 Stat. 1501A-222); Pub. L. 111-8 and 111-317; and OMB Circular A-25 (dated July 8, 1993) (58 FR 38142, July 15, 1993).

■ 2. In § 1910.7:

- a. Revise paragraph (f)(1) introductory text;
- b. Revise the first sentence of paragraph (f)(2) introductory text;
- c. Revise paragraph (f)(3)(i); and
- d. Revise paragraph (f)(4).

The revisions read as follows:

**§ 1910.7 Definition and requirements for a nationally recognized testing laboratory.**

\* \* \* \* \*

(f) \* \* \*

(1) Each applicant for NRTL recognition and each NRTL must pay fees for services provided by OSHA in advance of the provision of those services. OSHA will assess fees for the following services:

\* \* \* \* \*

(2) The fee schedule established by OSHA reflects the full cost of performing the activities for each service listed in paragraph (f)(1) of this section. \* \* \*

\* \* \* \* \*

(3)(i) OSHA will review the full costs periodically and will propose a revised fee schedule, if warranted. In its review, OSHA will apply the formula established in paragraph (f)(2) of this section to the current estimated full costs for the NRTL Program. If a change is warranted, OSHA will follow the implementation shown in paragraph (f)(4) of this section.

\* \* \* \* \*

(4) OSHA will implement periodic review, and fee assessment, collection, and payment, as follows:

Milestones/Dates	Action required
<b>I. Periodic Review of Fee Schedule</b>	
When review completed .....	OSHA will publish any proposed new fee schedule in the <b>Federal Register</b> if OSHA determines that costs warrant changes in the fee schedule.
Fifteen days after publication .....	Comments due on the proposed new fee schedule.
When OSHA approves the fee schedule.	OSHA will publish the final fee schedule in the <b>Federal Register</b> , making the fee schedule effective on a specific date.
<b>II. Application Processing Fees</b>	
Time of application .....	Applicant must pay the applicable fees in the fee schedule that are due when submitting an application; OSHA will not begin processing the application until it receives the fees.
Before assessment performed .....	Applicant must pay the estimated staff time and travel costs for its assessment based on the fees in effect at the time of the assessment. Applicant also must pay the fees for the final report and <b>Federal Register</b> notice, and other applicable fees, as specified in the fee schedule. OSHA may cancel an application if the applicant does not pay these fees, or any balance of these fees, when due.
<b>III. Audit Fees</b>	
Before audit performed .....	NRTL must pay the estimated staff time and travel costs for its audit based on the fees in effect at the time of the audit. NRTL also must pay other applicable fees, as specified in the fee schedule. After the audit, OSHA adjusts the audit fees to account for the actual costs for travel and staff time.
On due date .....	NRTL must pay the estimated audit fees, or any balance due, by the due date established by OSHA; OSHA will assess a late fee if NRTL does not pay audit fees (or any balance of fees due) by the due date. OSHA may still perform the audit when an NRTL does not pay the fees or does not pay them on time.
Thirty days after due date or, if earlier, date NRTL refuses to pay.	OSHA will begin processing a notice for publication in the <b>Federal Register</b> announcing its plan to revoke recognition for NRTLs that do not pay the estimated audit fees and any balance of audit fees due.

Note: For the purposes of 29 CFR 1910.7(f)(4), “days” means “calendar days,” and “applicant” means “the NRTL” or “an applicant for NRTL recognition.”



\* \* \* \* \*

[FR Doc. 2011-3937 Filed 2-24-11; 8:45 am]

BILLING CODE 4510-26-P

**DEPARTMENT OF THE TREASURY****Financial Crimes Enforcement Network****31 CFR Parts 1020, 1021, 1022, 1023, 1024, 1025, 1026, 1027, and 1028**

RIN 1506-AA92

**Transfer and Reorganization of Bank Secrecy Act Regulations—Technical Amendment.****AGENCY:** Financial Crimes Enforcement Network (FinCEN), Treasury.**ACTION:** Final rule.

**SUMMARY:** FinCEN is issuing this final rule as a technical amendment to new Chapter X of Title 31 of the Code of Federal Regulations, which was published on October 26, 2010. After that date, FinCEN published two final rules in Part 103 of Title 31 of the Code of Federal Regulations, one concerning mutual funds and the other concerning the confidentiality of a report of suspicious activity (SAR). This final rule moves the SAR confidentiality rule from Part 103 to new Chapter X and addresses the compliance date of the mutual fund rule. Additionally, the Chapter X Final Rule contained an inadvertent typographical error that omitted several sections from Subpart C of Part 1026 Rules for Futures Commission Merchants and Introducing Brokers in Commodities. This final rule corrects those omissions.

**DATES:** *Effective Date:* March 1, 2011.**FOR FURTHER INFORMATION CONTACT:** Regulatory Policy and Programs Division, FinCEN (800) 949-2732 and select option 6.**SUPPLEMENTARY INFORMATION:****I. Background**

On October 26, 2010, FinCEN issued a final rule (“the Chapter X Final Rule”), creating a new Chapter X in title 31 of the Code of Federal Regulations (CFR) for Bank Secrecy Act (BSA) regulations. As discussed in the Chapter X Final Rule, FinCEN is reorganizing its regulations in new Chapter X to make them more accessible for covered individuals and financial institutions. The reorganization is not intended to have any substantive effect on the BSA regulations. Chapter X will be effective on March 1, 2011.<sup>1</sup>

<sup>1</sup> See 75 FR 65806 (October 26, 2010) (Transfer and Reorganization of Bank Secrecy Act Regulations Final Rule).

On April 14, 2010, FinCEN issued a final rule to include mutual funds within the general definition of “financial institution” in the BSA regulations.<sup>2</sup> On October 15, 2010, FinCEN published a final rule extending the compliance date for those provisions of 31 CFR 103.33 that apply to mutual funds from January 10, 2011 to April 10, 2011; however, this extension of the compliance date has not otherwise amended the applicable regulation.<sup>3</sup> The regulatory changes made by including mutual funds within the general definition of “financial institution” were contained in the Chapter X Final Rule. The extended compliance date for these provisions still applies even though they have moved to 31 CFR Chapter X.

On December 3, 2010, FinCEN issued a final rule to amend the BSA regulations regarding the confidentiality of a report of suspicious activity (“SAR”). To reflect the reorganization of BSA rules in Chapter X, FinCEN is issuing this technical amendment rule to move the revised SAR confidentiality rules, without any change to their applicability date, to Chapter X.

As published, the Chapter X Final Rule contains omissions from Subpart C of Part 1026 Rules for Futures Commission Merchants and Introducing Brokers in Commodities. This final rule corrects those omissions.

**II. Effective Date**

The effective date of this technical amendment to Chapter X will be March 1, 2011. As noted above, this technical amendment does not affect any of the applicability dates of the rules that are being moved to Chapter X by this technical amendment.

**III. Regulatory Matters****A. Executive Order 12866**

It has been determined that this rulemaking is not a significant regulatory action for purposes of Executive Order 12866. Accordingly, a regulatory impact analysis is not required.

**B. Unfunded Mandates Reform Act of 1995**

Section 202 of the Unfunded Mandates Reform Act of 1995 (“Unfunded Mandates Act”), Public Law 104-4 (March 22, 1995), requires that an agency prepare a budgetary impact statement before promulgating a rule that may result in expenditure by state, local, and tribal governments, in the

<sup>2</sup> See 75 FR 19241 (April 14, 2010) (Final Rule defining Mutual Funds as Financial Institutions).

<sup>3</sup> See 75 FR 63382.

aggregate, or by the private sector, of \$100 million or more in any one year. If a budgetary impact statement is required, section 202 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. FinCEN has determined that it is not required to prepare a written statement under Section 202 and has concluded that on balance the rule provides the most cost-effective and least burdensome alternative to achieve the objectives of the rule.

**C. Regulatory Flexibility Act**

Pursuant to the Regulatory Flexibility Act (RFA) (5 U.S.C. 602 *et seq.*), FinCEN certifies that this final regulation likely will not have a significant economic impact on a substantial number of small entities. The regulatory changes in this final rule merely restructure and recodify existing regulations and do not alter current regulatory obligations.

**D. Paperwork Reduction Act**

This regulation contains no new information collection requirements subject to review and approval by the Office of Management and Budget under the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d) *et seq.*). The information collection requirements for the Bank Secrecy Act, currently codified at 31 CFR Part 103, were previously approved by the Office of Management and Budget under OMB Control numbers 1506-0001 through 1506-0046. Under the Paperwork Reduction Act, an agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a valid OMB control number.

**List of Subjects in 31 CFR Parts 1020, 1021, 1022, 1023, 1024, 1025, 1026, 1027, and 1028**

Administrative practice and procedure, Banks, Banking, Brokers, Currency, Foreign banking, Foreign currencies, Gambling, Investigations, Penalties, Reporting and recordkeeping requirements, Securities, Terrorism.

**Authority and Issuance**

For the reasons set forth above, 31 CFR Chapter X, published October 26, 2010 (75 FR 65842), is amended as follows:

**PART 1020—RULE FOR BANKS**

■ 1. The authority citation for part 1020 is added to read as follows: